Civil and Administrative Tribunal

New South Wales

Case Name:	Blackhall v Fine Cut Building Pty Ltd
Medium Neutral Citation:	[2021] NSWCATCD 43
Hearing Date(s):	22 March 2021 (last submissions 30 April 2021)
Date of Orders:	22 June 2021
Decision Date:	22 June 2021
Jurisdiction:	Consumer and Commercial Division
Before:	G Ellis SC, Senior Member
Decision:	1. The respondent is to pay the first applicant $100,035.24 immediately. 2. Any application for costs is to be made by written submissions which are provided to the Tribunal and the other parties on or before 06 July 2021. 3. Any response is to be made by written submissions which are to be provided to the Tribunal and the other parties on or before 20 July 2021. 4. Any such submissions should address the question of whether an order should be made to dispense with a hearing on the question of costs.
Catchwords:	BUILDING AND CONSTRUCTION - Home Building Act 1989 (NSW) - ss 18B, 18F, 48MA - Statutory warranty - Defective work – Statutory defence -Whether failure to comply with specified purpose - Mitigation of damage - Work order or money order
Legislation Cited:	Environment Planning and Assessment Act 1979 (NSW) Fair Trading Act 1987 (NSW) Home Building Act 1989 (NSW) Home Building Regulation 2014 (NSW)

Cases Cited:	Aceti v Woods [2014] NSWCATCD 214 Bellgrove v Eldridge [1954] HCA 36 Brennan Constructions Pty Ltd v Davison [2018] NSWCATAP 210 Brooks v Gannon Constructions Pty Ltd [2017] NSWCATCD 12 Bruno Pisano v Georgia Dandris [2014] NSWSC 1070 Galdona v Peacock [2017] NSWCATAP 64 Gallagher v Masters Installation Pty Ltd [2017] NSWCATAP 117 Haines v Bendall [1991] HCA 15 Henderson v LED Builders Pty Ltd [2005] NSWCTTT 266 J Evers Pty Ltd t/as The Plumbing and Electrical Doctor v Rolt [2018] NSWCATAP150 Karacominakis v Big Country Developments Pty Ltd [2000] NSWCA 313 Kell & Rigby Holdings Pty Ltd [2010] NSWSC 612 Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23 Legione v Hateley [1983] HCA11 Leung v Alexakis [2008] NSWCATAP 11 Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 Mitchell v Cullingral Pty Ltd [2012] NSWCA 389 National Strategic Constructions Pty Ltd v Deacon [2017] NSWCATAP 185 Nationwide Builders Pty Ltd v Le Roy [2019] NSWCATAP 220 Owners Corporation SP49822 v Easyway One Pty Ltd [2009] NSWCTTT 478 Pacorp Holdings Pty Ltd v Waller [2017] NSWCATAP 167 The Craftsman Restoration and Renovations v Boland [2008] NSWSC 660 The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067 The Owners Strata Plan No 66375 v Suncorp Metway Insurance (No 2) [2017] NSWSC 739 Urban Constructions (NSW) Pty Ltd v Brett Shearer and Bronwyn Shearer [2015] NSWCATCD 9 Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7 Wheeler v Ecroplot Pty Ltd [2010] NSWCA 61

Category:	Principal judgment
Parties:	Debra Anne Blackhall (First Applicant) Peter Allan Dean (Second Applicant) Fine Cut Building Pty Ltd (Respondent)
Representation:	Counsel: Mr M Klooster (First Applicant) Mr D O'Connor (Respondent) Solicitors: Mr M Atkinson (First Applicant) Mr A Singh (Respondent)
File Number(s):	HB 20/04461
Publication Restriction:	Nil

REASONS FOR DECISION

Outline

1 These proceedings relate to residential premises at Mulgoa. The second applicant entered into a contract with the respondent on 30 November 2016 for the construction of an extension at the rear of existing residence and a shed.

2 The first applicant acquired a half interest in the property on or about 26 June 2017 and on 29 January 2020 she commenced these proceedings. The second applicant was added by an order of the Tribunal on 18 February 2020.

3 This application raised for determination a number of alleged defects and associated issues, including whether a work order or a money order should be made. For the reasons indicated below, the Tribunal is satisfied that a number of defects have been proved and that a money order is the appropriate remedy.

Hearing

4 At the hearing, which was conducted via the telephone due to the COVID-19 pandemic, the first applicant was represented by Mr Klooster, instructed by Mr Atkinson, the second applicant was self-represented, and the respondent was represented by Mr O'Connor, instructed by Mr Singh. The second applicant did

not take an active part in the proceedings in that he did not give evidence, ask questions of witnesses or make submissions.

5 The lay witnesses were the first applicant (Ms Blackhall) and Mr Davies for the respondent. There was expert evidence from engineers, Mr Broune for the first applicant and Mr Noonan for the respondent, and also from building consultants, Mr Iskowicz for the first applicant and Mr Capaldi for the respondent. Each of those six witnesses was questioned. The first applicant also relied on a report from a geotechnical engineer, Mr Hamilton, who was not cross-examined. Written submissions were later lodged.

Evidence

6 The following documents were admitted as evidence:

Exhibit 1 - Tender bundle, containing documents upon which the parties relied

Exhibit 2 - Joint report from Messrs Broune, Noonan, Iskowicz and Capaldi

Exhibit 3 - Google Earth pages (2)

Exhibit 4 - Letter dated 31 January 2017 from Mr Singh to Mr Atkinson

Exhibit 5 - Complete copy of AS4055

7 Documents that did not form part of the evidence but were marked for identification were as follows:

MFI 1 – First applicant's preliminary submissions

MFI 2 - Statement of agreed facts and issues

MFI 3 - Respondent's preliminary submissions

MFI 4 - First applicant's closing submissions

MFI 5 - Respondent's closing submissions

Jurisdiction

8 It is clear these proceedings relate to residential building work, that the definition of "*building goods or services*" in s 48A of the *Home Building Act* 1989 (HBA) is satisfied. As these proceedings involve claims for an amount of

money, they involve a "*building claim"* within the meaning given to those words by s 48A of the HBA.

9 No issue was raised to suggest the proceedings were not commenced within the time limits imposed by s 18E of the HBA. The first applicant was entitled to rely on the statutory warranties provided by section 18B of the HBA as a successor in title or as a non-contracting owner by reason of s 18D(1) and s 18D(1A) respectively.

10 It is also noted that the amount claimed in the application, namely $250,000, exceeds the lower limit of $5,000 set by clause 2(3)(a) of the HBA and clause 12 of the *Home Building Regulation* 2014 and is below the upper limit of $500,000 set out in s 48K of the HBA. Accordingly, the Tribunal has jurisdiction under the HBA.

Issues

11 The written submissions of Mr Klooster for the first applicant covered the following issues and the written submissions of Mr O'Connor for the respondent responded to those issues and did not raise any additional issues. Accordingly, the Tribunal is required to consider and decide each of those issues, namely:

(1) What is the appropriate wind classification for the site?
(2) Have the applicants failed to mitigate their loss?
(3) Was there was a breach of s 18B(1)(f) of the HBA?
(4) Should there be an allowance of 10% for contingencies?
(5) Was there defective work?
(6) If so, what is the reasonable and necessary method of rectification?
(7) Should a money order or a work order should be made?
(8) If a money order, what amount should be awarded?
(9) If a work order, what should be the wording of that order?

Relevant statutory provisions

12 Section 18B(1) of the HBA (set out below) contains statutory warranties in relation to residential building work and clause 39 of the contract (1/116, ie page 116 of Exhibit 1) mirrors the wording of those six warranties.

(1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:

(a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,

(b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,

(c) a warranty that the work will be done in accordance with, and will comply with, this and any other law,

(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract or, if no time is stipulated, within a reasonable time,

(e) a warranty that, if the work consists of the construction of a dwelling, the marking or alternations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor's licence, or another person with express or apparent authority to enter into or vary any contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires that work to achieve, so as to show that the owner relies on the holder's or person's skill or judgment.

13 Section 18F, which provides defences to a breach of a section 18B(1) warranties, is set out below:

(1) In proceedings for a breach of a statutory warranty, it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from:

(a) instructions given by the person for whom the work was contracted to be done contrary to the advice of the defendant or person who did the work, being advice given in writing before the work was done, or

(b) reasonable reliance by the defendant on instructions given by a person who is a relevant professional acting for the person for whom the work was contracted to be done and who is independent of the defendant, being instructions given in writing before the work was done or confirmed in writing after the work was done.

