



Civil and Administrative Tribunal
New South Wales

Case Name: Dodd v Balmain Projects Group Pty Ltd

Medium Neutral Citation: [2021] NSWCATCD 82

Hearing Date(s): 12 August 2021

Date of Orders: 17 August 2021

Decision Date: 17 August 2021

Jurisdiction: Consumer and Commercial Division

Before: G Blake AM SC, Senior Member

Decision: (1) The respondent is to rectify the major defects to the property of the applicants the subject of the proceedings identified as items 2 so far as the defect identified as “Clamps missing”, 9 so far as the defect headed “No Overflow Provision”, 17 and 18 in the expert report of Anthony Capaldi which is part of exhibit A3 (the Capaldi report) on the following conditions:
(a) the rectification works are undertaken in accordance with the scope of works in the Capaldi report;
(b) the rectification works are completed by 18 October 2021.
(2) The proceedings are otherwise dismissed.
(3) If any party seeks a costs order, the applicant for costs (the costs applicant) must file and serve a costs application, including submissions limited to five pages and any evidence in support, within 14 days of the date of the orders in these reasons for decision.
(4) Any respondent to the costs application is to file and serve submissions limited to five pages and any evidence in reply within 14 days thereafter.
(5) The costs applicant is to file any submissions in reply limited to three pages within 14 days after receipt of the submissions and evidence of the respondent to

the costs application.

Catchwords:	BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) — Major defect — Whether any defects are a major defect — Whether a work or a money order should be made in respect of major defects as agreed or found
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Ashton v Stevenson; Stevenson v Ashton [2020] NSWCATAP 233 Leung v Alexakis [2018] NSWCATAP 11
Texts Cited:	Nil
Category:	Principal judgment
Parties:	James Dodd (First Applicant) Leanne Price (Second Applicant) Balmain Projects Group Pty Ltd (Respondent)
Representation:	Counsel: B Anderson (Respondent) Solicitors: Roberts Legal (First and Second Applicant) Fortis Law (Respondent)
File Number(s):	HB 21/05776
Publication Restriction:	Nil

REASONS FOR DECISION

Overview

- 1 In these proceedings the first applicant, James Dodd (Mr Dodd), and the second applicant, Leanne Price (together referred to as the applicants), seek relief under the *Home Building Act 1989* (NSW) (HB Act) against the respondent, Balmain Projects Group Pty Ltd, arising out of alleged defective building work undertaken at their property at Five Dock (the property or the building according to the context).

- 2 I have decided that the respondent should rectify the four items agreed or found to be major defects, and the proceedings should otherwise be dismissed.

The background

- 3 The respondent is a licenced builder (Licence No. 316633C).
- 4 The applicants are the registered proprietors of the property which is lot 2 of Strata Plan No 96698 (SP96698).
- 5 The respondent undertook residential building works at the property pursuant to a contract with Barclay Investments (NSW) Pty Ltd (Barclay).
- 6 On 23 July 2018, an interim occupation certificate was issued.
- 7 On 2 August 2018, a final occupation certificate was issued.
- 8 On 4 September 2018, SP96698 was registered.
- 9 On 29 November 2019, the applicants purchased the property from Barclay.

The history of the proceedings

- 10 On 8 February 2021, the applicants commenced proceedings HB 21/05776 against the respondent Designer Homes by Oxford Pty Ltd by filing an application in which they claimed an order to do work or services to the approximate value of \$93,000.00 and compensation for expert witness reports.
- 11 On 15 March 2021, the Tribunal relevantly amended the name of the respondent to Balmain Projects Pty Ltd and made procedural directions for the filing of points of claim by the applicants, points of defence by the respondent, and evidence by the parties.
- 12 In their points of claim filed on 12 April 2021, the applicants relevantly claimed that they were entitled to recover compensation for major and minor defects as set out in the expert report of Anthony Capaldi (Mr Capaldi) received by them on 30 November 2020 (the Capaldi report), their claim for minor defects was brought within the statutory warranty period, or alternatively time should be extended for making their claim for minor defects pursuant to s 41 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).

- 13 In its points of defence filed on 5 May 2021, the respondent relevantly denied it was liable for major and minor defects as set out in the Capaldi report, denied that the applicants' claim for minor defects was brought within the statutory warranty period, and denied that time should be extended for making their claim for minor defects pursuant to s 41 of the NCAT Act.

The hearing

- 14 On 12 August 2021, the hearing took place by telephone. Mr N Mortensen, a solicitor, appeared for the applicants. Ms B Anderson, a barrister, appeared for the respondent.
- 15 At the commencement of the hearing the applicants applied for an adjournment on the ground of the unavailability of Mr Capaldi. I dismissed the application and delivered oral reasons for my decision.
- 16 The applicants then applied for an order pursuant to s 44 of the NCAT Act that Barclay be joined as a respondent to the proceedings. I dismissed the application and delivered oral reasons for my decision.
- 17 I made an order by consent that the name of the respondent be amended to Balmain Projects Group Pty Ltd.
- 18 The applicants relied on the following evidence:
- (1) a bundle of documents which was received by the Registry on 26 April 2021 (exhibit A3), and included the Capaldi report which identified 23 items of defective work that were referred to as items 1 to 23;
 - (2) the supplementary expert report of (Mr Capaldi) dated 19 July 2021, which contains an update on item 2 and was referred to as item 1a (exhibit A4) (the supplementary Capaldi report);
 - (3) the defect notice for the property attached to the email sent on 12 February 2020 at 11.14pm from the applicants' then solicitors to Barclay's solicitors (exhibit A5).
- 19 The respondent relied on the expert report of David Roberts (Mr Roberts) dated 30 July 2021 (exhibit R2) (the Roberts report).
- 20 The parties relied on the joint expert report of Messrs Capaldi and Roberts dated 9 August 2021 (exhibit J1).

