Civil and Administrative Tribunal

New South Wales

Case Name:	Addbuild Master Builders Pty Ltd v Stern
Medium Neutral Citation:	[2021] NSWCATCD 83
Hearing Date(s):	17 and 18 May 2021
Date of Orders:	17 August 2021
Decision Date:	13 August 2021
Jurisdiction:	Consumer and Commercial Division
Before:	D Goldstein, Senior Member
Decision:	1 In HB 20/15094 Gary Stern must pay Addbuild Master Builders Pty Ltd $52,584.25 immediately. 2 In HB 20/33635 within 21 days of the date of this decision the parties must file (in hard copy and electronic form) an agreed work order with all necessary conditions including the period of time within which the work is to be undertaken, and any final payment to be made to the builder. 3 In the event that the parties are unable to agree the work order, they must each within 21 days of the date of this decision file (in hard copy and electronic form) the form of work order for which they contend with all necessary conditions including the period of time within which the work is to be undertaken, and any final payment to be made to the builder. 4 In the event that a party wishes to bring a costs application, the costs application must be lodged in the Tribunal and served on the costs respondent within 14 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application. 5 The costs respondent will have 14 days after the date it or he receives the application to lodge in the Tribunal and serve on the costs applicant his or its submissions,

if any, in response to the costs application, such submissions either attaching or referring to the documents relied upon.
6 The cost applicant will have 14 days after the date he or it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent its or his submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.
7 The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing.
8 Subject to the parties' submissions, the Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

Catchwords:	BUILDING AND CONSTRUCTION — Proper construction of payment provisions in clauses 12 and 14 of New South Wales Fair Trading residential building contract — Damages — Mitigation — Work order — Section 48MA of the Home Building Act 1989 (NSW)
Legislation Cited:	Home Building Act 1989 (NSW)
Cases Cited:	Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99 Bellgrove v Eldridge (1954) 90 C.L.R. 613 Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 Hadley v Baxendale (1854) 9 Exch 341 Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited [2015] HCA 37 Radford v De Froberville [1977] 1 WLR 1262 at 1270 Sotiros Shipping Inc. And Aeco Maritime S.A. v. Sameiet Solholt; (The 'Solholt') (1983) 1 Lloyds Rep, 605 Tabcorp Holdings Pty Limited v Bowen Investments Pty Limited [2009] HCA 8 The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067

Texts Cited:	Nil
Category:	Principal judgment
Parties:	Addbuild Master Builders Pty Ltd (Applicant) Gary Stern (Respondent)
Representation:	Counsel: P Newton (Applicant) J Foley (Respondent) Solicitors: Colin W Love & Company (Applicant) Pryor Tzannes & Wallis (Respondent)
File Number(s):	HB 20/15094 & HB 20/33635
Publication Restriction:	Nil

REASONS FOR DECISION

1 In proceedings HB 20/15094 Addbuild Master Builders Pty Ltd (the 'builder') claims the sum of $100,468.40 plus contractual interest on that amount from Mr Stern (the 'owner') in connection with carrying out residential building work on land owned by the owner.

2 In proceedings HB 20/33635 the owner claims $121,783.30 from the builder in connection with alleged defective and incomplete work carried out by the builder.

3 There is no dispute that the claims made by the builder and the owner are building claims as defined in s48K of the *Home Building Act* 1989 (NSW) and that the Tribunal has the jurisdiction to hear and determine those claims.

4 These proceedings were heard in the Tribunal on 17 and 18 May 2021.

5 The evidence in the proceedings was:

(a) Exhibit A, Three volume Court Book;
(b) Exhibit B, Affidavit of the owner affirmed 12 May 2021,
(c) Exhibit C, 5 page Waterproofing Certificate;
(d) Exhibit D, Construction Certificate dated 31 March 2017;
(e) Exhibit E, Bundle of Contractor's licences;

(f) Exhibit F, title search Folio A/313749; and

(g) Exhibit G, Addbuild plans.

6 The parties have filed final written submissions as ordered by the Tribunal.

The contract

7 These proceedings arise out of a New South Wales Fair Trading residential building contract the parties entered into on 16 March 2016. The contract price was stated to be $382,617.00. The nature of the work to be carried out was described in plans and specifications prepared by the builder and identified in the contract. The time for completion of the building works was 26 weeks from a date determined by the operation of clause 5.

8 The contract included a progress payment schedule whereby it was agreed that the contract price would be paid in 8 payments when the stage associated with each payment was completed. Refer clause 12. The contract also stated in clause 14 that if payments were made late and a notice of dispute was not given, then interest would be payable at the current bank rate as defined in clause 30.

9 Clause 12 of the contract stated:

> 'The owner must pay the contract price by progress payments within 5 business days of the completion of the stages of the work nominated in the schedule of progress payments. The contractor must notify the owner in writing when a stage of the work has reached completion. A stage of work has reached completion when it has been finished in accordance with the contract documents and any variations agreed to and there are no omissions or defects that prevent that stage of the work from being reasonably capable of being used for its intended purpose.'

10 The clause also stated:

> 'If there is any bona fide dispute in relation to the value or quality of work done, the dispute must be dealt with in accordance with the dispute resolution procedure set out in **Clause 27.** In those circumstances the parties agree as follows:
>
> (a) the owner may withhold from the progress payment, an amount estimated by the owner, acting reasonably, equal to the owners estimate of the value of the disputed item
>
> (b) the contractor must continue to carry out its obligations under this contract pending resolution of the dispute.'

11 Clause 13 of the contract dealt with variations. It stated among other things:

> 'Before commencing work on a variation, the contractor must provide to the owner a notice in writing containing a description of the work and the price (including GST). If not otherwise specified the price will be taken to include the contractor's margin for overheads, supervision and profit. **The notice must then be signed and dated by both parties to constitute acceptance.**
>
> Any adjustment to the contract price due to an agreed variation will be taken into account at the time of the next progress payment or paid as agreed by the parties.'

12 Clause 14 of the contract is also relevant. That clause deals with 'Time for payments'. The second paragraph of clause 14 states:

> 'If the owner disagrees that the contractor is entitled to be paid a progress claim or other amount due under the contract, the owner must notify the contractor in writing within 5 business days of receiving the claim setting out the reasons for that disagreement. If there is any dispute between the parties relating to a payment under the contract it must be resolved according to the dispute resolution procedure set out in clause 27.'

13 Clause 27 of the contract stated:

> 'If the owner or contractor considers that a dispute has arisen in relation to any matter covered by this contract, either during the progress of the work, after completion of the work or after the contract has been terminated, that person must probably give to the other party written notice of the items of dispute.'

A question of construction

14 It is necessary to consider the proper construction of the payment rights and obligations of the parties as contained in clauses 12 and 14 of the contract. This need arises due to the competing positions taken by the parties to the question of completion of a stage and how that affects the right of the builder to be entitled to claim and receive payment.

15 I find that under clause 12 the owner is obliged to pay the builder the amount claimed in a progress payment within 5 days of the completion of a stage. I also find that clause 12 provides a definition of what completion is in connection with claiming a progress payment following the completion of a stage. Clause 12 addresses the issue of a 'stage' by the provision of the Schedule of progress payments in clause 12 which is to be completed by the parties. This will require the parties to agree on the stages of work and how

much is to be paid for each stage. In these proceedings the parties agreed a progress payment schedule which identified stages and the amount to be paid for each stage. Clause 12 then provides that the builder must notify the owner when a stage of the works has reached completion. I find that the presentation of a written progress claim which identifies the agreed stage of work for which payment is being claimed will suffice as the builder notifying the owner that a stage of work has reached completion

16 Pursuant to clause 12 a mandatory requirement, indicated by the words 'must pay', to pay the builder the amount claimed in a progress claim within 5 days then arises. Clause 14 qualifies clause 12 in that the obligation to pay arises within 5 days of the receipt of the progress claim made under clause 12.

17 After being notified that a stage has been completed via the receipt of a claim for a progress payment, the owner then has the right to do two things. First, clause 12 states that if there is a bona fide dispute in relation to the value or quality of work done, the owner has the right to deal with that dispute in accordance with clause 27, which requires the issue of a written notice of dispute. Under clause 12 the owner has the right to withhold from the progress payment, an amount equal to the value of the disputed item.

18 Secondly, clause 14 states that if the owner disagrees that the contractor is entitled to be paid a progress claim, or other amount due under the contract, the owner must notify the contractor in writing within 5 business days of receiving the claim setting out the reasons for that disagreement. Clause 14 also states that such dispute must be resolved in accordance with clause 27.