(2) A relevant professional is independent of the defendant if the relevant professional was not engaged by the defendant to provide any

service or do any work for the defendant in connection with the residential building work concerned.

(3) A relevant professional is not independent of the defendant if it is established that the relevant professional:

(a) was engaged on the basis of a recommendation or referral of the defendant to act for the person for whom the work was contracted to be done, or

(b) is, or was within 3 years before the relevant instructions were given, a close associate of the defendant.

(4) In this section, relevant professional means a person who:

(a) represents himself or herself to be an architect, engineer or surveyor, or

(b) represents himself or herself to have expert or specialised qualifications or knowledge in respect of residential building work or any particular aspect of residential building work, or

(c) represents himself or herself to be engaged in a profession or to possess a qualification that is recognised by the regulations as qualifying a person as a relevant professional.

14 Section 48MA establishes a statutory preference: "A court of Tribunal determining a building claim involving an allegation of defective 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."

Consideration

15 It is convenient to deal with the evidence and submissions on an issue-by-issue basis.

16 In reaching a decision in relation to each of the claims made by the parties, the Tribunal has considered the entirety of the documents admitted as evidence and the submissions. These reasons focus on the material central to each of the issues but, to the extent that any evidence or a submission is not referred to, it should not be assumed that evidence or submissions has been ignored.

17 That approach is consistent with what was said by Allsop P in *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [2]:

> [A] *judge may, in dealing with large bodies of evidence, be forced to economise in expressions and approach in order to be coherent in resolving the overall controversy. The need for coherent and tolerably*

> *workable reasons sometimes requires a truncation of reference and expression. Judgement writing should not become a process that is oppressive and produces unnecessary prolixity. Not every piece of evidence must be referred to. That said, central controversies put up for resolution by the parties must be dealt with. The competing evidence directed or relevant to such controversies must be analysed or resolved …*

What is the appropriate wind classification for the site?

18 The aim of the Australian standard titled "*Wind Loads for Housing*", commonly referred to as AS4055 (the 2012 edition being applicable in this case), is to provide guidance for the design and construction of buildings that are affected by wind loading. It does so by categorising four aspects, namely (1) wind region, (2) site conditions or topography, and (3) terrain category, which determine (4) wind classification.

19 First, as to wind region, there is no dispute that the subject site falls within the non-cyclonic region A. Secondly, it is necessary to assess the topography (ranging from T0 to T5, each subdivided into full shielding, partial shielding and no shielding). It does not appear to be disputed that the subject site falls within topographic class T0 (slope less than 1 in 10) and partially shielded.

20 It is therefore necessary to determine the terrain category (ranging in five, half-integer steps, from TC1 to TC3) in order to obtain the wind classification (ranging from N1 to N6), using the table set out in section 2.2 of AS4055 (4/12).

21 Section 2.3 of AS4055 commences by saying that "The terrain category for a housing site is a measure of the lowest effective surface roughness from any radial direction within a distance of 500 m of the proposed housing site." It goes on to provide descriptions for each TC. The descriptions for TC2, TC2.5 and TC3 are set out below:

> Terrain Category 2 (TC2) Open terrain including grassland with well-scattered obstructions having heights generally from 1.5 m to 5 m with no more than two obstructions per hectare, e.g. farmland and cleared subdivisions with isolated trees and uncut grass.
>
> Terrain Category 2.5 (TC 2.5) Terrain with few trees or isolated obstructions. This category is intermediate between TC2 and TC3 and represents terrain in developing outer urban areas with scattered

houses, or large acreage developments with fewer than 10 buildings per hectare.

Terrain Category 3 (TC3) Terrain with numerous closely spaced obstructions having heights generally from 3 m to 10 m. The minimum density of obstructions shall be at least the equivalent of 10 house-size obstructions per hectare, e.g. suburban housing or light industrial estates.

22 However, those definitions are followed by both a narrative and notes which may affect the assessment of the TC for a site by reference to AS4055. That narrative reads as follows (emphasis added):

> In urban situations, roads, rivers, small lakes and canals less than 200 m wide shall be considered to form part of normal 'Terrain Category 3' terrain. Parks and other open spaces less than 250 000 m2 in area shall also be considered to form part of normal 'Terrain Category 3' terrain provided they are not within 500 m of each other, or not within 500 m of open country. Housing sites less than 200 m from the boundaries of open areas larger than 250 000 m2, e.g. golf courses, that are completely surrounded by urban terrain, shall be considered to have the same terrain category applicable to the open area itself. Shielding provisions may still apply to these sites.
>
> **Housing sites less than 500 m from the edge of a development shall be classified as the applicable terrain that adjoins the development …"**

23 In his report, Mr Broune referred to a Google Earth photo (1/601) and expressed the view that the TC was 2.5 to 2.25 (1/816). He set out his reasoning as follows:

> From [the Google Earth photo] the upwind terrain is predominantly open grassland with some treed areas and suburban terrain only within 200 m of the house.
>
> Hence adopt the terrain category TC2.5 to TC2.25.

24 On the other hand, Mr Noonan's report assessed the subject site as being TC3 (1/1267). After setting out that assessment, he referred to Mr Broune's report and said:

> The Broune report indicates terrain Category 2.5 due to open grassland within 200 metres of the house. However, it was found from Google Earth the closest open grassland, greater than 250 000 square metres, was more than 200 metres from the site as per the below excerpt, and thus Terrain category 3 is acceptable per the code.

25 It is convenient to make two observations in relation to those quoted portions. First, Mr Broune suggests a category of TC2.25 which does not exist in

AS4055. Secondly, Mr Noonan interpreted what Mr Broune said as indicating there was open grassland within 200 m of the site. However, it appears the view Mr Broune was expressing was that "*the upwind terrain is predominantly open grassland with some treed areas*" and that there is "*suburban terrain only within 200 m of the house*". In other words, the reference to 200 m appears to relate solely to the suburban terrain and not the open grassland. If the reference to 200 m was intended to relate to both the suburban terrain and the open grassland, then Mr Broune would be incorrect since the evidence shows that the grassland does not commence until a minimum of 248 m from the site (1/1267).

26 In the Joint Report (2/8), Mr Broune's view is expressed as "borderline TC2 – TC2.5" while Mr Noonan's position was that he "Maintained his position in relation to the wind load and rating, on the basis of his interpretation of the terrain category surrounding the property as being TC 2½."

27 It is convenient to here note that the practical impact of that difference that TC3 and TC2.5 both suggest a wind classification is N1 while TC2 suggests a wind classification of N2 and an N2 wind classification would require a wider scope of rectification in Item 5 of the claims for defective work.

28 Under cross-examination on this topic, Mr Broune said he had difficulty with the term "*outer urban area*". It was made apparent that he had not gone to the site to consider the terrain and had made his assessment made on Google Earth photos. He accepted that the assessment of terrain categories was not an exact science.

29 During the hearing, Mr Noonan accepted that he revised his opinion from TC3 to TC2.5 based on the open grassland that commenced about 250 m from the subject site. He said he had done a site inspection and considered the subject site to be in a typical urban area.

30 Submissions for the first applicant contained the following points:

(1) The wind classification should be "*borderline N1/N2*".

(2) Mr Broune has "consistently maintained a terrain category of 2.5 to 2.25".

(3) The applicant relies on the words of section 2.3 of AS4055.

(4) The Google Earth photos support a finding of TC2 in the adjacent land.

(5) A suggestion that Mr Noonan had misinterpreted Section 2.3 of AS4055.

(6) Mr Broune's assessment of the land was consistent with Hamilton's description of the land which should be accepted as there was no objection to his report and he was not required for cross-examination.

(7) The letter from Kneebone Berratta & Hall dated 23 October 2017 (2/27) should be treated with caution.

(8) The calculations and reasoning of Mr Broune were set out in full.

31 The submissions for the respondent:

(1) Noted that the difference between the parties was whether the category of the terrain about 250 m from the subject site was TC2.5 or TC2.25.

(2) Referred to the definitions for TC2 and TC 2.5.

(3) Replied to each of the matters raised for the applicant.