- 21 The applicants applied for leave to adduce oral evidence from Mr Dodd. I dismissed the application and delivered oral reasons for my decision.
- 22 Each of Messrs Capaldi and Roberts gave oral evidence. Mr Capaldi became available to give evidence after 2.00pm.
- 23 The applicants made oral submissions. The respondent relied on its written submissions and made oral submissions.
- 24 During the course of the hearing the applicants indicated that:
- (1) they were not pressing their claim for minor defects;
 - (2) they were not pressing items 2 so far as the defect headed "Patching to low section of sheet profile", 3, 6, 7, 8 so far as the defects headed "Corroding Barriers and Fixings" and "Soffit Lining not Fit for Purpose", 9 so far as the defect headed "Corroding Barriers and Fixings", 10 to 12, 14, 16, 19 to 21, and 23.
- 25 During the course of the hearing the respondent conceded that the applicants in the circumstances by reason of the operation of s18C are entitled to the benefit of the statutory warranties in s18B of the HB Act.
- 26 During the course of the hearing the parties indicated that agreement had been reached on the following matters:
- (1) items 9 so far as the defect headed "No Overflow Provision", 17 and 18 are major defects;
 - (2) the reasonable costs to rectify the following defects:
 - (a) item 1: \$3,500.67 (if found);
 - (b) item 1a: \$835.10 (if found);
 - (c) item 2: \$315.25 (if found);
 - (d) item 4: \$829.98 (if found);
 - (e) item 5: \$2,959.50 (if found);
 - (f) item 6: \$1,371.89 (if found);
 - (g) item 8 so far as the defect headed "No skirting tile": \$50.00 (if found);
 - (h) item 9 so far as the defect headed "No skirting tile": \$50.00 (if found);
 - (i) item 9 so far as the defect headed "No Overflow Provision": \$441.89;
 - (j) item 13: \$1,200.00 (if found);

- (k) item 15: \$146.00 (if found);
- (l) item 17: \$3,087.29;
- (m) item 18: \$3,243.19;
- (n) item 22: \$1,841.38 (if found).

27 The parties indicated that depending on the decision in the proceedings they would be making an application for costs, and they consented to an order pursuant to s 50(2) of the NCAT Act dispensing with a hearing in relation to the costs of proceedings.

28 At the conclusion of the hearing, I reserved my decision.

The issues

29 The following issues arise for determination:

- (1) whether any of the remaining items in dispute constitute a major defect;
- (2) whether a money or work order should be made in respect of the items agreed, and any items found, to be a major defect;
- (3) the costs of the proceedings.

30 Before considering the first and second issues it is appropriate to set out the applicable statutory provisions, and summarise the relevant legal principles.

The applicable statutory provisions

HB Act

31 Part 2C (ss 18A-18G) contains provisions dealing with statutory warranties. Section 18B deals with warranties as to residential building work, and relevantly provides:

18B Warranties as to residential building work

(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,

...

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

...

(e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations 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,

...

32 Section 18C deals with warranties as to work by others, and provides:

18C Warranties as to work by others

(1) A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.

(2) For the purposes of this section, residential building work done on behalf of a developer is taken to have been done by the developer.

33 Section 18E deals with proceedings for breach of warranty, and relevantly provides:

18E Proceedings for breach of warranty

(1) Proceedings for a breach of a statutory warranty must be commenced in accordance with the following provisions—

(a) proceedings must be commenced before the end of the warranty period for the breach,

(b) the warranty period is 6 years for a breach that results in a major defect in residential building work or 2 years in any other case,

(c) the warranty period starts on completion of the work to which it relates (but this does not prevent proceedings from being commenced before completion of the work),

...

(4) In this section—

major defect means—

(a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause—

(i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or

(ii) the destruction of the building or any part of the building, or

(iii) a threat of collapse of the building or any part of the building, or

(b) a defect of a kind that is prescribed by the regulations as a major defect, or

...

major element of a building means—

(a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or

(b) a fire safety system, or

(c) waterproofing, or

(d) any other element that is prescribed by the regulations as a major element of a building.

- 34 Part 3A Division 4 (ss 48K-48MA) contains provisions dealing with the jurisdiction of the Tribunal in relation to building claims. Section 48MA deals with the preferred outcome in proceedings, and provides:

48MA Rectification of defective work is preferred outcome in proceedings

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.

- 35 Part 3A Division 5 (ss 48N-48O) contains provisions dealing with the powers of the Tribunal in relation to building claims. Section 48O deals with the orders which the Tribunal may make, and relevantly provides:

48O Powers of Tribunal

(1) In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate—

(a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,

...

(c) an order that a party to the proceedings—

(i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or

...

HB Regulation

- 36 Clause 69A of the Home Building Regulation 2014 (HB Regulation) prescribes external cladding which fails to comply with the National Construction Code for fire resistance and fire safety as a major defect for the purposes of paragraph (b) of the definition of major defect in s 18E(4) of the HB Act. The HB Regulation does not prescribe any other major defect.

The relevant legal principles

Major defect in s 18E(4) of the HB Act

37 In *Ashton v Stevenson; Stevenson v Ashton* [2020] NSWCATAP 233 (*Ashton*) the Appeal Panel at [130]-[131], [134]-[135], [163], [198]-[199], and [201] relevantly considered the meaning and establishment of a major defect in s 18E(4) of the HB Act in respect of waterproofing:

“[130] ...The Tribunal evaluated the evidence and found the (roof) defects had not caused or were not likely to cause:

(1) the inability to inhabit or use the building the premises (or part thereof) for their intended purpose; or

(2) the destruction of the building or any part of the building.

[131] A determination of this matter was a question of fact.

...

[134] Evidence is required from which it can be concluded the defects will likely cause the specified outcome.

[135] Whilst it is inappropriate to try and catalogue all evidence that might be relevant to resolving the issue of whether the defects are likely to cause the building to become uninhabitable or to be destroyed in whole or in part, it can be readily accepted that the fact of water ingress arising from one or more of the defects would be relevant even though such an outcome had not presently manifested itself. The nature, location and extent of the defects would also be relevant in assessing the likelihood of the prescribed outcome. Lastly, expert evidence assessing the likelihood of the particular defects causing the prescribed outcome would be relevant, it being noted that the evidence must be of a type which is “comprehensible and reach conclusions that are rationally based” in order to “furnish the trier of fact with criteria enabling the evaluation of the validity of the expert’s conclusion”.

...

[163] Having considered the definition of waterproofing found in the Macquarie Dictionary, the Tribunal continued at [160]-[161]:

[160] In my view the term “waterproofing” when used in the definition of “major element” in s 18E(4) means the mechanisms by which water coming into contact, by whatever means, with a building or building element is excluded from the building or building element. I do not consider that the term extends to mechanisms designed to control water so as to prevent it coming into contact with the building.

...

[198] ... The Tribunal’s findings at [189], that the evidence of Mr Karsai was “speculative”, is a comment in the context where no destructive testing was carried out and where Mr Deitrich had said the windows had been “sealed between the edge of the frame and the rendered reveals” as well as in the context of the evidence concerning the detection of moisture through moisture

reading devices and the location of the affected areas: see [186] of the Tribunal's reasons.

[199] It was for these reasons the Tribunal said at [190]:

In the absence of specific details of Mr Karsai's moisture measurements I do not find Mr Karsai's evidence sufficient to persuade me the windows are leaking or that the window installation is defective.

...

[201] While this evidence may have supported a view there was moisture ingress, it seems to us that it was open to the Tribunal to conclude that the evidence was not sufficient to show the windows were leaking or that there was a relevant defect in the installation of the windows, let alone a major defect within the meaning of the HB Act."