19 Critically, clause 14 differs from clause 12 in that it does not state that if the owner disagrees that the builder is entitled to be paid a progress claim, or other amount due under the contract, and complies with the notice provisions in clause 14 and 27, then the owner is relieved from the mandatory obligation to pay the amount claimed which as stated is contained in the first sentence of clause 12. It is also relevant to have regard to the fact that clause 14, first paragraph, reinforces the owner's right in clause 12 to withhold money equal to his estimate of the value of the disputed item as referred to in clause 12 and

that there is no similar right in clause 14 entitling the owner to withhold money on any other basis.

20 While clause 27 does not provide a mechanism by which a final conclusion is reached on the matters referred to dispute, I find that if there is no resolution of a dispute of the type referred to in clause 14 pursuant to clause 27, a party is entitled to take that dispute to the Tribunal, or a Court for determination.

21 I also find that if there is a dispute about whether the contractor is entitled to be paid a progress claim because the owner contends that completion of a stage was not reached and therefore the builder's right to notify the owner that a stage of work has reached completion and to give a written claim for a progress payment has not been enlivened, the evidentiary onus is on the owner to establish that the stage was not completed, in accordance with what I have described as the definition of completion for the purposes of progress payments. This conclusion is reached as a result of the mandatory requirement imposed on the owner to pay the amount agreed for a stage of the works. I find that clauses 12 and 14 impose a presumption that the work in a stage has been completed when the builder presents a claim for a progress payment. The way in which clauses 12 and 14 operate as found above make such a presumption necessary particularly since neither clauses 12 nor 14 allow the owner to withhold payment if the owner disagrees that the builder is entitled to be paid a progress claim. As stated clause 14 states that in the event of such a disagreement the owner is entitled to refer the dispute to dispute resolution under clause 27. The following paragraph in clause 12 reinforces this construction:

> 'Payment of a progress payment is not to be regarded as acceptance by the owner that the work has been completed satisfactorily or in accordance with the contract documents.'

22 In *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 the principles applicable to the construction of a contract were outlined. At [46] – [48] the principles which I find are applicable to this dispute were stated as follows, footnotes excluded:

> 'The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of

the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.

In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.'

23 Much earlier, similar principles were stated by the High Court in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99 where the Court was considering a clause in a contract which dealt with adjustment of licence fees to account for inflation. At [8] Barwick CJ stated:

> 'It may be granted that the computation of the amount of the annual figure according to the expressly stated formula in cl. 2 may produce results which may not commend themselves to a person seeking to achieve an actual or even approximately constant value of the licence fee. But if that result is produced by the application of the words in which the parties have expressed themselves, it is no part of the function of a court by some process of divination as distinct from construction of the language employed to attribute to parties an intention to do something for which their express words do not provide.'

24 At [3] in an often quoted passage Gibbs J stated:

> 'It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.'
>
> On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the

> construction adopted is not the most obvious, or the most grammatically accurate", to use the words from earlier authority cited in Locke v. Dunlop [1888] UKLawRpCh 140; (1888) 39 Ch D 387, at p 393 , which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also Bottomley's Case [1880] UKLawRpCh 258; (1880) 16 Ch D 681, at p 686 . Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in Hillas & Co. Ltd. v. Arcos Ltd. [1932] UKHL 2; (1932) 147 LT 503, at p 514 , that the court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. Upper Hunter County District Council v. Australian Chilling and Freezing Co. Ltd. [1968] HCA 8; (1968) 118 CLR 429, at p 437). (at p110).'

25 I find that these passages extracted above apply to these proceeding because in my view the language of clauses 12 and 14 of the contract are stated in plain and unambiguous language. I find that clause 14 is not open to two constructions. Even if from the owner's point of view the outcome might seem unreasonable, I find that I am unable to depart from the plain meaning of the language used in clauses 12 and 14.

26 There is also the fact that the owner did not issue a notice which complied with clause 14 when the progress claims which are now objected to were made.

27 This construction of the contract arises as a result of the language contained in clauses 12 and 14 which apart from the exception referred to in clause 12, requires the owner to pay the builder the amounts agreed for stages of work carried out despite the fact that there may be disputes or disagreements that fall within the scope of clause 14. This no doubt reflects the reality that a builder must be paid in order to be able to progress the construction of the works. As Lord Denning MR famously stated in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 'There must be a 'cash flow' in the building trade. It is the very lifeblood of the enterprise.'

The experts

28 The parties appointed experts to give evidence in relation to the owner's defective and incomplete work claim.

29 Mr Hall gave opinion evidence on behalf of the owner. There was no objection to his ability to give expert evidence or his expertise. Mr Xu gave opinion evidence on behalf of the builder. There was no objection to his ability to give expert evidence or his expertise.

30 Both Mr Hall and Mr Xu provided expert reports and worked together to prepare a Joint Expert Report. I accept both of them as appropriately qualified experts able to give opinion evidence in the Tribunal.

The builder's claim

31 The builder's claim is for payment of the amounts it claimed in progress claims dated 10 November 2017, 9 February 2018 and 20 June 2018.

32 In its defence the owner admits that he has not paid the progress claims referred to and states that he is not liable for the builder's claims or invoices because they:

(a) Were not issued in accordance with the contract;

(b) Related to services not provided pursuant to or in accordance with the contract; and

(c) Claimed payment for work which was defective.

33 In its final written submissions [47] the builder does not press its 20 June 2018 progress claim. I will deal with the claims which are pressed and constitute the builder's claim.

10 November 2017 progress claim

34 The builder's fifth progress claim was dated 10 November 2017. It claimed $38,262.00 and variations 8, 9, 10 and 11 as well as a variation fee. The total claimed was $49,723.00.

35 The progress payment schedule identified the fifth stage as;

'F/F Internal linings completed & Fix out materials on site'

36 The amount to be paid in connection with the fifth stage was $38,262.00. I find that the amount claimed by the builder on 10 November 2017 was the fifth claim described in the progress payment schedule. As stated the claim also included a claim for variations 8, 9, 10 and 11 as well as a variation fee.

37 The documents filed on behalf of the builder, being those exhibited to the affidavit of Cheryl Paton indicate variations 8, and 9 related to electrical variations dated 4 August 2017. Variation 10 also related to an electrical variation. It was dated 16 October 2017. I find that the owner signed variations 8, 9 and 10, and that his signature indicated his consent to those variations as required by clause 13. I find that variation 11, dated 27 October 2017 related to the supply and installation of acoustic insulation batts and that the owner approved variation 11 on 30 October 2017 which constituted his consent as required by clause 13.

38 The builder also claimed an amount of $275.00, which it described as variation processing fee which it justified as being claimable under addendum 9 of the contract. I find that addendum 9 of the contract does not allow the builder to claim a variation processing fee and that addendum 9 allows the builder to claim a fee for late payment. However addendum 7 of the contract does allow the builder to claim a variation processing fee. On that basis the variation processing fee is allowed.

39 I find that the builder sent the owner progress claim 5 on 10 November 2017. Soon after receipt of progress claim 5 the owner stated:

> 'I acknowledge receipt of the claim, but am are unable to process until such time as variations claim are fully detailed.'

40 The owner's evidence is that on or about 13 November 2017 he received from the builder a copy of variations 8, 9, 10 and 11. The owner also states that he made a complaint about the builder to NSW Fair Trading on 10 November 2017. While that is correct, I find that the owner's complaint was not provided to the builder on 10 November 2017.

41 In his final written submissions the owner submits that the work to be done in relation to progress claim 5 and the variations referred to was not completed and as a result, the claim was not properly made since clause 12 stated:

> 'A stage of work has reached completion when it has been finished in accordance with the contract documents and any variations agreed to and there are no omissions or defects that prevent that stage of the work from being reasonably capable of being used for its intended purpose'

42 Unhelpfully, the owner does not refer to the evidence in support of the submission that the work to be done in relation to progress claim 5 and the variations was not completed.

43 The builder's final written submissions state that the owner's expert Mr Hall accepted that the first floor internal linings had been completed and that he had no reason to dispute that fit out materials were on site. I agree that Mr Hall gave evidence to this effect.

44 I find that the builder issued progress claim 5 on 10 November 2017 and on 13 November 2017 provided the owner, on his request, with copies of the variation claims that are referred to in progress claim 5. I have found that the owner had approved variations 8, 9, 10 and 11 as required by clause 13. I also find that the owner's request for details of the variations claimed in progress claim 5 was not a Notice of Dispute and if it was, that it was resolved by the builder providing the documents requested. I also find that the owners expert has conceded that the first floor internal linings had been completed and that he had no reason to dispute that fit out materials were on site. I find that the builder has established all of the elements required to support progress claim 5. I also find that the owner agrees that he has not paid progress claim 5.

45 For the reasons set out above I find that the builder is entitled to recover $49,723.00 in connection with progress claim 5.

9 February 2018 progress claim

46 The builder's sixth progress claim was dated 9 February 2018. It claimed $19,130.00, as well as the amount claimed in progress claim 5.