32 The Tribunal notes that Mr Broune never gave unqualified evidence in support of either TC2 or N2, using adjectives such as "*borderline*". As a result, in seeking an unqualified finding of TC2, the first applicant's submissions go beyond the opinion that Mr Broune was prepared to express. Further, despite suggesting in oral evidence that this area was not an exact science, Mr Broune referred to TC2.25 but no such category exists in AS4055. It is also noted that, in relation to Item 2 (considered below), the first applicant's submission was that it is not permissible to interpolate in a table contained in an Australian standard. Reliance on Mr Hamilton's description is not considered appropriate when he was not describing the area for the purpose of an assessment in relation to AS4055. It is not necessary to consider the letter from Kneebone Berratta & Hall since this issue falls to be determined by reference to direct evidence of the subject areas (notably the Google Earth photos) and the words of Section 2.3 of AS4055, having regard to the opinions expressed by Mr Broune and Mr Noonan and the submissions of the parties.

33 Having reviewed the evidence and submissions, the Tribunal considers this issue falls to be determined by an application of the wording of section 2.3 of AS4055 to evidence provided by the Good Earth photos (1/601-602 and 3/1-2). It is convenient to here note that the quotation of section 2.3 of AS4055 in Mr

Broune's report (1/669) appears to be a superseded wording by comparison with the full wording of AS4055-2012 which became Exhibit 4.

34 It is necessary to first resolve a matter which arises from the narrative in section 2.3 of AS4055 (quoted above). The first applicant says that there is land within 500 m of the subject site which warrants a lower TC category while the report from the respondent's expert appears to suggest that the fact that the subject site is more than 200 m from an open area means that a lower TC category is not warranted.

35 Simply stated, the first applicant says the words in **bold** type DO apply while the respondent says the underlined words DO NOT apply.

36 The words in what has been termed the narrative paragraph of section 2.3 do not present as alternatives but as statements, each applying without preference. Thus, although the land being more than 200 m from the site means that not operate to change the classification of the site, the presence within 500 m of the site of land which does apply operates to alter the classification of the subject site. It appears that such an alteration explains why Mr Noonan, who suggested TC3 in his report was content to accept TC2.5 in the Joint Report (2/8).

37 The following findings are made in relation to this issue:

(1) The subject site, considered solely by reference to the definitions in section 2.3 of AS 4055, is TC3 as it is in an area that has "*numerous closely spaced obstructions having heights generally from 3 m to 10 m*" and falls within the words "*suburban housing*".

(2) Just under 250 m from the subject site there is land which falls within the definition for TC2.5 land since it is terrain "*with a few trees and isolated obstructions*", presents as an "*outer urban area*" and appears to be "*intermediate between TC2 and TC3*".

(3) As a result, there are no open areas within 200 m that warrant a change in the TC.

(4) However, there are areas less than 500 m from the edge of a development that warrants the TC to be changed to that of those adjoining areas.

(5) Accordingly, the appropriate TC for the subject site is TC2.5, not TC3.

(6) As a result, the wind category according to AS4055 is N1.

Have the applicants failed to mitigate their loss?

38 The law in relation to mitigation of loss arising from a breach of contract was summarised in *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at [187] as follows (citations omitted):

> A plaintiff who acts unreasonably in failing to minimise his loss from the defendant's breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less. This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which he has not. Since the defendant is a wrongdoer, in determining whether the plaintiff has acted unreasonably a high standard of conduct will not be required, and the plaintiff will not be held to have acted unreasonably simply because the defendant can suggest other and more beneficial conduct if it was reasonable for the plaintiff to do what he did.

39 This issue arises because it was raised, in relation to Items 1 and 10 of the alleged defects, by the building expert retained by the respondent, Mr Capaldi.

40 In the submissions of the respondent, it was suggested that the applicants terminated the contract prior to completion of the work and that, as a result, there was a duty to protect incomplete work from the effects of weather or exposure which would not have occurred if that work had been completed. It was suggested that, *prima facie*, there was a failure to mitigate and that "*they bore the onus*".

41 The other points made were that the Tribunal is not a forum which requires strict pleading, that the point was raised by Mr Capaldi and dealt with by Mr Iskowicz and that it was not an issue which required any lay evidence. In short, the builder's case was that the applicants bore responsibility for incomplete work as they terminated the contract. It should be recalled that the contract was only with the second applicant: the first applicant being a non-contracting owner.

42 For the first applicant, it was noted that the suggestions of Mr Capaldi were that the timber decking should have been treated with oil or paint (2/3) and that the cladding should have been painted (2/17). It was contended that, in order for this allegation to succeed, the respondent needed to show that the applicants knew what was required to be done but decided not to do that work. Further,

that in the absence of cross-examination of the first applicant, the respondent cannot discharge the onus of proof which it bears.

43 The Tribunal does not find there was a failure to mitigate loss by the applicants for the following reasons:

(1) While the Tribunal is not a court which requires strict pleading, these proceedings did have Points of Claim and Points of Defence in which this issue was not raised.

(2) The question of whether there was an unreasonable failure to mitigate does not arise *prima facie,* as suggested for the respondent, since the respondent bears the onus of proof in relation to that issue.

(3) The suggestion of Mr Capaldi in his report (1/1332 and 1/1351) and in the Joint Report (2/4 and 2/17) is an insufficient basis upon which to find that the applicants failed to act reasonably to mitigate their loss.

(4) In relation to Item 1, Mr Iskowicz suggested the decking may be left in its natural state (2/3) and Mr Capaldi conceded in oral evidence he had not looked up the manufacturer's instructions for this decking. That leaves open the option of not painting or oiling the decking material.

(5) In relation to Item 10, the issue of mitigation was not put to Mr Iskowicz in cross-examination despite his expression of opinion in the Joint Report (2/16) that this is not a mitigation issue. That failure weighs against a finding of failure to mitigate in relation to that item.

(6) While the laws of evidence do not apply in Tribunal proceedings, it would be procedurally unfair to find that the applicants had failed to mitigate their loss when that case was never put to the first applicant in cross-examination in relation to either Item 1 or Item 10.

44 It is also noted that the submissions for the first applicant approached this issue on the basis that it arose in the context of a breach of contract, i.e. defective work, while the submissions for the respondent was alleging that the failure to mitigate arose in respect of incomplete work.

Was there was a breach of s 18B(1)(f) of the HBA?

45 This issue relates to Item 7 of the alleged defects which relates to the concrete floor slab of the shed.

46 The Tribunal notes the first applicant's case was not directed to the purpose for which the materials were used, i.e. s 18B(1)(b) of the HBA, and reference was made to four decisions said to suggest a common theme that there was a failure of the material used to perform the purpose for which it was used (*Owners Corporation SP49822 v Easyway One Pty Ltd* [2009] NSWCTTT 478,

The Owners Strata Plan No 66375 v Suncorp Metway Insurance (No 2) [2017] NSWSC 739 at [79-83], *Aceti v Woods* [2014] NSWCATCD 214 at [90-94] and *The Craftsman Restoration and Renovations v Boland* [2008] NSWSC 660 at [87-92]).

47 In contradistinction, the first applicant's case on this issue was said to be based on a claim that the materials were not fit for a specified purpose, i.e. s 18B(1)(f) of the HBA. The primary case reference was to *The Owners – Strata Plan No 62930 v Kell & Rigby Holdings Pty Ltd* [2010] NSWSC 612 (*Kell & Rigby*) where it was said, at [325]:

> Here, the decision to supply a particular product which does not prove to be suitable or even perhaps a product with particular specifications … does not in my opinion assist the Builder in circumstances where, whatever was to be supplied, there was an overriding contractual specification in relation to its purposes and intended operation and the system as supplied did not meet that.

48 In relation to s 18B(1)(f), reference was also made to other cases where the issue was whether there had been a failure to achieve a specified purpose or result rather than a failure of the materials used: *Urban Constructions (NSW) Pty Ltd v Brett Shearer and Bronwyn Shearer* [2015] NSWCATCD 9 at [232-236], *Henderson v LED Builders Pty Ltd* [2005] NSWCTTT 266 and *J Evers Pty Ltd t/as The Plumbing and Electrical Doctor v Rolt* [2018] NSWCATAP150 at [44].

49 For the purpose of these proceedings, the question is not whether one or more components that were supplied were fit for its or their intended purpose but whether what was supplied was reasonably fit for a specified purpose that was disclosed to the respondent in circumstances where there was reliance on the respondent's skill and judgment. As a result, the following matters must be proved in order to establish that the respondent has breached s 18B(1)(f) :

(1) The disclosure of a specified purpose or result for the concrete slab.

(2) Reliance on the respondent's skill and judgment to achieve that purpose or result.

(3) That the concrete slab was not reasonably fit for that purpose or result.