Preferred outcome pursuant to s 48MA of the HB Act

38 In *Leung v Alexakis* [2018] NSWCATAP 11 (*Leung*) the Appeal Panel at [116]-[118], [130]-[131] and [139]-[140] relevantly considered the meaning and application of s 48MA of the HB Act:

"[116] The second question is to what work does s 48MA apply?

[117] There are two possible interpretations as to what work is included in the expression "work by a party to the proceedings" used in s 48MA. They are:

- (1) Both work done personally or for which the person was responsible; or
- (2) Only work done personally by the party.

[118] For the following reasons, in our view the first interpretation is correct and s 48MA applies to building claims involving both work done personally by a party to the proceedings and work done on their behalf.

...

[130] Having reached this conclusion, in our view there is no logical reason why the expression "work by a party" in s 48MA should be given a meaning different to that work for which a party may be liable for breach of contract or breach of statutory warranties whether that work is done by:

- (1) "the holder of a contractor licence, or a person required to hold a contractor license before entering into a contract" (s 18B); or
- (2) "an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work". (s 18C)

[131] The alternative construction to limit the expression "work by a party" to work physically done by that party would exclude from the operation of s 48MA all work done by.

...

(5) work done by others on behalf of a developer for which a developer is liable.

...

[139] Rather, there was a discretion the Tribunal was required to exercise as to whether or not to make an order for compensation, an order in the nature of a work order or some other order as permitted by s 48O(1). In this regard, s 48O(2) provides the Tribunal can make a work order even if not asked for by the applicant who makes a claim for defective residential building work. In doing so, s 48MA requires the Tribunal “to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome”. Section 48MA is not, in terms, mandatory. Rather, it is a factor to be taken account of in the exercise of a discretion about what orders should be made to resolve a building claim.

[140] Being expressed as a “preferred outcome”, it operates in the manner of a presumption. That is, unless the facts of the particular case make it inappropriate to order rectification of the defective work by the responsible party, an order should be made in terms that give effect to the principle.”

Whether any of the remaining items in dispute constitute a major defect

Introduction

39 I have dealt with each item by setting out the evidence of the parties and the submissions of the parties, and then considering whether the item constitutes a major defect. In summarising the evidence of the parties I have set out the evidence of Messrs Capaldi and Roberts in respect of each item. As Messrs Capaldi and Roberts substantially agree on the method of rectification in respect of the items in dispute if found to be a defect I have not set out their evidence as to the method of rectification.

Item 1: Overflow of gutters and inadequate downpipes installed and no leaf guard installed

The evidence of the parties

The Capaldi report

40 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a major defect, and relevantly makes the following observations:

“1. The first floor roof is a metal deck profile that, for the most, falls to the rear of the building into a gutter.

2. There are only two downpipes that have been supplied and fixed into position to each corner of the development.

3. That is, a single downpipe to service each unit.

4. The gutters are currently showing evidence of overflowing. The resultant damage is that there is water damage to the paint coating of the balcony west elevation as shown in the image below: [photograph omitted]

5. The approved hydraulic plan by J&F Designs sheet 1 of 7 shows a requirement to install 4 downpipes to the full length of the gutter. That is, two

downpipe to service each unit. The plan excerpt below shows the downpipe that were required to be installed. The red arrow inserted by me shows the downpipe that has not been installed being DP3. [plan excerpt omitted]

6. Further the downpipes installed to the building are a 90mm diameter PVC section which is a typical stormwater pipe.

7. The approved hydraulic plan by J&F Designs sheet 1 of 7 in the box headed "Notes" shows a requirement to install 100mm diameter PVC sewer pipes to the full height of the downpipe. The plan excerpt below shows the requirement. (Refer to note 1) [plan excerpt omitted]

8. The Builder, in this instance has not constructed the roof drainage system in accordance with the approved drawings which has resulted in water damage to the building elements as well as a lesser volume/capacity of water to be within the downpipes.

9. If the additional downpipes are not installed, gutters regraded to the new downpipes and the pipes no increased to 100mm, then further water damage is to be expected.

10. Further the Builder has not installed leaf guard to the gutters as per the approved hydraulic plan by J&F Designs sheet 1 of 7 in the box headed "Notes" shows a requirement to install a gutter protection system. The plan excerpt above in paragraph 7 above shows the requirement. (Refer to note 3)

11. The failure to install leaf guard will result in leaves and debris entering into the stormwater system. The image below shows the absence of the gutter guard. [photograph omitted]

12. The Builder has contravened the approved drawings which have resulted in damage to the building."

The oral evidence of Mr Capaldi

- 41 In examination in chief, Mr Capaldi said that the consequence of the roofing system not being in conformity with the drawings is that water would get into the soffit of the balcony. Once this happened it could affect the timber holding up the soffit.
- 42 In cross-examination, Mr Capaldi accepted that he did not have hydraulic qualifications and did not know what effect the missing downpipes would have.

The Roberts report

- 43 In the Roberts report, Mr Roberts sets out the following findings:

"I agree the roof of the building falls to the rear eaves gutter. I further agree that two 90mm PVC downpipes service the one length of gutter over the two duplex developments. This effectively means one downpipes services each duplex.

I also noted and agree no leaf guard has been provided to the eaves gutter.

The peeling section of paintwork below the gutter shown in the photograph in the Tyrrells Report is approximately 250mm long and in my opinion does not in

any way establish any evidence of an overflowing gutter. In addition it is located near the common dividing wall of the two duplexes which would be the highest section of the guttering assuming it has been set to fall as required to the downpipes installed at the NW and SW corners of the two duplexes. This being the case the gutter would overflow at this location last being the highest point of the gutter length.

On the day of my inspection there was no evidence of significant ponding in the gutter or any other visible damage that could reasonably be attributed to the reported overflow of the eaves gutter to the property or that the drainage system installed was not performing satisfactorily.

The Tyrrells Report claims these reported issues constitute a major defect which in my opinion cannot be supported as no evidence has been provided to demonstrate an inability to inhabit or use the building, the destruction of the building or any threat of collapse of the building. In addition the alleged issue does not relate to a major building element such as internal or external load bearing components or stability of the building, waterproofing, or fire safety systems.”

The oral evidence of Mr Roberts

- 44 In examination in chief, Mr Roberts substantially repeated the evidence in the Roberts report.
- 45 In cross-examination, Mr Roberts accepted that the consequence of the roofing system not being in conformity with the drawings is that water could overflow the gutters. He disagreed that water would overflow into the balcony.

The submissions of the parties

- 46 In their oral submissions the applicants said there was a probability that water would enter the building and cause damage. It could be inferred that a failure to conform with the hydraulic drawings would be likely to cause damage.
- 47 In its oral submissions the respondent submitted that the consequence of the failure of roofing system was speculative because neither Mr Capaldi nor Mr Roberts is a hydraulic engineer.