47 The progress payment schedule identified the sixth stage as;

> 'Ground floor shower room ready for tiling and fitout'

48 The contract documents included 7 plans dated 16 March 2016 prepared by the builder. Copies of these plans are at 203 – 209 of exhibit A. I find that the only plan that is relevant to the sixth stage is page 206 which contains a poor quality copy of the plan which shows so far as I can see, that a study on the ground floor is being converted to a shower room with stairs to the new first floor. Unfortunately the plan in evidence is too small for any details to be clearly

seen. Variation 1 included some changes to this area which I find are not material to the issues to be considered in connection with progress claim 6.

49 I find that the amount claimed by the builder on 9 February 2018 was the sixth claim described in the progress payment schedule, given that it claimed the same sum as stated in the payment schedule.

50 On 9 February 2018 shortly after receiving progress claim 6, the owner responded by email stating that:

(1) He regarded the claim as fraudulent;

(2) Claims should be made in accordance with the contract at the appropriate time;

(3) There had been a previous complaint of unsuitable workmanship relating to a previous claim that had been paid; and

(4) Until such time as work had been completed to acceptable standards in connection with such previous claim, no further payments would 'become due and payable'

51 It can be seen from the owner's email to the builder that he was putting in issue the builder's right to be paid for progress claim 6. I find that because it was the builder's entitlement to be paid progress claim 6, that the second paragraph of clause 14 was enlivened.

52 In accordance with my findings about the proper construction to be given to clauses 12 and 14 of the contract, I find that the owner was obliged to pay progress claim 6 within 5 business days of receipt. I find that the owner failed to pay progress claim 6 as required by the contract.

53 Despite the fact that clause 14 required the dispute between the parties about progress claim 6 to be resolved in accordance with clause 27, I find that was never done.

54 In those circumstances I find that it remained open to the owner to take the position in these proceedings that stage 6 of the contract works had not reached completion, as defined in clause 12, by 9 February 2018.

55 In considering the experts' evidence it is critical to bear in mind what must be considered in connection with progress claim 6. That is whether the *'Ground floor shower room'* was '*ready for tiling and fitout'.* In their reports the experts

consider a broader question, namely whether there was incomplete work. That evidence does not address the critical issue as identified by a consideration of the description of stage 6, namely the readiness for tiling and fitout. I find that the experts' evidence regarding incomplete work on the ground floor in the shower room and the new stairs to the new first floor is not helpful and is more likely than not to lead me into error. Such evidence is at 7.1.6.2.5, 7.5.4, 7.5.5 and at 8.11 of Mr Hall's report, and at 6.10.1 of Mr Xu's report.

56 I also find that the evidentiary onus is on the owner to establish that the sixth stage of work, namely *'Ground floor shower room ready for tiling and fitout'* had not reached completion.

57 In their joint evidence, the experts were asked some questions regarding progress claim 6. Mr Hall's evidence was that the area was not ready for tiling. He stated that the door jambs and architraves were not installed.

58 Mr Xu stated that architraves can be installed after tiling and apart from the lining under the stairs the area was ready for tiling. Mr Hall disagreed with this evidence stating that standard practice is to install the architraves so that the tiler knows where to tile to.

59 As to the lining under the stairs, I find that such lining is not relevant to the question of whether *'Ground floor shower room ready for tiling and fitout'* since under the stairs was not part of the shower room.

60 There is a dispute between the experts about this issue. I find that the conflicting evidence is equally plausible.

61 I find that the owner has not persuaded me on the balance of probabilities that the 'Ground floor shower room *was not* ready for tiling and fitout.

62 As a result I find that the builder was entitled to be paid progress claim 6 in the sum of $19,130.00.

63 I have found in favour of the builder in connection with its 5th and 6th progress claims as referred to above. As a result I will make an order in the sum of $68,853.00 in favour of the builder as sought at [47] of its final written submissions.

Interest

64 As stated above, clause 14 of the contract stated that the builder was entitled to interest.

65 The builder's interest claim is mentioned in its outline of submissions dated 10 May 2021, but not in its final written submissions. As there was no up to date calculation of contractual interest. I ordered the builder, if it was to press its interest claim, to file its final calculation of interest.

66 The builder has filed its interest claims which address the contractual interest rate being the Commonwealth Bank Overdraft Index rate as published from time to time plus 2%. The owner did not file submissions indicating a disagreement with the builder's calculations. The builder submits that the Commonwealth Bank Overdraft Index rate from 13 March 2019 to 2 April 2020 was 9.31% and from 3 April 2020 onward was 7.68%. 2% must be added to these rates in accordance with the contract.

67 I will have regard to the builder's interest submissions as they apply to its progress claims 5 and 6.

68 Clause 14 required the amount claimed in progress claim 5 to be paid within 5 business days, namely by 15 November 2017. Clause 14 also stated that if the owner failed to pay the amount of the claim by the due date, then interest would be payable for the overdue period. I construe the contract to mean that interest would be payable as from the 6th day after the owner received the progress claim. I find that the approach taken by the builder in its Statement of Claim and in its interest calculations allows for this.

69 Based on the particulars provided by the builder, I calculate interest on progress claim 5 which was dated 10 November 2017 as follows:

(a) in the period 16 November to 13 March 2019, $7,369.80; and

(b) in the period 14 march 2019 to 9 August 2021, $12,461.12.

70 Based on the particulars provided by the builder, I calculate interest on progress claim 6 which was dated 9 February 2018 as follows:

(a) in the period 17 February 2018 November to 13 March 2019, $2,306.77; and

(b) in the period 14 March 2019 to 9 August 2021, $4,793.56.

71 The total amount of interest to be found in favour of the builder is therefore $26,931.25.

Termination of the contract

72 The builder's submissions address the circumstances pursuant to which the builder terminated the contract. However no claim for damages is made by the builder regarding the termination of the contract, or the consequences of the termination.

73 The owner submits at [85] that it is necessary that I determine whether the builder's termination of the contract was valid for the purposes of determining his late completion damages claim. How the termination of the contract issue relates to the late completion damages claim is not directly addressed in the submissions. The relevance of the termination of the contract emerges by reference to [86] of counsel's submissions which relates to the owner's case for damages for late completion. As I understand the position, the owner submits that if the builder's termination was valid, the damages for late completion would end on 26 June 2018 and if the termination was not valid, such damages would end on 1 April 2019. I would observe that the owner's position as I have described it is inconsistent with his position at [18] of his Reply submissions.

74 The builder's letter dated 26 June 2018 which stated that the contract was terminated was not, on the evidence before me, answered by the owner. There is no evidence before me about the facts that occurred after 26 June 2018. Nor was the question of the builder's termination of the contract or the consequences of it raised by the owner in his District Court Statement of Cross Claim that was transferred to the Tribunal and allocated the case designation HB 20/33635 in the Consumer and Commercial Division of the Tribunal. The same may be said for the builder's District Court Statement of Claim and the owner's defence to it that were transferred to the Tribunal and allocated the case designation HB 20/15094 in the Consumer and Commercial Division of the Tribunal

75 Given that the validity of the termination by the builder does not fall for determination in the proceedings, I find that it is not necessary for me to make

any findings in connection with that issue, other than the contract was purportedly terminated by the builder's solicitor's letter dated 26 June 2018. I infer that the owner was entitled to take possession of the premises after that date.

76 So far as the question raised by the owner's counsel is concerned, namely the date when the calculation of late completion damages ends by reference to the validity of the builder's termination of the contract, I find that issue is to be resolved by reference to whether the damages claimed for the period after the termination of the contract arise as a direct result of the defects and incomplete work or were foreseeable as a consequence of the builder's breaches of contract which led to the defects and incomplete work. Questions about mitigation of damages also arise.

77 That claim by the owner is dealt with later in these reasons.

The owner's claim

78 The owner's claim against the builder relates to alleged defective and incomplete work.

79 In accordance with orders made at the conclusion of the hearing, namely:

> 'Not later than 24 May 2021 the parties must file and serve an Agreed Schedule of Alleged Defective and Incomplete work showing items agreed and disagreed, cross referenced to Mr Hall's 4 September 2019 report.'

the owner's solicitor filed a 'Joint Schedule of Allegedly Defective and Incomplete Works' ('Joint Schedule').

80 The Joint Schedule may have been an amalgamation of previous schedules prepared by the experts, the most recent of which was their Joint Scott Schedule dated 30 May 2021.

81 The experts are unable to agree on items 1.4, 2.6, 2.7, 2.8, 3.1, 3.2, 3.3, 3.4, 4.1, 4.2, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.8, 7.1, 7.2, 7.3, 7.4, 7.6, 8.1, 8.2, 8.3, 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, 10.7, 10.8, 10.9, 11.1, and 11.2.