50 The submissions for the first applicant set out five reasons why the Tribunal should find that the "*Homeowner*" disclosed a specified purpose or result with

the suggested result that the respondent was obliged to ensure that the slab achieved that purpose of result:

(1) The evidence of Mr Davies was that he was aware that the shed was going to have a hoist that would be used to move vehicles (1/408 at [4]).

(2) By reason of seeing Corvettes (a reference to the model of a car manufactured by Chevrolet), the respondent gained an understanding as to the type of car that was to be moved by the hoist.

(3) Mr Davies' evidence was that he stated he could make the slab "as strong as you need it. I'll allow for thickened concrete beams in the slab anyway" (1/408 at [4]).

(4) Nothing turns on the fact that the type of hoist was not selected or disclosed to the builder since he said he would allow for thickened concrete beams on the slab which, it was submitted, was *"presumably to accommodate any type of hoist*".

(5) The pre-contractual conversations made known the purpose and intended operation, as was the case in *Kell & Rigby*.

51 The points made in the submissions for the respondent on this issue were as follows:

(1) The first applicant conceded in cross-examination that the applicants never identified what type of hoist they were intending to use.

(2) The first applicant's expert, Mr Broune conceded that the type of hoist to be used would be relevant.

(3) There was no reference to the kind of hoist in the building contract.

(4) The first applicant's submissions did not address the parole evidence rule or otherwise explain how this specified purpose or result became part of the subject contract.

(5) In the absence of a contractual provision that supports disclosure of the purpose, this issue should be determined in favour of the respondent.

(6) *Kell & Rigby* could be distinguished on the facts since the type and specification of the air-conditioning system was disclosed in the contract in that case.

52 The Tribunal does not accept that it is necessary for the specified purpose or result to be specified in the subject contract. First, since s 18B(1)(f) refers to that purpose or result being expressly made known to a person, being either the licence holder or "*another person with express or apparent authority to enter into or vary any contractual arrangements*" and those are inconsistent with a requirement that the specified purpose or result be included in the contract. After all, if it was intended that the specified purpose or result be

included in the contract it would be expected that s 18B(1)(f) would be worded much more simply by requiring the specified purpose or result to be included in the contract. Secondly, the warranty implied by s 18B(1)(f) was included in clause 39(f) of the contract (1/116) but, even if it was not expressly included, it would be impliedly included by s18B(1)(f). Either way, the words of s 18B(1)(f) become an exception to the parole evidence rule.

53 Mr Broune did accept, during his oral evidence, that the type of hoist would be relevant. Indeed, in the last question he was asked in relation to this item, he agreed the kind of hoist would be critical.

54 Turning to the first of the three matters which the first applicant needs to prove in order to succeed on this issue, it is clear that the purpose of installing a hoist in the shed to be used in the restoration of motor vehicles was disclosed to the respondent.

55 The second question is whether there was reliance on the respondent's skill and judgement. This question arises because the concluding words of s 18B(1)(f) require not only the disclosure of a specified purpose or result but also that such disclosure was "*so as to show that the owner relies on the holder's or person's skill or judgment".*

56 In this case, it was the applicants who chose the kind of shed they wanted. They obtained a quote for materials from Wide Span Sheds, which they accepted. The plans for the shed were prepared by Taberco Engineering Pty Ltd for Wide Span Sheds and it was those plans that were provided to the builder. There is no evidence that either of the applicants specified their purpose or result to either Wide Span Sheds or Taberco Engineering Pty Ltd. That provides support for the view that reliance was being placed on the builder's skill or judgment.

57 There are competing versions of what was said in relation to the specified purpose or result.

58 The first applicant 's evidence (1/15-16 at [10]) was that the conversation included a request for the slab to be strong enough to accommodate a vehicle host as the applicants wished to use the shed for the restoration of motor

vehicles. It was suggested that conversation included an indication that they did not have a hoist and had not decided whether they wanted a fixed hoist or a host that could be moved around. Further, it was asserted that the respondent's Mr Davies said: "*I can make the slab as strong as you need it either way*". When questioned during the hearing, the first applicant said she left the choice of hoist to the second applicant and that no decision had been made on that *"to date*".

59 The lay evidence for the respondent on this issue is that of Mr Davies whose version of the conversation (1/407-408 at [4]) included that the applicants had not decided on whether they wished to install a fixed or mobile hoist. On the question of the slab thickness, Mr Davies contended that he said: "*You will need to decide what you want and give the specification to your engineer to change the plans. But I can make it as strong as you need it. I'll allow for thickened concrete beams in the slab anyway, so that the cost doesn't blow out too far.*"

60 Under cross-examination, Mr Davies accepted that he prepared and lodged the documents required by the local council and that he directed his mind to the thickness of the slab and that he proposed thicker edge beams. He also accepted that the slab had to be strong enough to bear the weight of a car but said the applicants provided engineer's drawings which showed a 100 mm thick slab. He accepted that the respondent was required to construct in accordance with those drawings.

61 The position on the question of reliance is that the respondent was provided with engineer's plans plus an indication of the specified purpose or result. While it might be expected that the applicants would notify the engineer of their intended purpose in order to make sure the shed would be suitable for its intended purpose, and while Mr Davies contends that he suggested that course, it is clear that the respondent submitted the documents to the local council and proceeded with construction without requesting further consideration by the engineer.

62 Had the specified purpose or result been communicated to the engineer then the respondent may have been able to rely on a defence under s 18F of the

HBA. However, since the applicants did not revert to the engineer and the respondent proceeded with construction, the Tribunal finds that the applicants relied on the skill or judgment of the respondent. That conclusion is reinforced by the fact that the evidence of both the first applicant and Mr Davies includes reference to the thickness or strength of the slab by Mr Davies.

63 Thirdly, was the concrete slab, as constructed, fit for the purpose that was disclosed? A decision on this aspect depends on the evidence or Mr Broune and Mr Noonan which is considered below in relation to Item 7.

Should there be an allowance of 10% for contingencies?

64 The first applicant's expert (Mr Iskowicz) allowed 10% for contingencies in his costings but the respondent's expert (Mr Capaldi) did not accept that such an allowance should be made.

65 Reasons advanced in support of this 10% allowance were:

(1) The detailed costing methodology of Mr Iskowicz was not challenged in cross-examination.

(2) Any suggestion there are no unforeseen elements is contraindicated by the discovery on 01 March 2021 of the absence of brick footings.

(3) There does not appear to be any dispute as to the percentage.

(4) Remedial building work has an inherent element of uncertainty.

(5) The larger the scope of work, the more likely it is that there will be unforeseen elements that cause an increase in the cost of that work.

66 In opposition to this allowance, the respondent's case is that, since the scope of works having been identified with particularity, an allowance for contingencies is only appropriate in larger jobs that involve an unknown element, such as excavation, that cannot be easily quantified prior to the commencement of the work. As a result, no allowance should be made here as the work has a narrow scope.

67 The Tribunal considers that, while an allowance for contingencies is commonly made, it must nonetheless be appropriate in the circumstances of each case. As a result, a decision on this aspect is deferred until the defects claims have been considered.

Whether there was defective work?

What is the reasonable and necessary method of rectification?

What amount should be awarded?

68 It is convenient to consider these three questions together, on an item-by-item basis. While it may seem premature to consider what amount should be awarded prior to deciding whether to make a work order or a money order, it is necessary to have determined an amount if a money order is made and it is desirable to have determined an amount in case a work order is made but later set aside.

69 The case law in relation to the cost of rectification is well-settled. Where there is a defect, rectification method must be both necessary and reasonable and the rectification cost must be reasonable: *Bellgrove v Eldridge* [1954] HCA 36. Further, since defective building work involves breach of contract, the fundamental principle is that the party affected by the breach should be put in the same position as if the breach had not occurred: *Haines v Bendall* [1991] HCA 15. Other reported decisions commonly reveal how those principles are applied to the facts of the particular case.

70 Although there are a total of five expert reports, the competing opinions are conveniently summarised in the Joint Report (Exhibit 2).

71 It is noted that the item-by-item written submissions for the first applicant (MFI 4) include allowances for preliminaries, builder's margin, contingencies and GST in relation to each item. In most cases, the summary takes the base amount and then adds those allowances to the total of those base amounts. However, in relation to the second component of Item 1, the amount of $2,827.04 shown on page 21 of those submissions includes those allowances but in the summary table at page 37 that amount $2,827.04 is shown and then allowances are added to the total which results in double-counting. It is preferable to omit allowances when dealing with each item and consider them in relation to the overall amount, ie assess each item, add them to give a sub-total, and then add the allowances which are considered appropriate.