Consideration

- 48 I am satisfied that the failure of roofing system to conform with the hydraulic drawings by incorrectly sized and missing downpipes and missing leafguard is a defect. I am also satisfied that the roofing system is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.

- 49 There was no evidence that this defect had caused any damage to the building. In particular, I am not satisfied that this defect has led to any water ingress, and that the peeling paint is the result of water overflowing the gutter. I am not satisfied that this defect is likely to cause any of the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.
- 50 While I am satisfied that this defect constitutes a breach of the statutory warranty in s 18B(1)(a) of the HB Act, it has not resulted in a major defect within s 18E(1)(b) when read with s 18E(4) of the HB Act. The consequence is the proceedings were not commenced before the end of the warranty period of 2 years for the breach and accordingly the Tribunal has no jurisdiction to hear and determine the claim for this defect.

Items 2 and 1a: Corrosion to fittings and clamps missing

The evidence of the parties

The Capaldi report

- 51 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a major defect, and relevantly makes the following observations:

“1. I was able to physically access the roof sheeting via the first floor balcony and found the following:

2. The hex head fixings to the roof sheeting are prematurely corroding. The fixings, in my opinion, should not be corroding within 2 years of the completion of the building. Corrosion will continue unless the fixings are removed and replaced. [photograph omitted]

3. The rubber seals (boots) provided to the sewer vent pipe surrounds are reliant on sealant only and have not been provided with screw clamps to ensure the boot does not detach from the pipe surface. If the sealant fails to adhere, then water ingress is to be expected. The clamp will reduce the chance of detachment. [photograph omitted]”

- 52 In the supplementary Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a major defect, and relevantly makes the following observations:

“4. The water ingress has been identified in the first floor bedroom adjoining the main bedroom ensuite. I have named this room as “Bedroom 2”.

5. The floor plan provided below is of the first floor and the red shaded room is the room where water staining has not been identified. [plan omitted]

6. The image below has been provided by the Applicant/Owner and shows the water staining to the plasterboard ceiling. [photograph omitted]

7. There is a sewer vent pipe that adjoins Bedroom 2 which services the main bedroom ensuite.

8. The sewer vent pipe is shown in the image below taken during my site inspection. The vent pipe has been circled in red. [photograph omitted]

9. My earlier report on page 15 paragraph 3 has identified the defects with the weatherproofing of the sewer vent pipe rubber seals and has also stated that water ingress is to be expected. ...

10. The image below was taken on the roof during my site inspection which shows the poor attempt at weatherproofing of the sewer vent pipe surrounds. [photograph omitted]

11. The water ingress has now occurred as a direct result of the failure to adequately weatherproof the roof penetration being the sewer vent pipe.

12. It then follows that the water ingress contravenes NCC 2016 P2.2.2 "Weatherproofing" which states the following:

P2.2.2 Weatherproofing

A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause—

(a) unhealthy or dangerous conditions, or loss of amenity for occupants; and

(b) undue dampness or deterioration of building elements.

13. The consequence of not rectifying the defect is that further water ingress will occur resulting in extensive damage to linings and floor coverings. Further, the water ingress will result in the bedroom becoming unsafe to occupy."

The oral evidence of Mr Capaldi

53 In examination in chief, Mr Capaldi said that he saw corrosion on a hex head. Once corrosion starts he would expect it to continue, the rubber seals would fail, water would enter and have contact with timber causing damage. He observed evidence of leaking in bedroom 2 adjacent to the ensuite.

54 In cross-examination, Mr Capaldi accepted that he observed one instance of corrosion and that no standard required the use of clamps to the deektiles. He expressed the opinion that the use of clamps was good building practice.

The Roberts report

55 In the Roberts report, Mr Roberts sets out the following findings as to item 2:

"Corrosion to fittings

...

During my inspection of the roof of the subject property I was unable to identify any significant corrosion in the roof fixings or the coating finish to them that would necessitate their replacement. (See Photograph 1 in Annexure C of this Report)

The Tyrrells Report claims this reported item constitutes a major defect which in my opinion cannot be supported as no evidence has been provided to demonstrate an inability to inhabit or use the building, the destruction of the building or any threat of collapse of the building. In addition the alleged issue does not relate to a major building element such as internal or external load bearing components or stability of the building, waterproofing, or fire safety systems.

If the reported issue was found to exist, which was not the case at the time of my inspection, the reported issue would therefore be categorised as a general defects using the definitions outlined in Section 18E of the Home Building Act.

Clamps missing

I concede that no clamps have been fitted to the decktites (rubber seals) at the junctions with the two PVC vent pipes and one TV antenna cable nor has the Tyrrells Report detailed any requirement of such clamps at these junctions or non-compliance with the NCC or relevant Australian Standards. At the time of my inspection the decktite junctions were sealed with silicone joint.

At present the omission of clamps on the decktites has not been established as defective work or the source of water ingress to the building.

As this is the case the claim in the Tyrrells Report that this item is a major defect cannot be supported as no evidence has been provided to demonstrate an inability to inhabit or use the building, the destruction of the building or any threat of collapse of the building. In addition the alleged issue does not relate to a major building element such as internal or external load bearing components or stability of the building, waterproofing, or fire safety systems.

Based on the current information provided this item is not considered to be defective work."

56 In the Roberts report, Mr Roberts sets out the following findings as to item 1a:

"I was not provided this Report at the time of my inspection of the property.

At the time of my inspection I was not shown any water staining to the ceiling within this room by the Owners.

My responses to this item are therefore based on the information and photographs provided in the Tyrrells Report only.

Item 10 of the Tyrrells Report depicts a pipe penetration through the roof and states that the photograph shows a poor attempt at weatherproofing the vent pipe. The photograph shows a visible sealant joint between the vent pipe and decktite and there is also visible sealant at the base of the decktite at the junction with the roof sheeting. The Tyrrells Report details no visible gaps, delamination or failure of any sealant joints of the roof penetration nor has any water testing been undertaken to confirm the source of the leak.

Item 6 depicts a photograph of reported water staining to the ceiling of the room. While the photograph is not clear I concede the circled area in the photograph has the appearance of a water stain.

As I was not able to inspect the damage at the time of my inspection I have assumed the reported vent penetration is the most likely source of the reported leak to the Bedroom.

Assuming the reported water damage is from the penetration in the roof this issue would be categorised as a major defect as it has the potential to effect the weatherproofing and use of the building using the definitions outlined in Section 18E of the Home Building Act.”

The oral evidence of Mr Roberts

- 57 In examination in chief, Mr Roberts substantially repeated the evidence in the Roberts report.
- 58 In cross-examination, Mr Roberts accepted that if the silicon sealant failed water could enter. He did not see any evidence of water damage.