82 I will deal with each disputed item in turn.

Item 1.4 - Accoustic Insulation batts not supplied or installed

83 Mr Hall for the owner states that this variation has not been installed. His evidence is a conclusion and he provides no basis to support the conclusion that he has reached. The owner submits that since the builder's expert Mr Xu has not dealt with this issue in his report, he has conceded this item.

84 This item of claim has evolved. As submitted by the builder Annexure Z to Mr Hall's report does not mention this item. Mr Xu does not concede that this work was not carried out as submitted by the owner. He stated in his report that there was incomplete work. However he did not list this work as being incomplete.

85 The experts Joint Scott Schedule dated 30 May 2021 did not mention this item. I conclude that this item which is for a relatively modest amount of money was not given detailed consideration during the preparation of the evidence, no doubt because there were numerous more important other items to consider.

86 Mr Hall's unsupported conclusion regarding this item does not persuade me that this work has not been carried out. This item of the owner's claim is rejected on that basis.

Item 2.6 – Downpipe on Northern Wall at incorrect location

87 Mr Hall's evidence does not adequately explain the basis upon which it is contended that this item is defective work. If the suggestion is that the work carried out by the builder was not carried out with due care and skill or did not comply with the drawings in breach of s18B(1) of the *Home Building Act* or clause 9 of the contract, Mr Hall does not say so. His statement at page 511 of exhibit A that a downpipe is not in the location shown on the approved plans is not obvious or, if I may say, well-illustrated.

88 Mr Hall's evidence does not persuade me that there has been a breach of the statutory warranties or the contract in connection with this item. This item of the owner's claim is rejected on that basis.

Item 2.7 – Inadequacy of downpipe on front lower tiled roof

89 This item appears to be closely linked to item 2.6. Mr Hall has not adequately explained where the downpipe that he is referring to appears on the plans,

whether or not it has been supplied and installed as shown on the drawings and if it is said that the Building Code of Australia ('BCA') has not been complied with, Mr Hall has not stated what is required by the BCA and how the relevant downpipe installed by the builder fails to meet those requirements.

90 Mr Hall's evidence does not persuade me that there has been a breach of the statutory warranties or the contract in connection with this item. This item of the owner's claim is rejected on that basis.

Item 2.8 – Gutters installed without required overflow provisions

91 It is stated that there is partial agreement by the experts about this item. In its final submissions, the builder states that if a work order were to be made, it would rectify eave gutters to provide for slotting in accordance with BCA requirements. This work should be included in a work order, if made.

Item 3.1 No proper puddle flange installed, flange installed not properly sealed

92 This item relates to the rear balcony. The builder states that if a work order were to be made, it would consent to an order that it would to the extent necessary, rectify the puddle flanges in accordance with Australian Standard 4654.2. This work should be included in a work order, if made.

93 **Item 3.2 – Waterproof membrane not installed under sand and cement screed bed and downpipe not installed to level floor of sheeting**

94 The owner's submissions state that if he is successful on this item, items 3.1, 3.3 and 3.4 will not have to be determined because they will all have to be re-done after the rectification of this item.

95 Mr Hall's evidence in connection with this item is predominantly conclusionary. The owner's final submissions state that his conclusion is based upon his observation that '*no lower level of waterproofing has been turned down into the downpipe, as required by the relevant standard'.*

96 At 8.5.3 of his first report Mr Hall states that the waterproof membrane is not turned down into the puddle flanges at the floor sheeting level. I infer this statement is based on Mr Hall's inspections and observations made at the time.

97 The builder has stated in its final submissions that that if a work order were to be made, it would consent to an order that it would, to the extent that the waterproof membrane does not comply with Australian Standard 4654.2, rectify the waterproof membrane to comply with that standard.

98 The work of investigating the position and carrying out any work required to comply with Australian Standard 4654.2 should be included in a work order, if made.

Item 3.3 – Screed bed not installed with required fall to outlets

99 The experts are unable to agree the falls of the rear balcony screed bed. Mr Hall makes a conclusionary statement in his first report that the falls do not comply with AS 3958.1 Appendix D. In response Mr Xu stated that he carried out the necessary measurements and that the falls complied with AS 3958.1 Appendix D. In reply Mr Hall states that there is not a sufficient step down at the sliding door entrance to the balcony for adequate falls to be provided. He states by reference to a 'fall calculator' without identifying precisely what that is or where it is to be found, that there would need to be a rise of 70mm at the centre of the balcony, presumably for complying falls. Mr Hall then relies on his photograph 6.4.10 as evidence of this proposition. I do not find 6.4.10 to demonstrate his point in a way that is overwhelmingly obvious.

100 I prefer Mr Xu's evidence. He carried out measurements. If Mr Hall was of the view that Mr Xu's measurements were wrong and did not demonstrate that the falls complied with AS 3958.1 Appendix D, all he had to do was take his own measurements.

101 I prefer Mr Xu's evidence to Mr Hall's. Mr Hall's evidence is not sufficiently precise and therefore not sufficiently persuasive for me to be satisfied that it should be accepted in preference to Mr Xu's evidence.

102 This item of the owner's claim is rejected.

Item 3.4 – Balcony installed with inadequate fall from balcony door

103 The builder's final submissions state that this item was not something that was raised in chief, namely in Mr Hall's first report and that as a result Mr Xu did not

have the opportunity to respond to it. This item was not dealt with in the Joint Scott Schedule dated 30 May 2021.

104 Order 2 made by me on 18 May 2021 stated:

> 'Not later than 24 May 2021 the parties must file and serve an Agreed Schedule of Alleged Defective and Incomplete work showing items agreed and disagreed, cross referenced to Mr Hall's 4 September 2019 report.'

105 The Joint Schedule states that this item was not mentioned in Mr Hall's 4 September 2019 report. Because of that I find that this is not a matter which arises for determination in these proceedings. As a result this item of the owner's claim is rejected.

Item 4.1 Service pipes surface mounted not recessed

106 Mr Hall states that service pipes are not recessed when they should be.

107 I have not been referred to a contractual plan or a provision of the specification which expressly requires the builder to recess service pipes. As a result I am unable to find that the builder breached clause 9(a) of the contract, namely a warranty that the work will be done *'in accordance with the plans and specifications set out in the contract'*.

108 The relevant provision of clause 9 of the contract which is said to be breached in connection with this item of claim has not been identified. Based on the owner's final written submissions, it seems that the owner advances the claim on the basis that the work was not done '*with due care and skill'*.

109 Mr Hall states that the recessing of service pipes is standard practice. Mr Xu states that it is not standard practice to recess service pipes and that surface mounting service pipes is not prohibited by Australian Standards.

110 I have been referred to passages of cross examination of Mr Xu regarding the plans. However the as the plans upon which the cross examination are based have not been identified so that I may have regard to them, I do not find references to cross examination to be particularly meaningful especially as Mr Xu made no significant concession. I should also say that I have not been provided with a transcript of this aspect of Mr Xu's evidence before the Tribunal.

111 In circumstances where the contract plans and specifications are not sufficiently specific and the experts do not agree whether surface mounted service pipes would indicate a failure to carry out work with *due care and skill,* Mr Hall's evidence is not sufficiently persuasive to satisfy me that the builder has carried out this aspect of the works in breach of clause 9 of the contract.

112 For the reasons provided, this aspect of the owner's claim is rejected.

Item 4.2 Previous rear vent pipe to be relocated and completed

113 The joint schedule indicates that this item is in dispute. The owner's written submissions state that the item is agreed. Mr Xu agrees that the work is incomplete.

114 The owner is entitled to an order that the work should be completed in accordance with the drawings and specification, or the costs of doing that work. This work should be included in a work order, if made

Item 4.3 – Previous rear vent pipe to be relocated and completed

115 Mr Xu agrees that the work is incomplete.

116 The owner is entitled to an order that the work should be completed in accordance with the drawings and specification, or the costs of doing that work. This work should be included in a work order, if made.

Item 5.1 – Failure to install control joints at point where first floor external walls meet

117 The parties' submissions indicate that a common opinion emerged during the expert's concurrent evidence that two control joints are required, one on the southern exterior wall and one on the northern exterior wall, each control joint to be where wall meets the base of the void or recess.

118 By reason of the agreement of the experts I will make an order that the builder must provide two control joints, one on the southern exterior wall and one on the northern exterior wall, each control joint to be where wall meets the base of the void or recess, or the costs of doing that work. This work should be included in a work order, if made

Item 5.2 – Cladding abuts front roof tiles, without requisite clearance, and lack of flashing detail

119 The contract drawings sheet No.1 states, among other things,

Cladding	50mm POLYSTYRENE CLADDING WITH TEXTURE COAT FINISH LAID OVER FOIL SARKING

120 It seems that the supplier of the foam cladding used by the builder was Masterwall, as suggested by Mr Xu at [6.6.7] although I find that there can be no certainty about this. In his report in reply Mr Hall at [6.6] concedes that Masterwall manufactured material was used in the works. There is no direct evidence about who supplied the cladding.