Item 1

72 This item has two components: (1) the framing and support for the floor of the house and (2) the timber decking boards.

73 As to the framing and support, there is agreement on liability and scope but not quantum. The agreed scope is that of Mr Broune, with some minor adjustments. Mr Iskowicz costed Mr Broune's scope and Mr Capaldi provided some revised costs in relation to those adjustments. Combining those amounts, as set out in the first applicant's written submissions, gives $3,288.

74 In relation to the timber decking boards, the claim is for $1,770. The respondent's suggestion that this work is incomplete is rejected in view of (1) the photos at 1/1046-1053, (2) the allegation not being raised in Mr Capaldi's report, (3) the absence of reasons for that conclusion, and (4) the oral evidence that rectification would require work to be re-done.

75 The photos at 1/1045-1053 satisfy the Tribunal that there has been defective work in that the timber decking boards have not been installed with due care and skill in that (1) the ends were not cut square, (2) the ends do not fit tightly against the adjoining ends, and (3) the ends have been poorly detailed in that they were not smoothly finished.

76 Those defects do not present as being the result of movement or shrinkage. Although the respondent's submissions suggested a comparison with the eastern side of the property, there was no reference to photos or other evidence in support of that submission. It was the respondent's case that no amount should be awarded due to a failure to mitigate by either oiling or painting the decking timbers. That argument, considered above, has been rejected.

77 As a result, an amount of $1,770 is assessed for this component of item 1, giving a total of $5,058 (ie $3,288 plus $1,770).

Item 2

78 In relation to the wall framing of the house, the first applicant claims $1,050.86 but the respondent does not concede any amount as liability is contested. The issue is how Table 11 of AS2684.2 (1/647) should be read: Mr Broune reads

that table and concludes that MGP10 jamb studs are required while Mr Noonan interpolates between the figures in the table and concludes that no jamb studs are required.

79 As with AS4055, considered above in relation to wind classification, there is nothing in AS1684.2 which suggests or approves interpolation. No reasoning in support of interpolation was provided by Mr Noonan other than to suggest it was common engineering practice. Even though the Tribunal is not bound by the rules of evidence, *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 per Heydon JA (as he then was) makes it clear that an expert's opinion should be supported by the reasoning process upon which it is based.

80 Consistent with the view that Australian Standards represent acceptable practice (*Bruno Pisano v Georgia Dandris* [2014] NSWSC 1070 at [91]), and that a breach of an Australian Standard can establish a breach of s 18B(1)(a) of the HBA (*National Strategic Constructions Pty Ltd v Deacon* [2017] NSWCATAP 185 at [46]) and s 18B(1)(c) of the HBA (*Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [10]), the Tribunal rejects the approach of Mr Noonan, accepts the opinion of Mr Broune on this aspect and assesses $1,050.86 as the reasonable cost of rectification for this item.

Item 3

81 Although differing opinions were expressed in the expert reports upon which the parties relied, the Joint Report (2/6) indicates it is agreed that there is a defect which requires rectification. It appears the difference between the parties in relation to this item is that Mr Broune suggests additional plywood bracing is required while Mr Noonan proposes using two extra strap wall braces instead.

82 Mr Iskowicz suggests $2,894.50 (1/1138). Mr Capaldi concedes $924.36 (2/68). The Tribunal was provided with a detailed costing by Mr Iskowicz but only two sentences from Mr Capaldi in the Joint Report.

83 It is difficult to understand the written submissions of either party. The first applicant's submissions suggested "*the difference in costs with respect to the disputed scope is no more than a few hundred dollars*". The respondent's submissions suggested $925.36 was "*an amount in accordance with the*

Iskowicz report minus line 3 and 4" but lines 3 and 4 at 1/1137 only involve a total amount of $132.50. Those quoted comments appear to relate to Item 4 since the revised costings of Mr Iskowicz (2/35) suggests completing assessments of $1,396.30 and $1,263.80, which is a small difference, and appears to be the result of Mr Capaldi not accepting lines 3 and 4 of the costings of Mr Iskowicz at 1/1139.

84 Absent a detailed costing from Mr Capaldi, the Tribunal adopts the $2,894.50 amount for which the first applicant contended, noting that neither Mr Broune nor Mr Iskowicz were cross-examined in relation to this item.

Item 4

85 The Joint Report indicates that this item is an agreed defect (2/7) and, during the hearing, it was indicated that an amount of $1,263.80 had been agreed in relation to this item.

Item 5

86 If the appropriate wind classification was N1 to N2 then the broader scope of rectification would be relevant. It appears that, in such a case, there is agreement as to the scope of works suggested by Mr Broune. Only Mr Iskowicz provided a detailed costing for that scope of works, and his total amount is $32,991.70.

87 However, as the Tribunal has already determined the wind classification for the site to be N1, the narrower basis for rectification needs to be considered. For this wind classification there is a dispute as to the scope of works and the cost of rectification. While both Mr Broune (at 1/715-717) and Mr Noonan (at 1/1275) have provided a scope of works based on an N1 wind classification, only Mr Capaldi provided a costing (2/69), and his total amount is $1,698.

88 The submissions for the first applicant noted that neither party had costed the other party's scope of works and suggested: "In circumstances where neither expert has costed the other expert's scope, the entire costing dispute will be resolved through the Tribunal's determination of what is the reasonable and necessary rectification scope". That submission overlooks the absence of a costing by Mr Iskowicz of Mr Broune's scope of works for an N1 wind classification.

89 There are two areas of disagreement in relation to the scope of works for an N1 wind classification. First, in relation to the steel beam supported by timber posts: Mr Broune favours affixing a steel rod, encasing both elements in the brick pier and then attaching the reinforced timbers to the steel beam (1/796 at (j)) while Mr Noonan suggests affixing a steel strap with at least three nails (1/1275 at [8.6]). Secondly, Mr Broune proposes the use of multigrip connectors and nails (1/795) while Mr Noonan favours adding either more skewed nails or the use of a multigrip brackets and framing cleats to various structural elements (2/9-10).

90 In relation to the steel beam, it appears this aspect has been influenced by the discovery, at the conclave, of the absence of concrete pad footings, considered at Item 11, which caused Mr Capaldi to revise his suggested total cost from $612 (2/9) to $1,698 (2/69).

91 It was suggested, in the submissions for the first applicant (MFI 4 at [8.36]) that the additional cost if skewed nails were not used would be to increase the required labour time from 8 hours to 48 hours and the additional cost of materials. While the cost of additional labour could easily be calculated as $2,960 (40 additional hours at an hourly rate of $74) by reference to Mr Capaldi's calculation (at 2/69), there was no evidence of the additional cost of materials.

92 It is understandable that the first applicant would not favour the use of more screw nails, when their use was one of the complaints that gave rise to an agreed defect. Also, the Tribunal notes that Mr Noonan included the use of multigrip brackets as an alternative in his comments in the Joint Report (2/9-10). The Tribunal considers that the method of rectification for this item should follow the scope of works proposed by Mr Bourne for those reasons.

93 It is well-established that, where precision is not possible, the Tribunal must do the best it can on the evidence that is available: *Gallagher v Masters Installation Pty Ltd* [2017] NSWCATAP 117; *Pacorp Holdings Pty Ltd v Waller* [2017] NSWCATAP 167.

94 Although there has been no indication in the submissions of the first applicant as to the evidence suggesting the labour time required for Mr Broune scope of

works for this item, taking the amount of $1,698 suggested by Mr Capaldi and adding an amount of $2,940 for additional labour gives $4,638. Rounding that figure up to $5,000.00 serves to provide an allowance for additional materials. Accordingly, doing the best it can on the basis of the available evidence, the Tribunal considers the appropriate amount for this item to be $5,000.00.

Item 6

95 For this item, liability is agreed but there are two aspects of the scope of works that remain in dispute, namely (1) the struts supporting the under purlins and (2) the top wall plate packer support.

96 In relation to the struts, it is agreed that there are struts that have been cut at their bases in a manner that results in their bearing on the supporting timber roof plate on one edge, at the end of the strut, while other struts have been installed without a timber block adjacent to the strut (1/732). Mr Broune proposes that the struts not properly cut be replaced and that all sloping struts without a timber chock plate at the base fixed to the top plate have a timber chock added against the base of the sloping strut and fixed to the top plate (1/797). Mr Noonan favours the use of timber wedges and chocking (1/1276).