The submissions of the parties

- 59 The applicants made no oral submissions on this item.
- 60 In its oral submissions the respondent accepted that the one corroded hex head is a defect, and submitted that the absence of clamps is not a defect.

Consideration

- 61 I am satisfied that the corrosion of a hex head and the failure to fit clamps to the decktites is each a defect. I am also satisfied that a hex head and a clamp fitted to the decktites is each a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.
- 62 There is no evidence that the corroded hex head has caused any damage to the building. However, there is evidence the failure to fit clamps to the decktites has led to water ingress in bedroom 2 near the ensuite. I am satisfied that this defect is likely to cause the consequence in paragraph (a)(i) of the definition in s 18E(4) of the HB Act.
- 63 I am satisfied that this item so far as the absence of clamps constitutes a breach of the statutory warranty in s 18B(1)(a) of the HB Act and has resulted in a major defect within s 18E(1)(b) when read with s 18E(4) of the HB Act. The consequence is the proceedings were commenced before the end of the warranty period of 6 years for the breach and accordingly the Tribunal has jurisdiction to hear and determine the claim for this defect.

- 64 While I am satisfied that this item so far as the corroded hex head constitutes a breach of the statutory warranty in s 18B(1)(a) of the HB Act, it has not resulted in a major defect within s 18E(1)(b) when read with s 18E(4) of the HB Act. The consequence is the proceedings were not commenced before the end of the warranty period of 2 years for the breach and accordingly the Tribunal has no jurisdiction to hear and determine the claim for this defect.

Item 4: Masonry not properly cleaned and areas to be re-pointed, and articulation joint sealant is incomplete

The evidence of the parties

The Capaldi report

- 65 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a minor defect, and relevantly makes the following observations:

- “1. I observed that the areas of the face masonry to the external walls still requires spot cleaning of mortar debris. [photograph omitted]
2. IN FGT 17 page 30 clause 3.11 states that mortar smears not cleaned from face masonry is a defect. The clause has been provided below [text omitted]
3. There are localised areas of the face masonry that requires re-pointing to the south elevation adjoining the render and to the balconies.
4. The articulation joints installed to the external walls are incomplete by way of sealant installation. The area of incomplete works is to the east elevation first floor.”

The oral evidence of Mr Capaldi

- 66 In examination in chief, Mr Capaldi said that there is a possibility that water could enter through the cracks in the mortar. Once this happened it could come into contact with timber and cause deterioration.
- 67 In cross-examination, Mr Capaldi accepted that this was an aesthetic issue. He took three photographs of this defect. He said that the internal walls showed no evidence of water ingress.

The Roberts report

- 68 In the Roberts report, Mr Roberts sets out the following findings:

“The Tyrrells Report does not define the locations where masonry has not been cleaned or brick joints needed repointing.

At the time of my inspection I noted the external brickwork was generally cleaned and pointed to a reasonable standard. The minor exceptions to this was:

- Minor mortar splatter on the bottom two courses of bricks on the eastern wall and adjacent to the main entry door.
- Minor voids in several brick joints above the electrical box on the northern wall near the eastern corner of the building.

The vertical joint at the junction between the rendered masonry wall and face brickwork on the southern wall of the first floor balcony was also found to not be fill with a uniform sealant joint. I assume this was the incomplete articulation joint referred to in the Tyrrells Report.

The Tyrrells Report lists the above items as minor defects. I agree the reported issues would be categorised as a general defects using the definitions outlined in Section 18E of the Home Building Act."

The oral evidence of Mr Roberts

- 69 In examination in chief, Mr Roberts substantially repeated the evidence in the Roberts report.
- 70 In cross-examination, Mr Roberts did not accept that this item was a likely cause of water ingress.

The submissions of the parties

- 71 In their oral submissions the applicants said there was an incomplete articulation joint.
- 72 In its oral submissions the respondent submitted that Mr Capaldi acknowledged that this issue was aesthetic. There is no defect.

Consideration

- 73 I am satisfied that the failure to properly clean masonry, re-point some areas, completely seal the articulation joint sealant is a defect. I am not satisfied that these elements are a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing. It can be inferred that both Messrs Capaldi and Roberts have this opinion.
- 74 If, contrary to my finding, this item constitutes a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing, then there was no evidence that this defect has caused any damage to the building. In particular, I am not satisfied that this defect has led to any water ingress. I am not satisfied that this defect is likely to cause any of

the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.

- 75 While I am satisfied that this defect constitutes a breach of the statutory warranty in s 18B(1)(a) of the HB Act, it has not resulted in a major defect within s 18E(1)(b) when read with s 18E(4) of the HB Act. The consequence is the proceedings were not commenced before the end of the warranty period of 2 years for the breach and accordingly the Tribunal has no jurisdiction to hear and determine the claim for this defect.

Item 5: Cracking to the external rendered walls

The evidence of the parties

The Capaldi report

- 76 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a major defect, and relevantly makes the following observations:

- “1. There was cracking to the rendered external walls of the building.
2. Some of the cracking is due to shrinkage resulting in “spider-web” type cracking. The spider web cracking is due to rapid shrinkage of the render from the drying and curing process. [photograph omitted]
3. In other areas the cracking is due to settlement of the building. This is evidenced by way of diagonal and horizontal cracking from openings within the walls. [photograph omitted]
4. In some instances, the cracking is due to improper installation of the control joints installed in the render.
5. The cracking due to improper construction of the control joint has resulted in drummy and render becoming detached from the sub-strate surface. This is evidenced to the south east corner of the building to the ground floor.
6. The FGT 17 on page 48 clause 10.6 states the following: [text omitted]
7. The combination of settlement of the building and inadequate control joints in the render has resulted in the cracking as shown in the image above.”

The oral evidence of Mr Capaldi

- 77 Mr Capaldi gave no evidence in chief on this item.
- 78 Mr Capaldi was not cross-examined on this item.

The Roberts report

- 79 In the Roberts report, Mr Roberts sets out the following findings:

“The Tyrrells Report does not define any specific locations where the render is defective where it has cracked. I noted several instances of cracking in the external walls of the building which were measured with a crack indicator gauge and found to vary between hairline and .3mm in width. (See Photograph 1 in Annexure C of this Report)

The Tyrrells Report detailed alleged improper construction of a control joint and detached render at the south east corner of the building. I was unable to identify any detached or delaminated render in this location. There was a minor hairline horizontal crack in the wall approximately one course above ground level at this location which was not deemed a defect for the following reason.

It appears the Tyrrells Report is suggesting the hairline cracking I identified at the south eastern corner is the result of a lack of a control joint at this location and relies on Section 10.6 of the Guide to Standards and Tolerances 2017 to support the claim of a building defect. The Tyrrells Report does not however establish why a control joint is required at the location of the cracking in the rendered wall nor was I able to find any requirement for the same where the cracking was identified.