121 At 8.5.7 of his report Mr Hall states that the cladding abutting the front roof tiles had not been completed in accordance with standard details. He relies upon an unattributed drawing to support an unsupported conclusion that there should be a 35mm gap between the cladding and the roof tiles.

122 In response Mr Xu states by reference to a Masterwall detail that the manufacturer's requirement was for a 10mm air gap between the cladding and a pressed metal flashing.

123 In reply at [6.6.4] Mr Hall accepts Mr Xu's evidence that the relevant requirement was for a 10mm air gap between the cladding and a pressed metal flashing. At [6.6.5] Mr Hall proceeds upon an assumption that a detail on the Masterwall drawing referred to by Mr Xu has not been provided. He provides no evidence to substantiate that detail.

124 In his conclusion at [6.6] Mr Hall states in connection with cladding abutting the front and rear roof:

> 'The cladding abutting the front and rear roof is not sealed to prevent deterioration of the foam materials through the provision of a metal channel.'

125 I find Mr Hall's evidence to be unsatisfactory in connection with this item of the owner's claim. To begin with his evidence was that that there was an insufficient gap between the bottom of the cladding and the roof tiles. This evidence, although barely articulated, relied upon an unattributed drawing. When Mr Xu referred to the correct detail in a different drawing, Mr Hall

abandoned his original complaint and in reply moved to a new basis of complaint based on the drawing referred to by Mr Xu, namely that extracted in the previous paragraph.

126 There was no support for this conclusion provided by Mr Hall.

127 Paragraphs [14] –[16] of the NCAT Procedural Direction 3 provide:

> '14. An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert witness's area of expertise.
>
> 15. An expert witness's paramount duty is to the Tribunal and not to any party to the proceedings including the person retaining the expert witness.
>
> 16. An expert witness is not an advocate for a party.'

128 I find that I am unable to rely on Mr Hall's evidence in connection with this item of the claim because Mr Hall did not clearly disclose that he had changed the basis upon which this item of the owner's claim was made. By failing to do that he introduced uncertainty and a lack of frankness into the consideration of this item and, I find, acted more like an advocate than an expert.

129 For the reasons provided I reject this item of the owner's claim.

130 The owner's submissions state that Mr Xu conceded in cross examination that that the clearance was less than 10mm. No transcript was produced to substantiate the concession referred to. The builder's submissions did not agree that such a concession was made. My notes of the hearing do not record such a concession. I reject the submission that Mr Xu made the concession submitted.

131 I find that the experts did not measure the clearance between the cladding and the front roof tiles.

Item 5.3 - Window sills installed without requisite trim (to prevent water entry)

132 Mr Hall states that the window sill as installed does not comply with the standard sill details for the product, in that a PVC window sill trim has been removed.

133 Mr Xu does not in terms address the issue of the removal of a PVC window sill trim.

134 During the course of the hearing I was referred to page 729 of exhibit A and the detail above 'Window Sill – Direct Fixed'. This diagram which is dated November 2010 shows a detail 'Sill flashing to drain water from sill and Jamb'.

135 I find that there is no evidence which establishes that the detail referred to in the previous paragraph was a requirement of the manufacturer of the windows installed by the builder. The contract drawings sheet No.1 states, among other things, that glazing was to comply with AS 1288 (2006). There is no evidence about the relevance of AS 1288 (2006) to this item of claim.

136 Mr Hall's evidence is conclusionary and unsupported by credible evidence. I find that there is no evidence of the standard sill details for the window product supplied or that such details required a PVC window sill trim.

137 This item of the owner's claim is rejected.

Item 5.4 – Window sills level and without requisite fall

138 Mr Hall stated in his report that the window sills are level and not provided with a splayed fall. He refers to Annexure P, which does not relate to windows or window sills. I take it that he intended to refer to annexure Q.

139 Mr Xu stated in his report that he has measured the window sill and noted that the sill was falling away from the building.

140 In reply Mr Hall maintains that there is no fall, relying on his photograph 6.6.6.

141 The competing evidence in relation to this item is that Mr Hall's opinion relies on photographs whereas Mr Xu states that he has taken some measurements which indicate a fall. However I find that in the concurrent expert evidence session at the hearing Mr Xu conceded that the sills did not have the necessary falls.

142 I find that as a result of Mr Xue's concession the owner will be successful on this item. The necessary rectification work should be included in a work order, if made.

Item 5.5 – Window sill flashing trim removed and not reinstalled

143 This item appears to be related to item 5.3. It is rejected for the same reasons as item 5.3.

Item 5.6 - Moulding installed in an excessively uneven way

144 The relevant item of Mr Hall's first report is at [8.7.13]. Mr Xu agrees with this at [6.6.6] of his report although he states that the work is incomplete. The builder does not submit that it is not responsible for incomplete work.

145 The necessary rectification work should be included in a work order, if made.

Item 5.8 – Coat to cladding varying excessively in colour and texture

146 This item is dealt with at [8.7.17] – [8.7.19] of Mr Hall's first report where Mr Hall includes 5 photographs and states that the coat varies excessively in colour and texture, that the colour and texture variations are obvious and that the above items for the external wall cladding are defects. Mr Xu disagrees that the colour and texture variations are excessive or that they constitute defects. He states that there are minor variations to colour and texture due to the work being incomplete and that such colour variation and texture can be easily rectified.

147 I prefer Mr Xu's evidence. The photographs relied upon by Mr Hall do not establish or support except in a minor way the assertions he makes. In fact his photographs support Mr Xu's opinion.

148 The builder has not submitted that it is not responsible for incomplete work. The necessary rectification work to the extent suggested by Mr Xu should be included in a work order, if made.

Item 7.1 – ceiling to stairwell out of level

149 Mr Hall stated that he measured this ceiling and found it to be out of level in excess of acceptable tolerances. Mr Xu stated that he did not measure this ceiling and visually there was no indication that the ceiling was out of level. I accept Mr Hall's un-contradicted evidence

150 In submissions the builder states that there is no evidence that the ceiling is not fit for purpose.

151 I find that if a builder constructs a ceiling out of level and outside acceptable tolerances, that builder will be in breach of 9(a) of the contract that such part of the work will be done with due care and skill.

152 The owner will be successful on this item. The necessary rectification work should be included in a work order, if made.

Item 7.2 – Areas of Northern bedroom out of level and out of plumb

153 The owner's counsel submits by reference to the Joint Scott Schedule dated 30 May 2021 that Mr Xu has conceded these defects although he referred to bedroom 3 rather that to the northern bedroom. It is submitted that despite the different references, the bedroom being discussed is the same. Remarkably, this item of dispute in part turns on whether bedroom 3 referred to in the Joint Scott Schedule dated 30 May 2021 is the same as the Northern bedroom. There is no evidence about this and because of that, I find that the owner's reliance on the Joint Scott Schedule dated 30 May 2021 is of no assistance in determining whether areas of the Northern bedroom are out of level and out of plumb. However I prefer Mr Hall's report in connection with this item as it has more detail than Mr Xu's report. The photographs to Mr Xu's report do not show what is being relied upon. I would add that the evidence of the experts in connection with this item is not particularly persuasive, but Mr Xu's evidence is the least persuasive.

154 I will find for the owner in connection with this item. The necessary rectification work should be included in a work order, if made.

Item 7.3 – Areas of southern bedroom out of level

155 In his report Mr Xu states he has identified all areas to be within tolerances, except for the southern and eastern bedroom, 'which the defect is agreed to.'

156 This item is conceded by the builder in its submissions. The necessary rectification work should be included in a work order, if made.

Item 7.4 - Areas of eastern bedroom out of level

157 This item is conceded by the builder in its submissions. The necessary rectification work should be included in a work order, if made.

Item 7.5 – Floor outside bathroom out of level

158 This item is conceded by the builder in its submissions. The necessary rectification work should be included in a work order, if made.

Item 7.6 – Northern bedroom ensuite wall out of plumb

159 This item is conceded by the builder in its submissions. The necessary rectification work should be included in a work order, if made.

Item 8.1 – As built wall of stairwell has additional step in wall

160 This item arises because of a lack of detail on the plans. Mr Hall states that a wall is not built in the correct location and that there is a step in the wall. The photographs to Mr Hall's report show a 'step' in the wall, although I find that Mr Hall's report does not contain sufficient supporting detail to sustain a finding by me that the wall was not built in the correct location.

161 Mr Xu states that step in the wall was consistent in nature, and not substandard workmanship.

162 Despite Mr Xu's opinion a failure to carry out the work win accordance with the contractual plans will be a breach of clause 9(a) of the contract.