97 The Tribunal favours the method proposed by Mr Broune as AS1684.2 requires struts to be cut at their base to provide an even bearing. This, while Mr Noonan's method may address the defect, Mr Broune's method remedies that defect.

98 In relation to the top wall plate packer support, both experts agree that the timber top plate is supported by a timber block laid loose between the timber jamb studs and the top plate (1/734-735). Mr Broune contends for the loose timber block to be removed and jamb studs of the correct length installed (1/798) while Mr Noonan favours fixing the loose timber block so it cannot be dislodged (1/1277).

99 Again, the Tribunal favours Mr Broune's method as it not only addresses the defect but also remedies that defect by achieving compliance with AS 1684.2 and AS1720.1

100 Mr Iskowicz costs the Broune method at $4,633.08 while Mr Capaldi costs the Noonan method at $1,534. For the reasons indicated above, the Tribunal adopts the amount calculated by Mr Iskowicz.

Item 7

101 This item relates to the concrete floor slab. An amount of $13,405 is claimed. No amount was conceded as liability was in issue. Nor was any amount indicated on an 'if found' basis, ie there was no amount indicated as the amount for which the respondent contended in the event that the Tribunal accepted the first applicant's case on liability.

102 There are four defects alleged in the first applicant's submissions:

(1) (1) The thickened edge beam is 300 mm but the minimum depth should be 400 mm (1/762).

(2) (2) The thickness of the slab in two random locations was 100 mm, less than the 125 mm required for a Class H2 or H2 site (1/762) and there is geotechnical evidence that the site is the more reactive Class P (1/858).

(3) (3) The slab has been placed on uncontrolled fill in breach of the Building Code of Australia (BCA) clause 3.2.2.2 (1/763).

(4) (4) The slab is not fit for the specified purpose or result disclosed to the respondent, namely the ability to bear a hoist so as to enable vehicles to be moved (1/763).

103 It is unfortunate that the Points of Claim (1/8) are in a generic form with the result that they did not serve to inform the respondent of the nature of the allegations made against it. However, each of the matters now raised against the respondent were included in the report of Mr Broune (1/752-764, with his opinions at 1/761-764).

104 In that report, Mr Broune included references to two car hoists, the first of which required 150 mm thick concrete slab to support a hoist rated to lift 4,000 kg (well above the 1,600 kg weight of a Corvette) and the second required a minimum of 100 mm and a recommended thickness of 140 mm (1/763).

105 The report of Mr Noonan deals with this item briefly (1/1279) by suggesting that the applicants sourced the design of the shed slab and that the design could not be evaluated without knowing the loading which required identification of the selected hoist. He also suggested, based on a vehicle weight of 2 tonnes,

that two footings, 450 mm square and 600 mm deep, one under each post, would be required and that should be done rather than cutting a strip in the slab as suggested by Mr Broune in section 18.10 of his report (1/799).

106 In the Joint Report (2/12), Mr Noonan referred to a four-post hoist with a four-tonne capacity which required a minimum slab thickness of 100 mm and copies of supporting documents were provided (2/28-34).

107 During the hearing, Mr Broune conceded that uncontrolled fill would not normally be a problem, but said it was here due to the hoist. It also became apparent that, in relation to this item, the focus of the conclave and thus of the Joint Report, was the ability of the slab to accept a hoist. That is also reflected in the rectification cost for which the first applicant contends since the calculations of Mr Iskowicz are based on the method of rectification proposed by Mr Broune.

108 The written submissions for the first applicant (MFI 4 at page 29) suggested that the first three of the four matters listed above were not challenged. Those submissions went on to suggest that Mr Broune's opinion that the slab is not suitable for the specified purpose or result was not challenged but the same can be said of Mr Noonan's opinion that the slab is suitable for the installation of a hoist.

109 It was also submitted that Mr Noonan accepted that the slab is not structurally adequate. In order to view what Mr Noonan said in context, the relevant paragraph in his report is set out below:

> The design of the slab cannot be evaluated unless specific loading is provided by the selected hoist manufacturer. It is my opinion, that if the hoist places a substantial post load on the slab, it will not be structurally adequate. However rather than cutting a strip in the slab as per the Broune report section 18.10, this could be accommodated by cutting a square hole in the slab and placing a pad footing to competent soil or rock. The design of this pad footing could only be done when loads are known. Based on a vehicle weight of 2 tonnes, and an allowable bearing capacity of 100 kPa, I would estimate the pad footing would need to be 450 mm square x 600 mm deep. Two footings would be required, centred under each post.

110 Thus, the concession in the second sentence is not unconditional as it is qualified by what appears in the first sentence. The balance of the paragraph

appears to be directed to providing an alternative method of rectification to that suggested by Mr Broune.

111 Having summarised the evidence and submissions, it is necessary to indicate a decision and provide reasons for that decision.

112 The National Construction Code (NCC) is an initiative of the Council of Australian Governments (COAG) developed to incorporate all on-site construction requirements into a single code. It comprises the Building Code of Australia (BCA), as Volume One and Volume Two, and the Plumbing Code of Australia (PCA), as Volume Three. As a result, the NCC is a uniform set of technical provisions for the design, construction and performance of buildings throughout Australia. The NCC is given the force of law in New South Wales by the *Environment Planning and Assessment Act 1979*.

113 There is clear, uncontested evidence from Mr Hamilton (1/553 at 561 and 563) that the concrete slab was laid on uncontrolled fill. That was contrary to clause 3.2.2.2 of the BCA. Accordingly, for the reason set out in the previous paragraph, the construction of the concrete slab constituted a breach 18B(1)(c) of the HBA.

114 For the sake of completeness, the Tribunal considers s 18B(1)(f) in isolation, i.e. without consideration of the uncontrolled fill. By reference to the words of that statutory warranty, it is necessary to determine whether the shed is "*reasonably fit for the specified purpose or result",* namely the restoration of motor vehicles using a hoist. That decision is rendered difficult by the facts of this case where the engineering plans for the slab were provided by the applicants/owners to the respondent/builder and the purpose of using a hoist was specified but the kind or model of hoist was never indicated. It is easy to think of what could and what should have been done but the outcome must obviously be based on what was done.

115 In the absence of the particular hoist being specified, the concrete slab of the shed will be reasonably fit for the specified purpose or result if **a** hoist can be installed. The evidence sourced by Mr Broune suggested a hoist could be installed if the slab had a minimum thickness of 100 mm, which it has. Likewise, the evidence sourced by Mr Noonan suggested a hoist could be

installed on a slab with a minimum thickness of 100 mm. Thus, if considered in isolation, the Tribunal would be inclined to the view that there would be no breach of s 18B(1)(f).

116 However, when the uncontrolled fill is added as a consideration, the case for a breach of s 18B(1)(f) becomes clear since the use of uncontrolled fill may be reasonably expected to weaken the strength of a slab which, at 100 mm thickness, is at the very minimum end of the range for both the hoist referred to by Mr Broune and the hoist referred to by Mr Noonan.

117 Further, it appears that the thickened edge beam is 300 mm and, as that is less than the 400 mm specified in the engineering plans, there is also a breach of s 18B(1)(a).

118 In those circumstances, it is not necessary to consider the remaining aspect raised in the submissions for the first applicant which related to the site classification.

119 Moving to the question of what damages should be awarded, the method of rectification proposed by Mr Broune did not seek to address any aspect other than the ability to use a hoist in the shed which would render it fit for purpose. That appears to be a reasonable and necessary course of rectification given the applicants' intended use of the shed. While there is an alternative method of rectification proposed by Mr Noonan, there is no costing for that method. There is a costing for Mr Broune's method that was prepared by Mr Iskowicz which was not challenged, and the Tribunal is unable to discern any reason why the amount suggested by that costing, namely $13,405.00 should not be adopted.

Item 8

120 This item relates to a number of alleged defects in the wall and roof of the shed, one of which is the location of the doors. That shed formed part of the contract works. Regardless of whether the respondent did the work or sub-contracted another party to do the subject work, the respondent's invoices included that work and Mr Davies accepted that the respondent was responsible for that work. Of course, the respondent may have a claim against the party that carried out that work.

121 The first applicant's expert, Mr Noonan, accepted that the work was not in accordance with the plans. Mr Broune prepared a scope of works and Mr Iskowicz prepared a costing for that scope of works which, without allowances, is $25,180. However, if the components relating to the location of the doors are omitted, that amount reduces to $5,700, as shown in the revised costings of Mr Iksowicz (2/35).