Based on the above information the cracks in the rendered surfaces should be assessed in accordance with AS 2870 Table C1 which is included in Section 3.2 of the Guide to Standards and Tolerances noted in the Tyrrells Report. Table C1 categorises cracking less than 1mm in width as very slight that do not need repair.

In the light of the above information the Tyrrells Report fails to establish that the cracking identified is a building defect.

In addition the Tyrrells Report claims the cracking constitutes a major defect which in my opinion cannot be supported as no evidence has been provided to demonstrate an inability to inhabit or use the building, the destruction of the building or any threat of collapse of the building. In addition the alleged issue does not relate to a major building element such as internal or external load bearing components or stability of the building, waterproofing, or fire safety systems.

If the reported cracking was found to be a defect, which was not the case at the time of my inspection, the reported issue would therefore be categorised as a general defects using the definitions outlined in Section 18E of the Home Building Act.”

The oral evidence of Mr Roberts

80 In examination in chief, Mr Roberts said that this item did not relate to waterproofing.

81 In cross-examination, Mr Roberts did not accept that paint and render keep water from the building.

The submissions of the parties

82 In their oral submissions the applicants said there is an incomplete articulation joint.

- 83 In its oral submissions the respondent submitted that Mr Capaldi acknowledged that this issue was aesthetic. There is no defect.

Consideration

- 84 I prefer the opinion of Mr Roberts to that of Mr Capaldi because it is supported by detailed reasons, and so am not satisfied that this item is a defect. I am also not satisfied that this item is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.
- 85 If, contrary to my finding, this item constitutes a defect and is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing, then there was no evidence that this defect has caused any damage to the building. In particular, I am not satisfied that this defect has led to any water ingress. I am not satisfied that this defect is likely to cause any of the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.

Item 8: No Skirting tile (West balcony)

Item 9: No Skirting tile (East balcony)

The evidence of the parties

The Capaldi report

- 86 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a major defect, and relevantly makes the following observations as to each of items 8 and 9:

“11. Skirting tiles have not been installed

12. The waterproof membrane upturn is clearly visible to the perimeter walls of the balcony to the face masonry panel. [photograph omitted]

13. As the balcony is a trafficable area, the exposed membrane is subject to damage.

14. Further, I have not been provided with the materials used by the Builder to waterproof the balconies. If the material is not UV stable, then the membrane is subject to deterioration and failure.

15. To avoid damage from traffic and general usage and deterioration from exposure, a prudent Builder would install a skirting tile to mitigate the chance of damage and deterioration.”

The oral evidence of Mr Capaldi

- 87 In examination in chief, Mr Capaldi described the damage that could occur if there is no skirting tile protecting the upturn of a membrane.
- 88 In cross-examination, Mr Capaldi accepted that there is no damage to the upturn of the membrane.

The Roberts report

- 89 In the Roberts report, Mr Roberts sets out the following findings as to each of items 8 and 9:

“No Skirting Tiles

At the time of my inspection the upturn of the waterproof membrane was visible over a length of approximately 200mm on the southern wall of the balcony between the A/C unit and the hob at the front of the balcony. The remainder of the length of this upturn (approximately 1m) was covered by the A/C unit. (See Photograph 4 in Annexure C of this Report)

The Tyrrells Report has not detailed or established any defect or failure in the membrane installed or any requirement for a skirting tile to be installed. This item is therefore in my opinion an issue of finish and not defective work.

In addition the Tyrrells Report claims this item to constitute a major defect which in my opinion cannot be supported as no evidence has been provided to demonstrate an inability to inhabit or use the building, the destruction of the building or any threat of collapse of the building. In addition the alleged issue does not relate to a major building element such as internal or external load bearing components or stability of the building, waterproofing, or fire safety systems.

If the reported exposed membrane was found to be a defect, which was not the case at the time of my inspection, the reported issue would therefore be categorised as a general defects using the definitions outlined in Section 18E of the Home Building Act.”

The oral evidence of Mr Roberts

- 90 In examination in chief, Mr Roberts said that there is no requirement for skirting tiles for the upturn of a membrane. He saw no evidence of water damage.
- 91 In cross-examination, Mr Roberts said a skirting tile was the best way to protect the upturn of a membrane. He agreed if the membrane failed there is the possibility of water damage.

The submissions of the parties

- 92 The applicants made no oral submissions on this item.
- 93 The respondent made no oral submissions on this item.

Consideration

- 94 I prefer the opinion of Mr Roberts to that of Mr Capaldi because it is supported by detailed reasons, and so am not satisfied that this item is a defect. I am also not satisfied that this item is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.
- 95 If, contrary to my finding, this item constitutes a defect and is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing, then there was no evidence that this defect has caused any damage to the building. In particular, I am not satisfied that this defect has led to any water ingress. I am not satisfied that this defect is likely to cause any of the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.

Item 13: Water and moisture ingress

The evidence of the parties

The Capaldi report

- 96 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a major defect, and relevantly makes the following observations:

- "1. This defect refers to moisture and lateral damp ingress to the family room north east corner to the base of the wall.
2. I have been advised that the Owner has had to clean mould from this area on numerous occasions.
3. The area of the defect is located to the step down within the ground floor from the entry to the living areas.
4. The image below was taken during my site inspection. [photograph omitted]
5. Using a Tramex Moisture Encounter, I was able to undertake dry datum readings and then relative readings to ascertain if elevated moisture was present in the wall.
6. Tramex Moisture Encounter set on level 1 (timber) established a dry datum on the hallway skirting of 6% and then when placed on the affected area, the moisture reading was found to be 18%.
7. Tramex Moisture Encounter set on level 2 (drywall) established a dry datum on the hallway wall of 10/100 and then when placed on the affected area, the moisture reading was found to be 38/100.
8. He (sic) moisture readings that have been undertaken show elevated moisture to the affected area when compared to areas that do not exhibit water ingress. This is consistent with current water ingress.

9. I was able to inspect the external walls of this area and found that the concrete paving levels are set above the damp proof course up to 100mm. [photograph omitted]

10. The obstruction of weepholes resist the drainage of the cavities of water. The image below is a magnification of the image above to show the level of the concrete paving to the weepholes. The level of the base of the weepholes which cannot be seen, is also the level of the damp proof course. The red arrow shows the weephole that has been obstructed at the base. [photograph omitted]

11. Considering the step down is the location of the issue, extra attention and consideration should have been made by the Builder prior to installing the concrete paving.

12. I was able to undertake levels and found that the external concrete paving level is 100mm higher than the internal floor level.

13. The obstruction of the weepholes and the level of the concrete is the reason why there is internal moisture.

14. The ingress of damp and moisture contravenes the NCC 2016 P2.2.2 "Weatherproofing" which states:

P2.2.2 Weatherproofing

A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause—

(a) unhealthy or dangerous conditions, or loss of amenity for occupants; and

(b) undue dampness or deterioration of building elements.

15. The ingress of damp and moisture contravenes the NCC 2016 P2.2.3 "Dampness" which states:

P2.2.3 Dampness

Moisture from the ground must be prevented from causing—

(a) unhealthy or dangerous conditions, or loss of amenity for occupants; and

(b) undue dampness or deterioration of building elements.

16. The consequence of not rectifying the defect is that moisture and dampness will continue to enter the building resulting in damage to finishes and mould growth which creates an unhealthy environment."

The oral evidence of Mr Capaldi

97 In examination in chief, Mr Capaldi said that the consequence of no weepholes is that water cannot escape.

98 In cross-examination, Mr Capaldi said that he saw an instance of mould. He agreed that he did not undertake any water testing, but relied on a Tramex Moisture Encounter.

The Roberts report

99 In the Roberts report, Mr Roberts sets out the following findings:

“At the time of my inspection I found the lower section of the northern external wall displayed minor mould staining and/or paint discolouration near the eastern corner of the room. I tested the wall with a moisture meter which provided normal relative moisture readings of 106 in both the areas tested. A normal reading in this instance should not exceed approximately 240 while a fully wet reading would be 1000. Based on the results of this moisture testing I was unable to confirm any current moisture/water ingress through the wall. (See Photographs 8 and 9 in Annexure C of this Report)

I also viewed the external face of the same wall and for the most part found it to be finished with render and a paint finish. As this was the case minimal, if any, water would be expected to soak through the external skin of brickwork, then run down the back of the external skin to the cavity flashing at the base of the wall and drain through the weepholes to the outside of the building as intended.

While no water ingress was confirmed on the day of inspection I concede that the minor extent of visible damage internally may indicate moisture/water ingress only occurs during extended and or heavy rain events.

The Tyrrells Report has not detailed any form of water testing or destructive investigation undertaken to establish the cavity flashing as the source of this issue. I would therefore propose further water testing and destructive investigation at a future time, in an effort to confirm the source of any water/moisture ingress that may exist after which a more definitive Scope of Works can be finalised to address the same.

Should water ingress be confirmed through the external wall this issue would be categorised as a major defect as it has the potential to effect the weatherproofing and use of the building using the definitions outlined in Section 18E of the Home Building Act.”

The oral evidence of Mr Roberts

100 In examination in chief, Mr Roberts said that there was no evidence of any significant ongoing issue.

101 In cross-examination, Mr Roberts said that there was no significant effect because there is a cavity between the external and internal skins.

The submissions of the parties

102 In their oral submissions the applicants said there is evidence of water ingress.

103 In its oral submissions the respondent submitted that there is no satisfactory evidence of a defect because Mr Capaldi did not undertake any testing, and referred to *Ashton* at [195]-[210].

Consideration

- 104 I am satisfied that obstruction of the weepholes is a defect. I am also satisfied that properly functioning weepholes are a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.
- 105 There is insufficient evidence that this defect has caused any damage to the building. In particular, while I accept that there is evidence of moisture in the building, in the absence of testing the opinion of Mr Capaldi that obstruction of the weepholes and the level of the concrete is the cause of the moisture is speculative and the Tramex Moisture Encounter reading does not provide a sufficient basis for establishing the cause of the moisture. I am not satisfied that this defect is likely to cause any of the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.
- 106 While I am satisfied that this defect constitutes a breach of the statutory warranty in s 18B(1)(a) of the HB Act, it has not resulted in a major defect within s 18E(1)(b) when read with s 18E(4) of the HB Act. The consequence is the proceedings were not commenced before the end of the warranty period of 2 years for the breach and accordingly the Tribunal has no jurisdiction to hear and determine the claim for this defect.

Item 15: Loose styles and storm moulds not installed

The evidence of the parties

The Capaldi report

- 107 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a minor defect, and relevantly makes the following observations:

- “1. The first floor balcony sliding door unit to the west elevation (rear) shows loose and poorly fixed side styles specifically to the handle and catch side. [photograph omitted]
2. The external window to the ground floor bathroom shows gaps of 13mm between the masonry and the frame. [two photographs omitted]
3. This allows for water ingress into the cavities of the building as well as ingress of insects and the like.
4. Typical building practice is to supply and fix storm moulds to cover the gaps.”

The oral evidence of Mr Capaldi

- 108 In examination in chief, Mr Capaldi said that whether water ingress in gap between the stile of the bathroom window and adjoining face brick wall would cause damage would depend on the flashings.
- 109 In cross-examination, Mr Capaldi said that he did not know the configuration of the flashings for this window.

The Roberts report

- 110 In the Roberts report, Mr Roberts sets out the following findings:

“Loose Stile to West Elevation Sliding Doors

At the time of my inspection I was unable to identify the reported loose stile referred to in the Tyrrells Report.

The Tyrrells Report details this item as a minor defect. Should this item be found to exist I would agree this issue is categorised as a general defects using the definitions outlined in Section 18E of the Home Building Act.

External Face of Ground Floor Bathroom Window

I agree there was an excessive gap between the stile of the bathroom window and adjoining face brick wall. There was no visible water ingress reported or found to the building as a result of the gaps identified.

The Tyrrells Report details this item as a minor defect. I would agree this issue is categorised as a general defects using the definitions outlined in Section 18E of the Home Building Act.”

The oral evidence of Mr Roberts

- 111 In examination in chief, Mr Roberts said that this item did not relate to waterproofing.
- 112 In cross-examination, Mr Roberts while conceding it is possible that water could enter adjacent to the bathroom window, he was of the opinion it is unlikely to do so.

The submissions of the parties

- 113 In their oral submissions the applicants pointed to the lack of storm moulds.
- 114 In its oral submissions the respondent submitted that there was no satisfactory evidence of a defect because Mr Capaldi did not undertake any testing, and the likelihood of damage would depend upon the configuration of the flashings for bathroom window.

Consideration

- 115 I am satisfied that this item so far as the gap between the masonry and the frame of the bathroom window is a defect. I am satisfied that this item is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.
- 116 There is no evidence that this defect has caused any damage to the building. In particular, without information as to the configuration of the flashings for this window there is no basis for a finding that this defect is likely to cause any damage. I am not satisfied that this defect is likely to cause any of the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.
- 117 While I am satisfied that this defect constituted a breach of the statutory warranty in s 18B(1)(a) of the HB Act, it has not resulted in a major defect within s 18E(1)(b) when read with s 18E(4) of the HB Act. The consequence is the proceedings were not commenced before the end of the warranty period of 2 years for the breach and accordingly the Tribunal has no jurisdiction to hear and determine the claim for this defect.
- 118 This item so far as the first floor balcony sliding door unit to the west elevation was not the subject of any oral evidence or submissions. I am not satisfied that it constitutes a defect. I am also not satisfied that it is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.
- 119 If, contrary to my finding, this item constitutes a defect and is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing, then there was no evidence that this defect has caused any damage to the building. In particular, I am not satisfied that this defect has led to any water ingress. I am not satisfied that this defect is likely to cause any of the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.

Item 22: Water ingress to stairwell

The evidence of the parties

The Capaldi report

120 In the Capaldi report, Mr Capaldi without any supporting reasons expresses the opinion this item is a major defect, and relevantly makes the following observations:

“1. I have been advised by the Owner that water ingress occurred during rain events from the east facing window to the stairwell walls adjoining and below.

2. The images below have been provided by the Owners. [four photographs omitted]

3. The ingress of water contravenes the NCC 2016 P2.2.2 “Weatherproofing” which states the following:

P2.2.2 Weatherproofing

A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause—

(a) unhealthy or dangerous conditions, or loss of amenity for occupants; and

(b) undue dampness or deterioration of building elements.

4. I am of the opinion that the water ingress will continue and the consequence is further damage and deterioration to building finishes.”

The oral evidence of Mr Capaldi

121 In examination in chief, Mr Capaldi said he did not see deterioration.

122 Mr Capaldi was not cross-examined on this item.

The Roberts report

123 In the Roberts report, Mr Roberts sets out the following findings:

“At the time of my inspection I found the lower section of the eastern on the ground floor of the stairwell displayed some minor mould staining above the level of the skirting. (See Photograph 12 in Annexure C of this Report). There was no visible water staining or damage to the paint finishes or wall lining consistent with water ingress through the window or wall at the time of my inspection. I tested the eastern wall at the sill of the window and at two locations above the skirting line which in each location provided normal relative moisture readings up to 125. A normal reading in this instance should not exceed approximately 240 while a fully wet reading would be 1000. (See Photograph 13 in Annexure C of this Report). I also tested the base the base of the wall with a moisture meter in the vicinity of the mould staining which also returned normal moisture readings of 122. (See Photograph 14 in Annexure C of this Report) Based on the results of this moisture testing I was unable to confirm any current moisture/water ingress through the wall or window opening. As a sideboard had been moved from along this way to provide

access to view the area it is possible the minor mould identified was the result of a lack of movement of air between the sideboard and wall.

The Tyrrells Report appears to have relied entirely on the advice of the Owners in relation to the alleged leak from the window. The Report has not detailed any form of water testing or destructive investigation undertaken to establish whether the window and/or the wall is leaking.

Based on my inspection and the information currently available to me it is my opinion no building defect has currently been established in relation to this item.

Should water ingress be confirmed through the external wall this issue would be categorised as a major defect as it has the potential to effect the weatherproofing and use of the building using the definitions outlined in Section 18E of the Home Building Act.”

The oral evidence of Mr Roberts

- 124 In examination in chief, Mr Roberts substantially repeated the evidence in the Roberts report.
- 125 In cross-examination, Mr Roberts said that he did not see any evidence of water damage.

The submissions of the parties

- 126 In their oral submissions the applicants said there was evidence of water ingress.
- 127 In its oral submissions the respondent submitted that there was insufficient evidence of water ingress.

Consideration

- 128 I prefer the opinion of Mr Roberts to that of Mr Capaldi because it is supported by detailed reasons, and so I am not satisfied that this item is a defect. The opinion of Mr Capaldi has no satisfactory basis because it was based on hearsay information and photographs provided by the applicants which were not proved. I am also not satisfied that this item is a major element of a building within paragraph (c) of the definition in s 18E(4) of the HB Act by being part of the waterproofing.
- 129 If, contrary to my finding, this item constitutes a defect, then there was no evidence that this defect has caused any damage to the building. I am not satisfied that this defect is likely to cause any of the consequences in paragraph (a)(i), (ii) or (iii) of the definition in s 18E(4) of the HB Act.

Whether a money or work order should be made in respect of the items agreed, and any items found, to be a major defect

- 130 The applicants seeks a money order under s 48O(1)(a) of the HB Act and oppose a work order under s 48O(1)(c)(i) of the HB Act in respect of the major defects as agreed or found on the basis that the respondent has failed to rectify the defects after Barclay received the defects notice on 12 February 2020.
- 131 The respondent seeks a work order under s 48O(1)(c)(i) of the HB Act in respect of the major defects as agreed or found and relies on s 48MA of the HB Act.
- 132 I am satisfied that the respondent is the responsible party for the major defects within the meaning of s 48MA of the HB Act. Having regard to the principles relating to the application of s 48MA of the HB Act in *Leung* at [139]-[140], I am satisfied that I should exercise the discretion under s 48O(1)(c)(i) of the HB Act to make a work order in respect of the major defects as agreed or found on the basis that the respondent undertakes their rectification on the following conditions:
- (1) the rectification works are undertaken in accordance with the scope of works in the Capaldi report;
 - (2) the rectification works are completed by 18 October 2021.

The costs of the proceedings

- 133 I will deal with the costs of the proceedings by way of written submissions as follows:
- (1) if any party seeks a costs order, the applicant for costs (the costs applicant) must file and serve a costs application, including submissions limited to five pages and any evidence in support, within 14 days of the date of the orders in these reasons for decision;
 - (2) any respondent to the costs application is to file and serve any submissions limited to five pages and any evidence in reply within 14 days thereafter;
 - (3) the costs applicant is to file any submissions limited to three pages in reply within 14 days after receipt of the submissions and any evidence of the respondent to the costs application.

Orders

- 134 I make the following orders:

- (1) the respondent is to rectify the major defects to the property identified as items 2 so far as the defect identified as “Clamps missing”, 9 so far as the defect headed “No Overflow Provision”, 17 and 18 in the Capaldi report on the following conditions:
 - (a) the rectification works are undertaken in accordance with the scope of works in the Capaldi report;
 - (b) the rectification works are completed by 18 October 2021;
- (2) the proceedings are otherwise dismissed;
- (3) if any party seeks a costs order, the applicant for costs (the costs applicant) must file and serve a costs application, including submissions limited to five pages and any evidence in support, within 14 days of the date of the orders in these reasons for decision;
- (4) any respondent to the costs application is to file and serve any submissions limited to five pages and any evidence in reply within 14 days thereafter;
- (5) the costs applicant is to file any submissions limited to three pages in reply within 14 days after receipt of the submissions and any evidence of the respondent to the costs application.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.