163 In *Bellgrove v Eldridge (1954) 90 C.L.R. 613* the High Court of Australia stated, in connection with a building case, where there had been a breach of contract that a plaintiff would be entitled to the cost of making the work or building conform to the contract. The court stated that there was one qualification to this rule, namely that the work must be necessary to produce conformity to the contract, but the undertaking of the work must be a reasonable course to adopt

164 In *Tabcorp* Holdings Pty Limited v Bowen Investments Pty Limited *[2009] HCA 8 (12 February 2009)* the High Court of Australia discussed reasonableness as referred to by the High Court in *Bellgrove v Eldridge.* The Court stated:

> 'The example which the Court' (in *Bellgrove v Eldridge*) 'gave of unreasonableness was the following [26]:
>
> > "No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks."
>
> That tends to indicate that the test of "unreasonableness" is only to be satisfied by fairly exceptional circumstances.'

165 An example of such exceptional circumstances was stated to be closely aligned with a party 'merely using a technical breach to secure an

uncovenanted profit' as referred to by Oliver J. in *Radford v De Froberville* [1977] 1 WLR 1262 at 1270.

166 Given the limited details on the plan relied upon by Mr Hall together with the fact that no issue has been identified going to the quality of the construction of the stairwell wall or any other detriment to the owner, I find that the making of a money or work order in favour of the owner would come within an exceptional circumstance of the type of the owner using a technical breach to secure an uncovenanted profit or advantage, or to punish the builder.

167 I can find no reason to order rectification work to be carried out in connection with this item in the event that a work order is to be made.

Item 8.2 – Stairs installed with uneven finishes at the side stringers, and installed uneven with gaps

168 Mr Xu stated that he agreed that the installed stair to be uneven with gaps, although he stated that the work was incomplete.

169 This item is conceded by the builder in its submissions. The necessary rectification work should be included in a work order, if made.

Item 8.3 – No ducting of exhaust fan for original bathroom to vent externally

170 This item is conceded by the builder in its submissions. The necessary rectification work should be included in a work order, if made.

Item 9.1 – Underside of stairs not lined and laundry otherwise incomplete

171 This item is conceded by the builder in its submissions. The necessary completion work should be included in a work order, if made.

Items 10.1 – 10.9 Water damage and other damage to the original structure

172 Items 10.1 – 10.9 relate to damage to the owner's premises that occurred during the course of construction. The factual basis for these items is in the owner's affidavit at [65] – [68]. In that regard I find that the owner's evidence is general and relates to water leaking into the premises during the course of construction. In addition there are various other references in the owner's affidavit regarding water leaking into the property.

173 Mr Hall's evidence in relation to these items is to photograph and comment on instances of water entry and damage caused by water entry. There is also

reference to a crack in an archway and physical damage to the kitchen ceiling, although no opinion is offered about the cause of the damage.

174 Mr Xu also makes comments about water marks and whether the damage observed is continuing or not. Mr Xu states that given the contract had been terminated, he was unable to attribute responsibility for damage to the parties.

175 In his 19 August 2019 report in reply to Mr Xu's report, Mr Hall deals with water damage and other damage at 6.11. At its highest Mr Hall's evidence is that plastic sheeting intended to protect the works during the construction stage was placed at roof level rather that at floor level which Mr Hall states is standard practice. As a result Mr Hall states at [6.11], conclusion, that there has been substantial water entry into:

(1) The entry foyer area;
(2) Ceiling to the front ground floor bedroom;
(3) The lower bathroom causing delamination;
(4) Walls of bedroom 2 causing staining of walls;
(5) The ceiling of the lounge including dislodgment of cornices; and
(6) The kitchen area causing substantial damage.

176 There was no objection to this evidence and Mr Hall was not cross examined on it. Moreover the builder did not address this evidence in its final written submissions, although as a general submission the builder stated that water damage does not comprise defective building works. Be that as it may be, the gist of Mr Hall's evidence is that the way in which the builder used the protective plastic sheeting was incorrect, and thus was a breach of clause 9(a) of the contract which required it to carry out the work '*with due care and skill'*.

177 I accept Mr Hall's evidence and find that the way in which the builder used plastic sheeting intended to prevent water ingress was in breach of clause 9(a) of the contract which required it to carry out the work '*with due care and skill'.*

178 The necessary rectification work should be included in a work order, if made.

Item 10.1 - Damage to walls in entry foyer

179 Based on my findings above and [173(1)], I find for the owner in connection with this item. The necessary rectification work should be included in a work order, if made.

Item 10.2 - damage to ceiling on ground floor bedroom

180 Based on my findings above and [173(2)], I find for the owner in connection with this item. The necessary rectification work should be included in a work order, if made.

Item 10.3 - lower bathroom door delaminated

181 Based on my findings above and [173(3)], I find for the owner in connection with this item.

Item 10.4 - damage to ceiling to second ground floor bedroom

182 I reject this item of the claim on the basis that there is no evidence to support a finding that this damage was caused by a breach of clause 9 of the contract

Item 10.5 - damage (staining) to walls of bedroom two

183 Based on my findings above and [173(4)], I find for the owner in connection with this item. The necessary rectification work should be included in a work order, if made.

Item 10.6 – damage to ceiling to lounge room

184 Based on my findings above and [173(5)], I find for the owner in connection with this item, including damage to lounge room cornices. The necessary rectification work should be included in a work order, if made.

Item 10.7 - crack in archway

185 I reject this item of the claim on the basis that there is no evidence to support a finding that this crack was caused by a breach of clause 9 of the contract.

Item 10.8 cornice to dining area dislodged

186 I reject this item of the claim on the basis that there is no evidence to support a finding that the cornices to the is crack was caused by a breach of clause 9 of the contract

Item 10.9 - damage to kitchen ceiling

187 Based on my findings above and [173(6)], I find for the owner in connection with this item. The necessary rectification work should be included in a work order, if made.

Item 11.1 - tiling to balcony

188 This item is conceded by the builder as incomplete work in its submissions. The necessary completion work should be included in a work order, if made.

Item 11.2 - electrical works

189 This item is conceded by the builder as incomplete work in its submissions. The necessary completion work should be included in a work order, if made.

Claim for damages caused by the late completion of the works

190 The owner claims damages for late completion of the building works.

191 Clause 6 of the contract stated that the builder would complete the work under the contract within 26 weeks from the date the work was to be commenced under clause 5 of the contract, namely:

(a) Within 30 working days from the date of the contract; or

(b) If approval of the local council was still to be obtained for the work, the date written notification of that approval; or

(c) if consent of a lending authority was required the date written notification of consent that the work may proceed which ever was the latest.

192 In these proceedings the owner's evidence, which I accept, is that the DA was eventually approved on or about 3 August 2016. There is no evidence that lending was required.

193 I find that the contract was signed by the parties on 16 March 2016. I find that the DA approval was obtained on 3 August 2016.

194 Clause 7 of the contract dealt with extensions of time.

195 The owner submits that the works were commenced on 16 March 2016 which is said to be an acceptance of the builder's position. It is submitted that as a result the works were required to be completed by 14 September 2016. The

owner also accepts that the date for completion should be extended by 10 days.

196 The builder submits that commencement of the building works were delayed by agreement of the parties until early May 2017 and actually commenced on 29 May 2017. I accept those submissions and the evidence which supports them.

197 As a result I find that the building works were commenced on 29 May 2017 and were to be completed within 26 weeks of that date, namely 21 November 2017. The builder claims that it was entitled to an extension of time of 13 days as claimed on 27 October and 2 November 2017. The owner has accepted a 10 day extension of time. The parties are in dispute as to 3 days claimed extension of time.

198 Clause 7 of the contract stated that if the builder wished to claim an extension of time it was required to notify the owner in writing of the cause and estimated length of the delay within 10 business days of the occurrence of the delay event. The clause also stated that if the owner did not within a further 10 business days notify the builder in writing that the extension of time was unreasonable, the completion date for the contract would be extended by the period notified to the owner.

199 I find that on 27 October and 2 November 2017, the builder notified the owner in writing of 18 days delay of which it presses 13 days. I find that the builder's delay notices informed the owner of the cause and estimated length of the delays and were provided within 10 business days of the occurrence of the delay events referred to. I also find that the owner did not notify the builder in writing that the extensions of time claimed were unreasonable. What the owner did was state that he did not accept the claims. The contract required him to state whether or not he thought them to be unreasonable. Whether or not he accepted the claims was not an issue the contract required to be addressed; the reasonableness of the time claimed being the contractual focus.

200 I find that the builder was entitled to a 13 day extension of time which will cause the date for completion of 21 November 2017 to be extended to 8 December 2017. However as the builder in its submissions contends that the date for completion was 21 November 2017, I will accept that date as the date

by which the works were to be brought to completion. It is common ground that the works were not brought to completion as at that date. It follows that the builder will be liable to the owner for damages for breach of the completion provisions of the contract as and from 22 November 2017.