122 The submissions for the respondent included that it did not install the shed, the applicants chose the manufacturer and that manufacturer "*identified an appropriate installer*". Further, that the applicants paid Wide Span Sheds, presumably for the materials. None of those matters provides an answer to the claim made in respect of this item since the relevant work was done by or for the respondent.

123 It was also suggested that the respondent had a defence under section 18F of the HBA. However, for that defence to operate here requires instructions in writing to build the shed as it was built and there is no such evidence. Thus, even if an oral instruction was given, that would not enliven section 18F of the HBA.

124 It was also submitted that the applicants were estopped from raising the fact that the doors depart from the plans as they instructed the respondent to construct the shed in that fashion. The first applicant gave evidence that "[the second applicant] *and I then decided to change the positioning of both doors in the shed due to the Builder's errors*" (1/19 at [21]) and there does not appear to be any dispute that the 'as built' location of the doors is the result of instructions provided by one or both applicants to the respondent's Mr Davies.

125 There is little doubt that an expert, comparing what was built with the plans, would see what appears to be a s 18B(1)(a) defect in that there appears to be a failure to construct in accordance with the plans. However, when the lay evidence is taken into consideration, it is clear that the location of the doors is the result of instructions given by the one or both applicants to the respondent's Mr Davies.

126 In those circumstances, the applicants cannot now recover the cost of relocating the doors so that they accord with what is shown on the plans. It is

difficult to see how the applicants can recover in relation to a breach of contract (not putting the doors where they should be, according to the plans) when they caused that breach (by requesting the doors to be placed in another location). Mr Iskowicz appears to accept that because he revised his assessment of the cost of rectification from $25,180 to $5,700 (2/35).

127 While it does not appear necessary to provide legal reasoning for such an outcome in relation to the doors, there does appear to be a situation of estoppel by representation in that the applicants gave an instruction and the respondent acted upon that instruction with the result that the applicants cannot now recover damages because the respondent, relying on that representation, acted in accordance with it: *Legione v Hateley* [1983] HCA11 or *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7.

128 On the basis that the placing of the garage doors was not a defect, but the remaining aspects are defects, the respondent agreed with an amount of $5,700 by reference to the costings of Mr Iskowicz (2/35). The Tribunal awards that amount.

Item 9

129 Under this heading, which deals with windows and doors in the laundry, bedroom and dining room of the extensions to the house, the issue is whether the subject work was defective or incomplete. A claim is made for $1,245. No amount is conceded.

130 While the respondent's solicitors did, in correspondence (1/147), contend that lock-up was achieved on 17 July 2017, which is prior to termination of the contract, lock-up is a term used to denote that the doors and windows are in place such that the property can be properly secured. However, the fact that building work has reached lock-up stage does not, of itself, indicate that work on the windows and doors has been completed.

131 Windows and doors being in place does not necessarily mean that their installation has been finalised. The fact that some work would need to be redone in order to finalise their installation is also not considered determinative. It is noted that Mr Capaldi's evidence, that it is common practice to tack a

window into position and later undertake final adjustments, does not appear to have been challenged.

132 The Tribunal prefers to base a decision on the evidence of what work was, in fact, done in order to determine if any work remained to be done. On the basis of the photos provided by both experts, namely the photos of Mr Iskowicz at 1/1054-1058 and Mr Capadli at 1/1428-1429, the Tribunal is satisfied that this was incomplete work. As a result, no amount is recoverable, noting that the first applicant's preliminary submissions (MFI 1 at [7]) conceded that the applicant were not entitled to recover any amount in respect of incomplete work.

Item 10

133 Again, the primary contest is whether the work covered by this item, namely the external cladding, is defective. For the first applicant, Mr Iskowicz raised a number of matters in support of his opinion that there was defective work:

(1) Weatherboards that had been cut to fit had not been sealed, contrary to the manufacturer's instructions (1/1174).

(2) A number of boards had been cut and installed in a manner that left gaps between the ends (1/1060).

(3) A number of boards were not installed over timber stud framing (1/1106, 1109-1110), again contrary to the manufacturer's instructions (1/1175).

(4) Installation of weatherboards directly over the timber framing and sarking membrane without the provision of a cavity batten, contrary to the manufacturer's instructions (1/1177).

(5) Capping and corner trims were installed with unsealed cut edges and with the framing out of square (1/1112-1122).

(6) Installation of weatherboards without the required ground clearance (1/1119-1120).

134 Those matters were supported by photos and suggest a failure to carry out work with due care and skill. The focus of the defence to this item was an allegation of failure to mitigate, considered and rejected above. Painting the cladding would not address the matters listed in the previous paragraph. The Tribunal is satisfied that there was defective work which constitutes a breach of s 18B(1)(a) of the HBA.

135 It is therefore necessary to determine what amount should be awarded. Mr Capaldi's scope of work (1/1356), which suggests rectification would only require four hours' work to replace some of the cladding, does not appear to be sufficient, having regard to the photographic evidence. Mr Iskowicz provided a detailed costing suggests a total of $21,664.40 as the cost of rectification for this work. Mr Capaldi agreed with that costing except for two costs components relating to the stairs, namely items 25 and 26, which involve a total of $1,120. His exclusion of those amounts was on the basis that the stairs have been rectified and he was not challenged on that aspect. As a result, Mr Capaldi conceded $20,544.40 on an 'if found' basis and that amount is allowed.

Item 11

136 The absence of concrete footings on the western side of the house was first discovered at the conclave. In the submissions for the respondent, it was suggested this item should be rejected on the basis that the respondent did not have an opportunity to reply to this allegation through its experts. It was also suggested there is no lay evidence as to what instruction was given to the builder.

137 A just, quick and cheap resolution of the issues between these parties favours this issue being considered in these proceedings rather than having a separate application for a single defect with a cost of rectification in the vicinity of $3,000. It is difficult to see how there can be any disadvantage to the builder since it is the work of the builder that is being subjected to consideration. In other words, the status of the concrete footings was known to the respondent prior to this discovery at the conclave.

138 Both experts had the same opportunity to consider this item as it was discovered at that conclave on 01 March 2021, three weeks prior to the hearing. For the respondent to have a defence to this item under s 18F of the HBA, it would need to have something in writing and three weeks should have been sufficient time for any such document to be located. If there was any need for additional evidence to be sought and/or provided, then either that evidence could have been filed and served prior to the hearing or an application for an adjournment could have been made.

139 Mr Capaldi prepared a costing for this defect of $3,082 which the first applicant adopted and which the respondent accepts on an 'if found' basis. Accordingly, the issue to be determined is that of liability. That issue does not raise any question of dishonesty and, since it is the first applicant who commenced these proceedings, it is for her to raise defects and to prove any such defects.

140 The evidence relating to this issue is found in the Joint Report (Exhibit 2) was signed by four experts, being the engineers and building consultants retained by the first applicant and the respondents. Pages 19-21 of that report reveal that, in the course of determining a tie down point for a steel beam it was discovered that there was no concrete footing underneath the brick piers in that area. Reference was made to the structural engineering details which required concrete footing 450 mm square and 400 mm deep, brick piers to be built on top of the footings which were to be a minimum of 500 mm below ground level.

141 In the Joint Report, Mr Broune set out calculations and then expressed his opinion. Included in that passage were the words: "*The existing brick piers do not comply with the requirements of the* [engineer's drawings] *and hence do not satisfy HBA Section 18B warranty (a)."* Mr Broune proceeded to set out what he considered to be the reasonable and necessary method of rectification. Immediately underneath what Mr Broune wrote, Mr Noonan's view was expressed as: "*agree with above. Builder has advised that the substandard piers were the outside verandah piers only*".

142 As a result of what is recorded by Mr Broune and Mr Noonan in the Joint Report, the Tribunal is satisfied that this item involves a breach of s 18B(1)(a) of the HBA in relation to two piers and that the method of rectification proposed is reasonable and necessary. Further that the amount suggested as the cost of rectification by Mr Capaldi is reasonable. Accordingly, an amount of $3,082 is considered appropriate for this item.

Item 12

143 It is agreed that an allowance of 10% should be added for preliminaries.

Item 13

144 A builder's margin of 20% was also agreed.

Item 14

145 Having regard to the nature and extent of the defects found in items 1 to 11 above, the Tribunal is satisfied that there is a sufficient amount of work and level of uncertainty to warrant an allowance for contingencies and that an allowance of 10% is reasonable in the circumstances of this case.

Item 15

146 It is clear that 10% should be added for GST.

Summary

147 The following table sets out the calculation of an amount of $100,035.24 for the items considered above with the relevant allowances added.

Item	*Amount*
1	5,058.00
2	1,050.86
3	2,894.50
4	1,263.80
5	5,000.00
6	4,633.08
7	13,405.00
8	5,700.00
9	-
10	20,544.40
11	3,082.00

Sub-total	62,631.64
Preliminaries (10%)	6,263.16
	68,894.80
Margin (20%)	13,778.96
	82,673.76
Contingencies (10%)	8,267.37
	90,941.13
GST (10%)	9,094.11
Total	100,035.24

Should a work order or a money order should be made?

148 *Galdona v Peacock* [2017] NSWCATAP 64 noted that section 48MA provided for a preferred outcome, not a mandatory outcome. That case also suggests that a work order would not be appropriate where:

(1) the relationship between the parties has broken down,

(2) the builder has not acknowledged a poor standard of work, and/or

(3) there are reservations as to the ability of the builder to rectify the work with due care and skill.

149 *Leung v Alexakis* [2008] NSWCATAP 11 serves to remind that, by reason of s 48O(3) of the HBA, s 79U of the *Fair Trading Act* 1987 (the FTA) applies "*with any necessary modifications*". Subject to that qualification, s 79U(1) requires the Tribunal to consider what is just and equitable in the circumstances of the case, having regard to matters including but not limited those set out in s79U(2).

150 The situations listed in *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 were:

(1) the builder does not have a licence to complete the work,

(2) the builder is financially unable to complete the work,

(3) the relationship between the owner and the builder has broken down,

(4) the builder does not acknowledge the work is sub-standard, and

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

151 Decisions such as *Brooks v Gannon Constructions Pty Ltd* [2017] NSWCATCD 12 (*Brooks*) at [70] and *Brennan Constructions Pty Ltd v Davison* [2018] NSWCATAP 210 at [21] make it clear that, even though the test is subject in that the actual circumstances are to be considered, the test is objective in that the Tribunal is required to make an assessment be based on what is reasonable in those circumstances. As a result, that personal opposition of an owner is, of itself, insufficient unless it can be said there has been a breakdown in the owner-builder relationship.

152 The submissions for the first applicant referred to the judgement in *The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067. While that was a case where the builder offered to carry out rectification work for $1 and the decision was based on the question of mitigation of loss and not the application of s 48MA of the HBA, it was held, at [45], that a relevant consideration was whether it was reasonable for the owners to no longer have confidence in the builder and that was adopted by an Appeal Panel in *Nationwide Builders Pty Ltd v Le Roy* [2019] NSWCATAP 220 at [18].

153 The Tribunal is required to weigh up the factors in each case and make a decision accordingly: *Brooks,* at [64].

154 From the submissions for the first applicant, the following list summarises the matters said to provide support for a money order rather than a work order:

(1) The respondent was dishonest in not disclosing the absence of concrete pads which was a latent defect.

(2) The respondent was advised, on 4 and 20 September and 18 October in 2017, that there were substantive defects and was provided with an opportunity to rectify them (1/152, 154-165).

(3) Of the 40 defects notified on 18 October 2017, the respondent was only willing to rectify four of them and disputed the others (1/166-173).

(4) There was a refusal to take up further opportunities to rectify provided by offers made on 27 October, 3 November. 1 and 8 December in 2017 (1/174, 177, 179 and 187).

(5) The defects are significant, and the first applicant obtained advice from an expert who made recommendations.

(6) The respondent has not acknowledged the true nature and extent of the defects.

(7) The terms of any proposed work order have not been proposed by the respondent.

(8) The relationship between the parties has broken down.

(9) There is no evidence that the respondent is ready, willing able to carry out any rectification work.

(10) There is no evidence the respondent has the capacity to carry out that work.

155 The submissions for the respondent were, in summary:

(1) The respondent was willing to address the alleged defects, based on the 02 November 2017 and 05 December 2017 letter from its solicitor (1/175 and 1/180 respectively).

(2) The fact that the respondent may have disagreed with the first applicant in relation to some matters was not determinative.

(3) The applicants were not willing to meet with the respondent's experts to discuss the defects, as suggested in a letter dated 27 October 2017 (1/174).

(4) "The terms of any work order are a matter for the tribunal with reference to the scope of works provided by the parties."

(5) A strained relationship is not sufficient for the purposes of s 48MA.

(6) Any suggestion that the respondent does not have the capacity to carry out the work reverses the onus of proof as this is a matter for the first applicant to prove and is not sufficient to make such an allegation and require the respondent to rebut it.

156 It is noted that the letters from the solicitors for the first applicant dated 4 and 20 September 2017 (1/152 and 1/154), far from requesting the rectification of defects, both requested the respondent "*not to return to the site*" and that the number of defects listed in the schedule which accompanied the 18 October 2017 letter (1/155-165) appears to exceed what has been raised in these proceedings.

157 As to the letters dated 27 October, 3 November, 1 and 8 December in 2017 (1/174, 177, 179 and 187), the first of those four letters contained a refusal to

negotiate with the respondent, the second related to providing an opportunity for the respondent's expert to inspect the work at the premises, and only the last two sought to have the respondent return to carry out rectification work.

158 On the other hand, the letters from the respondent's solicitor dated 2 November 2017 and 5 December 2017 (1/175 and 1/180) do reveal a willingness to carry out rectification work.

159 The Tribunal places a low probative value on the correspondence to which the parties referred as those letters were exchanged in the context of pre-termination assertion of rights by the solicitors for the parties. Further, it is relevant to note that the defects now pursued appear to be considerably less than what was alleged at the time of that correspondence. Moreover, while what was said and done at that time is relevant, the question to be addressed is whether a work order should be made now.

160 When assessing the question of whether to make a work order or a money order, the Tribunal should plainly consider evidence and not mere allegations. There is no evidence provided by the first applicant to suggest the respondent does not have the capacity to carry out the rectification work and there is no obligation on the part of the respondent to provide such evidence.

161 The evidence does not warrant a finding of dishonesty on the part of the respondent, an allegation that could and should have been made to Mr Davies in cross-examination before any such submission was made.

162 While accepting that the starting point is that a work order is a preferred outcome, the Tribunal is satisfied that a money order should be made but not for the reasons put forward in the submissions for the first applicant. The potential explanations for the absence of the concrete pads underneath the brick piers are an attempt to save time and/or money or an oversight, the latter being a possibility which is difficult to accept since Mr Davies was able to advise Mr Noonan which piers did not have concrete pads underneath. Whatever, the explanation for that defect, it constituted a latent defect as it was a defect that would not have been detected but for the investigation of another matter during the conclave.

163 The discovery of that defect does not provide the Tribunal with the requisite confidence that any work order will be carried out with due care and skill and in accordance with the plans so as to suitably remedy the matters which have been determined to be defects which constitute breaches of the statutory warranties provided by s 18B of the HBA. That matter is considered sufficient to displace the statutory preference in favour of a work order. Put another way, the Tribunal does not consider it just and equitable to subject a homeowner to further work by a builder who has been discovered to have 'cut corners' in a way that comprised the strength and safety of residential premises. While that is not the normal basis for a finding that there has a breakdown in the relationship between a homeowner and a builder, the Tribunal is satisfied that can be said to be the case here.

What should be the wording of that order?

164 For the reasons indicated above, it is not necessary to consider this issue.

165 However, by way of observation, if a party contends that the Tribunal should make a work order then it is desirable that a copy of the proposed work order is included so that the other party has notice of what is being sought and so that the Tribunal is not left to draft a work order without assistance from either party. That can be done either in the report of the expert or in the submissions of the lawyer for the party. When that is not done, the Tribunal may have no choice but to indicate that it considers a work order appropriate and then seeking input from the parties as to the form of that work order which would involve additional time and cost and may raise issues which could and should have been ventilated either during the hearing or in submissions.

Orders

(1) *There was no suggestion that any order should be made in a manner that included the second applicant who was added as a party by the Tribunal. In those circumstances, the position as between the applicants does not appear to be a matter that requires the Tribunal's consideration.*

(2) *Accordingly, the orders of the Tribunal will be as follows:*

1. *The respondent is to pay the first applicant $100,035.24 immediately.*

2. Any application for costs is to be made by written submissions which are provided to the Tribunal and the other parties on or before 06 July 2021.

3. Any response is to be made by written submissions which are to be provided to the Tribunal and the other parties on or before 20 July 2021.

4. Any such submissions should address the question of whether an order should be made to dispense with a hearing on the question of costs.

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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

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