201 The next issue is when does the builder's obligation to pay such damages come to an end?

202 The builder submits that it ceased being liable to pay late completion damages when it suspended the works on 1 June 2018. I reject that submission. I find that a suspension of works does not end the builder's obligation to pay damages for late completion. Clause 7 states that if work is delayed by a suspension of works, the builder is entitled to claim an extension of time and thus protect itself from delay in completion caused by the suspension of works, which generally is justified under the contract by reason of an owner's default, as exemplified in clause 24.

203 I have found that the builder's solicitor sent a letter dated 26 June 2018 to the owner which purported to terminate the contract. I have made an inference that as a result of the builder's solicitor's letter, the owner was entitled to take possession of the premises after 26 June 2018. This is consistent with Ms Paton's evidence that the builder completed the works 'on or about 30 June 2018'.

204 I will therefore find that the builder's obligation to pay delay damages arising from late completion of the works applied in the period 22 November 2017 – 27 June 2018, which is approximately a 36 week period. The owner has claimed damages in the sum of $1,200.00 per week which would result in a late completion damages claim of $43,200.00.

Period June – November 2017

205 Insofar as the owner claims damages for the period when he left the premises during the course of construction to the date of completion, or the termination of the contract, the only basis that has been put forward to support such a claim is the existence of defects. The facts are that the owner and his family chose to reside in the residence during the course of construction. The nature of the work was the renovation of the residence by way of the addition of a

second level and associated works. The owner's evidence is that he and his family left the residence because of water ingress before completion.

206 The contract did not specifically provide for the owner and his family remaining in the residence during the construction period. Equally there was nothing in the contract that prevented them from doing so. I find that there was no term or condition that the builder would keep the residence in a condition that would allow the owner and his family to reside in the residence without inconvenience or discomfort.

207 The owner's evidence was that he and his family left the residence in the period 7 – 10 June 2017because of water ingress. At this time the builder had progressed the works to the second stage, namely first floor frame completed and flooring laid. Refer to the second progress claim at 106 of exhibit A. It was only on 19 September 2017 that stage 4 was completed and the subject of a claim for a progress payment. Refer to the fourth progress claim at 108 of exhibit A. Stage 4 was 'F/F Windows installed, Ext. cladding & roofing on – "**Lock Up**"'. In other words it was on 19 September when the first floor roofing was on and any water ingress should have ceased, primarily because the fist floor had achieved lock up.

208 I find that if the owner chose to reside on a construction site, without obtaining an agreement from the builder that he would be able to do that without interruption or inconvenience, he did so at his own risk as regards all the personal inconveniences that might occur as a result of the construction process.

209 I find that there is no basis to award the owner damages for rent he paid for alternative accommodation in the period June 2017 - 22 November 2017.

The delay rate

210 The evidence relating to the damages sustained by the applicant due to the late completion of the building works is complicated by the fact that the owner rented a property which was co-owned by his wife and another member of her family. The owner did not take a more traditional path of tendering a residential tenancy agreement and evidence of periodical payments of rent in accordance with such agreement. At [69] of his first affidavit the owner stated that on or

about 10 June 2017 he rented a family member's house at Anzac Parade for $1,200.00 per week and rented it from that date to 9 September 2019, the date of his affidavit.

211 On 12 May 2021, immediately before the hearing the owner affirmed an affidavit that addressed the issue of renting the Anzac Parade property. The affidavit was admitted into evidence as exhibit B, over the objection of the builder, subject to weight. The builder submits that the affidavit should be given no weight, because it was served so late and as a result it was denied the opportunity to summons documents relevant to the matters asserted in the affidavit. I will give the evidence in exhibit B little weight, based on its lateness and the fact that it was not served in accordance with a Tribunal order, all of which imposes disadvantage on the builder. Nonetheless, I find that the owner's evidence is that he rented the accommodation at Anzac Parade for $1,200.00 per week in the relevant period that I have found, namely 22 November 2017 – 27 June 2018.

212 The owner was cross examined on his delay damages claim and stated that Mr Alfred Rose who is his father in law would be paid rent on the Anzac Parade property. He also stated in cross examination that he had paid his father in law rent through what I would describe as a credit card transaction which utilised reward points and involved a service fee. I find this transaction difficult to understand, although that does not mean that it did not occur.

213 Despite the owner's evidence of rent paid for alternative accommodation being somewhat opaque, I nonetheless accept that he has obtained an agreement with his father in law to occupy the Anzac Parade property and to pay rent of $1,200.00 per week for it and that he has paid his father in law rent for the property and remains liable to pay rent at the rate of $1,200.00 for the property.

214 I find that the damage sustained by the owner which arises due to the builder's breach of clause 6 of the contract to complete the work within the time agreed, namely 26 weeks from commencement as extended in accordance with clause 7 will be $43,200.00, as referred to above.

215 In his closing submissions the owner at [92(c)] sought an order that the builder pay the owner delay damages of $1,200.00 per week for the period of delay as found. The finding in the preceding paragraph does precisely that.

Premises being habitable

216 In his submissions filed on 10 May 2021 there is a suggestion that the premises were not habitable when the builder left them. The owner claims for alternative accommodation in a period of time that goes beyond when the builder left the premises in 26 June 2018. These claims are stated in the owner's final written submissions in reply at [18] where it stated that the owner has claimed the costs of alternative accommodation from the time when he and his family were forced to vacate the property to the date of the final hearing. It is stated that this was made clear in the owner's pleadings, evidence and submissions. The owner's cross application provides as a particular of defective work, 'additional and alternate lease accommodation fees and expenses'. In his final written submissions, the claim for accommodation costs is framed in the context of 'delay' damages, that is damages sustained because the builder did not complete the work by the date for completion.

217 The question of whether the premises were habitable as at the date of the termination of the contract was not something that the owner addressed in his affidavit. In section [7.5] of his report Mr Hall responds to a question asked of him, namely 'Is the Property habitable, taking into account any safety or health hazards that may exist? Mr Hall states that the property is not habitable because electrical works are incomplete. Mr Hall also refers to water damaged ceilings in the ground floor area, the ground floor laundry being incomplete and bathrooms being incomplete. It seems probable that these aspects of incomplete work are referred to by Mr Hall as reasons why the property is not habitable, although he does not expressly say that. In his Reply report Mr Hall confirms this.

218 In his report Mr Xu states that the first floor bathroom light switches are incomplete. With that exception he stated that he would consider all other areas to be habitable at the time of his inspection.

219 I prefer the evidence of Mr Hall and find that for the reasons he provides that the residence was not habitable at the date of his inspection 19 August 2019. To some extent, this opinion is supported by Mr Xu. There is no evidence that any work was done by the owner, or the builder, after 26 June 2018. As a result of Mr Hall's and Mr Xu's evidence I will find that it is most probable that the residence was not habitable at the end of June 2018.

220 If a claim for loss measured from the time when the owner and his family vacated the property to the date of the final hearing was to be thought to be explicit or implicit in the owner's pleading or final written submissions, I find that the owner would be under an obligation to mitigate his loss by making the residence habitable, rather than leaving the premises in a state that meant that they could not be occupied and allowing that state of affairs to exist in the period 26 June 2018 to the conclusion of the hearing on 18 May 2021, approximately 3 years and expect to be awarded damages at the rate of $1,200.00 per week for that period, amounting to approximately $187,200.00.

Damages - Hadley v Baxendale

221 If the owner and his family was unable to occupy the residence because of defective and/or incomplete work and as a result had to expend money to arrange for alternative accommodation while the necessary work was carried out to rectify defective work or complete incomplete work such as to make the residence fit for occupation, I would find that the expenditure of funds for such accommodation would fall within the scope of damages payable on a breach of contract by reference to what was stated in *Hadley v Baxendale* (1854) 9 Exch 341. That is where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

222 Such a finding may in my view be made in circumstances where the owner moves expeditiously to carry out the necessary work to rectify defects or

complete what has been left incomplete by a builder in breach of contract. In my view the expenditure associated with alternative accommodation may be characterised as either arising naturally from the breach or such as may be supposed to have been in the contemplation of both parties at the time they made the contract. The reason for this conclusion is the fact that it was clear to both parties that the object of the contract was the performance of building work to add to and renovate the existing dwelling so that the owner and his family would have the benefit of residing in it after completion in its new and improved condition.

223 However the situation is different in these proceedings. For reasons which are unexplained, the owner apparently for approximately three years has not carried out any work to rectify defective work or to complete what is said was not completed. The owner now seeks to claim alternative accommodation costs for the three year period from the builder.

224 I find that the alternative accommodation costs for such a prolonged period do not either arise naturally from the breach or are such as may be supposed to have been in the contemplation of both parties at the time they made the contract. Such alternative accommodation costs for such a prolonged period arise in my view because the owners has decided for unexplained reasons not to rectify defects or complete incomplete work in order to make the residence habitable.

Mitigation of loss

225 In addition to what has been stated above in connection with *Hadley v Baxendale,* there is the issue of mitigation. Section 18BA of the Home Building Act states:

> '(1) Breach of a statutory warranty implied in a contract constitutes a breach of the contract and accordingly--
>
> (a) a party to the contract who suffers loss arising from the breach has a duty to mitigate their loss, and
>
> (b) the onus of establishing a failure to mitigate loss is on the party alleging the failure.'

226 In the case of *Sotiros Shipping Inc. And Aeco Maritime S.A. v. Sameiet Solholt; (The 'Solholt')* (1983) 1 Lloyds Rep, 605, Sir John Donaldson M.R. stated:

> ‘A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase "duty to mitigate". He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendants' breach of duty. As Viscount Haldane, L.C., put it in British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd, [1912] A.C. 673 at p. 689: The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.’

227 In *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 Ball J. stated at [42] in connection with mitigation of loss:

> ‘Generally speaking, a person who suffers loss as a consequence of a breach of contract is required to act reasonably in relation to that loss in order for the loss to be recoverable. An important aspect of this general principle is that the party who has suffered a loss is under a duty to mitigate its loss. Sometimes the use of the word "duty" in this context is criticised, since there is no requirement that the plaintiff act in a particular way and no requirement that the plaintiff minimise its loss: see, eg, J Carter, E Peden and GJ Tolhurst, *Contract Law in Australia*, (5th ed, 2007, LexisNexis) at [35-35]. Rather, the principle is that the plaintiff is not entitled to recover losses attributable to its own unreasonable conduct. As O'Connor J explained in *Hasell v Bagot, Shakes & Lewis Ltd* [1911] HCA 62; (1911) 13 CLR 374 at 388:
>
> ‘One of the principles on which damages are assessed [is] that a party to an agreement suffering injury from the other party's breach of its terms is bound to exercise reasonable care in mitigating the injurious consequences of the breach, and is not entitled to recover from the party in default any damage which the exercise of reasonable care on his part would have prevented from arising.’

228 I find that by not rectifying defects or completing incomplete work in order to make the residence habitable, the owner acted in what he considered to be in his best interests, as he was entitled to do. However in accordance with what has been stated in the authorities cited above, the fact that the owner acted in what he considered to be in his best interests does not make the builder responsible for all costs incurred in retaining alternative accommodation. I find that such costs as the owner has incurred cannot be properly be regarded as

caused by the builder's breach of contract, or to put it another way I find that such costs are attributable to the owner's own unreasonable conduct.

229 For the reasons provided I reject the owner's claim for the costs of alternative accommodation incurred after the builder terminated the contract.

230 However for the reasons provided, I find for the owner in the sum of $43,200.00 as the damage sustained by the owner which arises due to the builder's breach of clause 6 of the contract to complete the work within the time agreed, namely 26 weeks from commencement as extended in accordance with clause 7.

Section 48MA of the Home Building Act

231 This section states:

> '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.'

232 The owners state that they have reasonably lost confidence in the builder to complete the works or rectify defective work. As a result they submit that that an award of damages is appropriate and will bring a conclusion to the proceedings.

233 The builder submits that a work order should be made on terms that it filed and served before the hearing, namely

> 'Addbuild submits that the Tribunal should make orders to the effect of the following:
>
> (a) That Addbuild is to rectify the Agreed Rectification Works identified in the Scott Schedule.
>
> (b) That Stern:
>
> (i) To provide all necessary access and permissions to Addbuild, its contractors and representatives, so that Addbuild can complete the Agreed Rectification Works.
>
> (ii) Must not under any circumstances do any act or thing, or omit to do any act or thing, which would have the effect of interfering, hindering or preventing
>
> Addbuild, its contractors and representatives from rectifying the Agreed

Rectification Works,

(c) That subject to Stern's compliance with Order (b), that Addbuild complete the Agreed Rectification Works within 56 days from the date of the Tribunal making these orders.

(d) Addbuild is to complete those Agreed Rectification Works to the standards required under the terms of the Contract (notwithstanding any question as to the status of the Contract including whether the Contract remains in force between the parties) and the Home Building Act.

(e) Within fourteen (14) days from the date that Addbuild completes the Addbuild Rectification Works, the parties shall jointly instruct an agreed upon expert **(Independent Expert;** who for reasons of impartiality shall not be a person instructed by either of the parties in relation to these proceedings or the Contract, and who shall be determined by order of the Tribunal if the parties cannot agree an Independent Expert), who shall be asked to certify to each of the parties that:

(i) the Agreed Rectification Works have been completed to the standard required by Order (d); or

(ii) (if the Agreed Rectification Works have not been so completed), which part(s) of the Agreed Rectification Works are yet to be completed.

(f) Addbuild is to pay for the costs of the parties instructing the Independent Expert.

(g) In the event that the Expert certifies to the parties in accordance with Order (e)(i) that the Agreed Rectification Works have been completed in accordance with these Orders, then the following provisions commencing at Order (h) below shall apply. If the Expert certifies that the any part of the Agreed Rectification Works remains incomplete in accordance with Order (e)(ii), then the steps in these Orders shall be repeated until such time as the Expert certifies to the parties that the Agreed Rectification Works have

been completed in accordance with Order (e)(i), after which the provisions commencing at Order (h) below will then apply.

(h) Within 14 days after the date on which the Expert certifies to the parties that the Agreed Rectification Works have been completed. Stern will pay to Addbuild the Unpaid Amount together with interest calculated on the Unpaid Amount as determined by the Tribunal.'

234 The owner has stated that if the Tribunal is minded to implement s48MA of the *Home Building Act* and make work orders, he agrees with the work orders proposed by the builder subject to some amendments which are proposed which go to the appointment of a contract Superintendent with powers aimed at ensuring that work is carried out to the necessary degree of quality and completion.

235 It is clear that as the latter part of the work was carried out, a degree of acrimony came to exist between the owner and the builder. The evidence in the proceedings discloses that it was the owner who was acrimonious in his correspondence with the builder. I also find that the owner's evidence at the hearing disclosed that he was towards the end of the contract aggressive toward the builder, for example asserting that its claims were fraudulent, something not raised in the hearing. The owner may have at the time considered that his views were justified. Nonetheless I find that at times he didn't consider himself to be bound by certain aspects of the contract, for example stating when being cross-examined, 'Because variations were approved doesn't mean that I was going to pay. I went to Fair Trading'.

236 This attitude no doubt led the builder to suspend the work and then on 26 June 2018 to issue a letter terminating the contract.

237 I am unable to find any sufficient basis for not implementing the preferred outcome referred to by s48MA. I find that, absent other relevant factors, the owner's confidence or lack of confidence in the builder is not a critically relevant factor. More relevant will be a builder's actual ability to carry out the required work. The owner makes no submissions which suggest that the builder is not capable of rectifying defects or completing incomplete work.

238 I find that the suggestions made by the owner regarding the appointment of a contract superintendent with appropriate power to ensure work is of the required standard are helpful and appropriate. Every effort that can be made to ensure that the necessary work is carried out properly and in accordance with the contract documents will be of assistance to the parties in ensuring so far as possible that work orders are complied with and that there is no occasion for renewal proceedings. In this way finality of proceedings may be achieved in an overall cost effective way to the benefit of both parties.

239 For the reasons provided I will implement s48MA of the *Home Building Act* and make a work order for defective work as well as incomplete work, in preference to making a money order as sought by the owner.

Determination of the proceedings

240 The builder has been successful in obtaining findings which entitle it to an order in its favour in the sum of $95,784.25.

241 The owner has been successful in obtaining findings which entitle it to an order in his favour in the sum of $43,200.00.

242 I will therefor make a 'net' order in favour of the builder in the sum of $52,584.25.

243 I will order the parties within 21 days of the date of this decision to file (in hard copy and electronic form) an agreed work order with all necessary conditions including the period of time within which the work is to be undertaken, and any final payment to be made to the builder. In the event that the parties are unable to agree the work order, they must within 21 days of the date of this decision to file (in hard copy and electronic form) a form of work order with all necessary conditions including the period of time within which the work is to be undertaken, and any final payment to be made to the builder.

Costs

244 In the event that a party wishes to bring a costs application, the costs application must be lodged in the Tribunal and served on the costs respondent within 14 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application.

245 The costs respondent will have 14 days after the date it or he receives the application to lodge in the Tribunal and serve on the costs applicant his or its submissions, if any, in response to the costs application, such submissions either attaching or referring to the documents relied upon.

246 The cost applicant will have 14 days after the date he or it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent its or his submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.

247 The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing.

248 Subject to the parties' submissions, the Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar