Civil and Administrative Tribunal

New South Wales

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| Case Name: | Fisher v N. Phillips and M. Phillips t/as Arise Building Services |
| Medium Neutral Citation: | [2022] NSWCATCD 80 |
| Hearing Date(s): | 16 and 17 December 2021. Written submissions to 15 February 2022. |
| Date of Orders: | 25 May 2022 |
| Decision Date: | 25 May 2022 |
| Jurisdiction: | Consumer and Commercial Division |
| Before: | G Sarginson, Senior Member |
| Decision: | (1) The respondent, N. Phillips and M. Phillips t/as Arise Building Services, is to pay the applicant, Craig Fisher and Theresa Fisher, the sum of $49,168.35 by 28 days from the date of this decision.<br>(2) The respondent is to pay the applicant's costs of proceedings in Matter HB 20/51723 as agreed or assessed on the basis set out in the legal costs legislation (as defined in s 3A of the Legal Profession Uniform Law Application Act 2014 (NSW)).<br>(3) If either party seeks a different costs order to order 2 above it must inform the other party and the Tribunal in writing within 14 days of the date of this decision.<br>(4) If an application for a different costs order is made in accordance with order 3 above the Tribunal will issue procedural directions and orders to facilitate the disposition of the costs application. |
| Catchwords: | BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Contract — Defects — Major defect — Assessment of damages<br>BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Defences — s 18F Home Building |

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| | Act 1989 (NSW) |
| Legislation Cited: | Civil and Administrative Tribunal Act 2013 (NSW)<br>Civil and Administrative Tribunal Rules 2014 (NSW)<br>Design and Building Practitioners Act 2020 (NSW)<br>Environmental Planning and Assessment Act 1979 (NSW)<br>Home Building Act 1989 (NSW) |
| Cases Cited: | Ashton v Stevenson; Stevenson v Ashton [2020] NSWCATAP 233<br>Catapult Constructions Pty Ltd v Denison [2018] NSWCATAP 158<br>Deacon v National Strategic Constructions Pty Ltd; National Strategic Constructions Pty Ltd v Deacon [2017] NSWCATAP 185<br>Garofali v Moshkovich [2021] NSWCATAP 242<br>Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23<br>Oshlack v Richmond River Council [1998] HCA 11; (1998) 139 CLR 72<br>Parsons v Adams [2019] NSWCATAP 301<br>RBV Builders Pty Ltd v Chedra [2021] NSWCATAP 56<br>Stefanis v Oneview Construction Pty Ltd [2019] NSWCATAP 218<br>Stevenson v Ashton [2019] NSWSC 1689 |
| Texts Cited: | Nil |
| Category: | Principal judgment |
| Parties: | Craig Fisher and Theresa Fisher (Applicant)<br>N. Phillps and M. Phillips t/as Arise Building Services (Respondent) |
| Representation: | Counsel:<br>D Neggo (Applicant)<br><br>Solicitors:<br>Stacks Law Firm (Applicant)<br>Jane Button & Associates Pty Ltd (Respondent) |
| File Number(s): | HB 20/51723 |
| Publication Restriction: | Nil |

## REASONS FOR DECISION

1 This is a dispute involving residential building work under the *Home Building Act 1989* (NSW) ('the HB Act').

2 In this decision, the applicants are referred to as 'the homeowners' and the respondent is referred to as 'the builder'.

3 The homeowner's seek damages for the cost of rectifying allegedly defective building work. The homeowners alleged the builder has breached the statutory warranties in s 18B of the HB Act.

4 The homeowners entered into a written contract with the builder for additions and alterations to their residential dwelling. The date of contract was 2 November 2015. The contract price was $137,500 inclusive of GST.

5 The location of the residential dwelling is in the Southern Highlands of NSW.

6 The contract contained a quotation from the builder that included a scope of works. The contract also contained plans and specifications by Brett Goff Building and Design.

7 The scope of works under the contract relevantly included:

(1) New concrete slab for activities room;
(2) Cut new openings for windows and doors;
(3) Removal of non-load bearing columns in kitchen;
(4) Removal of walls to create new hall;
(5) Make good kitchen/living room ceilings and floors.
(6) Construction of new walls to suit window seats and new linen cupboard;
(7) Construction of new light well;
(8) Refurbishment of existing ensuite;
(9) Remove powder room cupboard to make new shower;
(10) Cut new opening to create new butler's pantry;
(11) Remove existing study door and fill opening in and make good.
(12) Create new walls for cloak/storeroom in entry.

8 The building works achieved practical completion under the contract on or about July 2016. An Occupation Certificate was issued on 1 June 2017.

9 On 10 December 2020 the homeowners commenced proceedings in the Tribunal. It is not in dispute that the applicant commenced proceedings outside the 2 year period from the date of practical completion for all defects under s 18E of the HB Act; and the homeowners are within the 6 year period for "major defects" under s 18E. The provisions of s 18E of the HB Act are discussed later in this decision.

10 After procedural directions hearings in the Tribunal on 1 February 2021; 15 March 2021; and 19 July 2021 the matter was set down for a two day hearing in the Tribunal.

11 The hearing occurred on 16 and 17 December 2022. At the conclusion of the hearing, the Tribunal made directions for the filing and serving of written submissions of the parties.

12 At the hearing, a Court Book containing the documentary evidence of the respective parties was admitted into evidence. A supplementary Joint Scott Schedule by the parties expert witnesses (Mr O'Donnell for the homeowner; and Mr Wallace for the builder) dated 16 December 2021 was additionally admitted into evidence and marked Exhibit 1.

13 The Tribunal received written submissions of the parties (being the homeowners' submissions in chief; the builder's submissions in chief; and the homeowner's submissions in reply). The date of submissions closed on 15 February 2022.

14 The hearing was conducted by Audio-Visual Link ('AVL'). Mr Neggo of Counsel appeared for the homeowners with his instructing Solicitor. Ms Button, Solicitor, appeared for the builder.

15 As discussed previously, each party had instructed a building consultant expert. The homeowner's expert is Mr O'Donnell. The builder's expert is Mr Wallace.

16 Mr O'Donnell and Mr Wallace had participated in a conclave on 31 August 2021 and prepared a Joint Scott Schedule. However, after that conclave, the homeowner had served two further "supplementary" reports of Mr O'Donnell dated 11 October 2021 and 2 November 2021.

17 The homeowner submitted that such reports were evidence “in reply”. The Tribunal did not accept that the further reports were evidence “in reply”, but rather constituted fresh evidence. The ramifications of a party serving further expert evidence in chief after experts have conclaved; or an expert changing an opinion expressed at a conclave; are discussed by the Appeal Panel of the Tribunal in *Garofali v Moshkovich* [2021] NSWCATAP 242 at [71].

18 To accord procedural fairness to the builder, if the Tribunal granted leave for the homeowners to rely upon the two supplementary reports of Mr O’Donnell the builder needed to have the opportunity for its expert to consider the supplementary reports and adduce further evidence in response.

19 However, it was unnecessary to consider adjourning the hearing, either by way of an adjournment application by the homeowner if the Tribunal refused the homeowner leave to rely on the two supplementary reports of Mr O’Donnell; or by way of the builder applying for an adjournment so that Mr Wallace could consider and respond to the supplementary reports.

20 As the matter had been set down for a two day hearing; and the items of defects were not extensive in number, the Tribunal determined that in accordance with the ‘guiding principle’ of the just, quick, cheap and efficient resolution of the real issues in dispute under s 36 (1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (‘the NCAT Act’), then the experts could confer on 16 December 2021 and prepare a further Joint Expert Report, including consideration and comment by Mr Wallace of the issues raised in Mr O’Donnell’s supplementary reports.

21 The legal representatives and the experts agreed that a further conclave could occur on 16 December 2021; and it was unnecessary to adjourn the proceedings. No issue arose in respect of the builder not having a reasonable opportunity to put forward its case and have its submissions considered under s 38 (5) of the NCAT Act by reason of the further conclave.

22 The Tribunal expresses its gratitude to the experts for being prepared to have a further conclave on 16 December 2021 and prepare a further Joint Expert Report. The fact that they were prepared to confer and prepare a further joint report saved the parties considerable legal costs and avoided there being an

adjournment by reason of the homeowner attempting to adduce further evidence in chief under the guise of evidence in reply.

23 The hearing proceeded on 16 December 2021 with the lay evidence being dealt with. Mr Fisher was cross examined. Ms Fisher was not required for cross examination. Mr Phillips was cross examined.

24 The cross examination of the lay witnesses was relatively brief, reflecting the limited ambit of the factual matters in dispute.

25 On 17 December 2021 Mr O'Donnell and Mr Wallace gave concurrent evidence and were cross examined. As discussed previously, a revised Joint Scott Schedule (referred to as the "supplementary Joint Scott Schedule") was filed dated 16 December 2021.

26 In written submissions, the builder made clear that the builder did not assert that a work order to rectify defective work should be made; and the builder was content for the Tribunal to find that the 'preferred outcome' under s 48MA of the HB Act was not a work order but an order for damages under s 48O of the HB Act for the cost of rectifying any defective work found by the Tribunal.

27 In respect of the quantum of any award of damages, the range was (according to the written submissions of the parties) between $11,734 (builder's position) and $67,394 (homeowner's position).

28 The Joint Scott Schedule identified 15 defect items. Of those, 8 items were not agreed between the experts, either in respect of whether there was a defect; or the appropriate method and cost of rectification.

29 In addition to disagreements between the expert witnesses regarding defect issues; the issues in dispute relevantly include:

(1) Whether the defects are "major defects" pursuant to s 18E of the HB Act. As discussed previously, it is clear that proceedings were taken in the Tribunal more than 2 years and less than 6 years after work reached practical completion in accordance with s 3B of the HB Act. Accordingly, the homeowner can only bring proceeding for breach of statutory warranties under s 18B of the HB Act if the defects are "major defects" under s 18E of the HB Act.

(2) Whether the builder can rely on a defence under s 18F of the HB Act.

(3) The appropriate method of rectification and the cost of rectification.

30 As the lay evidence in the proceedings was not extensive, and the issues in dispute involve consideration of the expert evidence, the reasons of the Tribunal will focus upon each of the purported defect items; the s 18F defence raised by the builder and how the lay evidence affects those issues (to the extent that it does).

## JURISDICTION OF THE TRIBUNAL AND APPLICABLE LEGAL PRINCIPLES IN RESPECT OF 'MAJOR DEFECT'

31 The dispute involves a "building claim" for "building goods and services" under s 48K of the HB Act. The claim involves work purportedly performed in breach of the statutory warranties under s 18B of the HB Act.

32 Section 18B of the HB Act states:

> **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,
>
> (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 or 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 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,
>
> (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 licence, or another person with express or apparent authority to enter into or vary 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 the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.
>
> (2) The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in a contract under which a person (the ***principal contractor***) who has contracted to do residential building work contracts with another person (a ***subcontractor***

> to the principal contractor) for the subcontractor to do the work (or any part of the work) for the principal contractor.

33 The legal test for whether the statutory warranties in s 18B of the HB Act have been breached is set out in *Deacon v National Strategic Constructions Pty Ltd; National Strategic Constructions Pty Ltd v Deacon* [2017] NSWCATAP 185 ('*Deacon*') as follows (at [46]):

> Although objective standards such as Australian Standards, the Building Code of Australia and the Guide are of significant relevance in establishing whether work has been performed in a proper and workmanlike manner (Wheeler v Ecroplot Pty Ltd [2010] NSWCA 61 at [10]), the absence of such evidence does not automatically mean a homeowner has failed to establish breach of statutory warranty. In our view, the relevant principle was succinctly stated by Senior Member Goldstein in G MacFayden and Anor v G Tadrosse [2014] NSWCATCD 194 at [46] as follows:
>
> …[E]vidence that work does not comply with the Building Code of Australia would establish a basis for a finding that sub section 18B(c) of the Act has been breached. Evidence of the details in which work does not comply with the contractual plans and specifications would form the basis for a finding that sub section 18B(a) of the Act has been breached. Evidence of work not being carried out in a proper and workmanlike manner would in my view involve identification of the work in question, a statement of how the expert would expect it to be carried out in in a proper and workmanlike manner and then identification of the factors which establish that the way in which the work has been carried out falls short of it being carried out in a proper and workmanlike manner. Evidence of this nature, if accepted, would form the basis for a finding that sub section 18B(a) of the Act has been breached.

34 As was also set out in *Deacon*, the Tribunal when considering whether breach of s 18B of the HB Act has been established must consider and make findings in respect of:

(1) Whether the owner has established on the balance of probabilities that works have not been performed in accordance with s 18B of the HB Act.

(2) If a 'defect' (in the sense of failure to comply with s 18B of the HB Act) is established, what is the appropriate method to rectify that defect and the cost of rectification.

35 Additionally, in the context of determining whether damages or a work order is the appropriate remedy for defective work, the Tribunal must consider that an order that the builder rectify defective work is the "preferred outcome" under s 48MA of the HB Act.

36 The appropriate method to rectify is considered in the context of the nature and degree of the relevant defect (*Deacon* at [57]-[59]). The method of rectification is the work necessary to achieve compliance with the contract, provided that

method is a reasonable course to adopt (*Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613 at 617-618).

37 In Bellgrove v Eldridge at 606, Dixon CJ, Webb and Taylor JJ addressed the circumstances in which damages for rectification of defective works are an appropriate remedy as follows:

> "…not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt….Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.
>
> As to what remedial work is both "necessary" and "reasonable" in any particular case is a question of fact…"

38 In *Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 [17]; (2009) 236 CLR 272 the High Court held that the test for reasonableness outlined in Bellgrove v Eldridge:

> "…tends to indicate that the test that the test of 'unreasonableness' is only to be satisfied by fairly exceptional circumstances. The example given by the court aligns closely with what Oliver J said in Radford, that is, that the diminution in value measure of damages will only apply where the innocent party is 'merely using a technical breach to secure an uncovenanted profit'."

39 By reason of the operation of s 18E of the HB Act, there is a different limitation period for building defects, depending upon whether the defect is a "major defect" or "non-major defect".

40 Section 18E of the HB Act states as follows:

> **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),
>
> (d) if the work is not completed, the warranty period starts on—
>
> (i) the date the contract is terminated, or

(ii) if the contract is not terminated—the date on which work under the contract ceased, or

(iii) if the contract is not terminated and work under the contract was not commenced—the date of the contract,

(e) if the breach of warranty becomes apparent within the last 6 months of the warranty period, proceedings may be commenced within a further 6 months after the end of the warranty period,

(f) a breach of warranty ***becomes apparent*** when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to have become aware) of the breach.

(1A) If a building bond has been lodged for building work under Part 11 of the *Strata Schemes Management Act 2015*, the period of 2 years specified for commencing proceedings for a breach of a statutory warranty for that work is extended until the end of 90 days after the end of the period within which a final inspection report on the building work under that Part is required.

(1B) Subsection (1A) does not limit any other law that permits the period for commencement of proceedings to be extended.

(2) The fact that a person entitled to the benefit of a statutory warranty specified in paragraph (a), (b), (c), (e) or (f) of section 18B has enforced the warranty in relation to a particular deficiency in the work does not prevent the person from enforcing the same warranty for a deficiency of a different kind in the work (***the other deficiency***) if—

(a) the other deficiency was in existence when the work to which the warranty relates was completed, and

(b) the person did not know, and could not reasonably be expected to have known, of the existence of the other deficiency when the warranty was previously enforced, and

(c) the proceedings to enforce the warranty in relation to the other deficiency are brought within the period referred to in subsection (1).

(3) The regulations may prescribe defects in a building that are not (despite any other provision of this section) a major defect.

(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

(c) the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

Note—

The definition of ***major defect*** also applies for the purposes of section 103B (Period of cover).

***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.

41 The Appeal Panel in *Ashton v Stevenson; Stevenson v Ashton* [2020] NSWCATAP 233 ('*Ashton*') considered the applicable principles for whether or not a defect was a "major defect" under Section 18E (1) (b) and (4) of the HB Act. Such principles are summarised as follows:

(a) The test under s 18E (4) of the HB Act has two parts. The first is that there must be a defect in "a major element of the building" attributable to one of the specified mattes. The second is that the defect must "cause" or "is likely to cause" (a) the inability to inhabit or use the building (or part of the building) for its intended purpose; or (b) the destruction of the building or any part of the building; or (c) a threat of collapse of the building or any part of the building (*Ashton* at [63]);

(b) Expert evidence may be necessary to establish the fact of the defect and the likely effect on the ability to inhabit the building or cause the destruction of the building. However, the homeowner may also give lay evidence on such issues, including matters such as observations about the absence of relevant elements of the work; the location of water staining; the fact of water ingress during a rain or flooding event; photographs of such matters; or other observations about which a non-expert could give evidence and which could rationally affect the determination of what is likely in the future (*Ashton* at [68]).

(c) Whether a particular defect is likely to cause the relevant consequences in the future is evaluated in the context of (a) how long the defect has existed; and (b) whether the defect has resulted in any damage that might indicate the likelihood the premises will become uninhabitable or destroyed in the future by reason of the defect (*Ashton* at [69]).

(d) The design life of the structure and materials used may be relevant considerations (*Ashton* at [70]).

(e) Determination of the matters in s 18E (4) (a) (i)-(ii) are questions of fact (Ashton at [130]-[131]). Evidence is required from which it can be concluded the defects will likely cause the specified outcome (*Ashton* at [134]).

(f) Defects in the drainage system (and the roof structure) designed to keep rainwater from entering the dwelling is a major element under s 18E (4) (c) of the HB Act; and evidence may establish defects are likely to cause the premises to become uninhabitable in the future due to flooding, even if such a rain event has not yet occurred (*Ashton* at [169]-[170]).

42 Further, the Appeal Panel stated in *Ashton* at [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" .

43 In *Stevenson v Ashton* [2019] NSWSC 1689, the Supreme Court (Harrison AsJ) stated at [74]-[76] that the legal test for whether the defect in s 18E (4) of the HB Act is a "major defect" does not require proof that the defect is "presently manifested and dire" or "imminent".

**Evidence of the Purported Defects**

44 The Joint Scott Schedule (i.e. the supplementary Joint Scott Schedule) dated 16 December 2021 is the appropriate starting point to summarise the evidence regarding the nature and extent of the defects. 15 items of purported defects are identified.

*Items 1-5 Roof*

45 Items 1-5 involve the roof (including skillion roof); flashing; and guttering of the premises that was constructed by the builder. The nature of the defects involve water ingress into the premises

46 Both experts at the joint conclave on 16 December 2021 on the nature of the defects; the method of rectification; and the cost of rectification. The cost of rectification for Items 1-4 (excluding builder's margin and GST) was $5,301; and the cost of rectification for Item 5 was $1,516.

47 As the experts agreed on the nature of the defects; the method of rectification and the cost of rectification, they were not cross examined at the hearing on Items 1-5.

48 It is unnecessary to set out in extensive detail the expert and lay evidence in respect of Items 1-5 as there is no significant disagreement between the experts. In essence, the nature of the defects were that edge flashing was leaking; the skylight was leaking; the end flashing tray was not contoured or notched; the end flashing and roof gutter termination was leaking and not installed in accordance with Australian Standard AS 1562; bottom edged corner flashings were inadequate; and the roof was not completely water sealed in accordance with Australian Standard AS 4654.1 and AS 4654.2.

49 In its written submissions of 7 February 2022 the builder submitted that Items 1-5 were not major defects under s 18E (4) of the HB Act because:

> (a) There is no evidence that the existence of the defect (sic) renders the building uninhabitable or unable to be used for its intended purpose.
>
> (b) Neither the building or part of it has been destroyed.
>
> (c) It is unlikely that the building or part of it is likely to be destroyed as a result of the alleged defect.

50 The homeowner submits that the defects are "major defects" because:

> (1) They are defects in waterproofing (the first limb); and
>
> (2) They cause, or are likely to cause, the inability to inhabit or to use part of the building for its intended purpose, or the destruction of any part of the building, or a threat of collapse to any part of the building (the second limb).

51 The homeowner's submission is that all of the defects identified in the second Joint Scott Schedule (and in the expert reports of the homeowner's expert Mr O'Donnell) are "major defects" because they all either involve the failure to adequately prevent water ingress into the building; or involve consequential damage due to water ingress.

52 In respect of the Items 1-5, the Tribunal notes that the lay evidence of the homeowners (Mr Fisher's witness statement of 20 August 2021) contains extensive evidence that he witnessed water leaks into the premises from the windows, lightwell, ceiling and the two entrances in the new hallway/activities area during periods of rain from June 2016 onwards. The builder returned to the site in about late 2016 and early 2017 to perform repairs, but Mr Fisher stated "water continued to leak into the interior of the house during periods of rain".

53 Mr Fisher continued to complain to the builder of leaks in text messages; emails and voicemail messages. The builder blamed water pooling in a box gutter, which the builder asserted was a "design fault" and not part of the scope of works performed by the builder. The builder' sent an employee to inspect the roof on about 5 March 2020. This inspection did not change the builder's view that water ingress was not the builder's responsibility.

54 The builder's lay evidence (witness statement of Mr Phillips dated 16 July 2021) was not that there was no water ingress, but that it was caused by the poor design of an existing box gutter which was not part of the scope of works of the builder. According to Mr Phillips, he orally raised this issue with Mr Fisher in about November 2015 and suggested re-pitching the entire roof of the premises to eliminate the box gutter, but Mr Fisher told him he did not have sufficient funds for such a course of action.

55 Mr Phillips accepted that the homeowners complained of water ingress into the residence "several times" including a complaint that there was water ingress from the lightwell. According to Mr Phillips he made "multiple attempts" to find any water ingress due to the work of the builder, but formed the view that most, if not all of the water ingress issues were due to the box gutter. Mr Phillips stated that he did perform patching work to air-conditioning pipes that linked the pre-existing part of the residence with the extension; and installed "some presstile" under the roof sheet below the lightwell (the lightwell being part of the scope of works performed by the builder) to address water ingress issues.

56 Having considered the both the lay and expert evidence in respect of Items 1-5, the Tribunal is satisfied that the roof contains defects in breach of the

statutory warranties in s 18B of the HB Act; and that such defects are “major defects”.

57 The roofing system (including the gutters and downpipes) constructed by the builder in conjunction with existing works when modifying and extending the dwelling is clearly a “major element” of the building under s 18E (4) (c) because “waterproofing” includes roofing; drainage and prevention measures to ensure there is not water ingress into the dwelling (*Ashton* at [169]-[170]);

58 Both Mr O’Donnell and Mr Wallace accept that the roofing system constructed by the builder contains defects within s 18B of the HB Act.

59 The water ingress is of sufficient magnitude and duration to cause destruction of part of the building; and will likely cause destruction of part of the building in the future. The Tribunal accepts the evidence of Mr O’Donnell (see pp 10-13 of his report of 11 October 2021) that the gyprock ceiling and southern wall of the residence had areas of dampness; mould; peeling paint and areas of popping nails which will eventually lead to sagging and collapse of gyprock. The Tribunal has not taken into account the photograph at page 10 of Mr O’Donnell’s report of 11 October 2021, as that is not a photograph of the residence the subject of this dispute. Although Mr Wallace did not see obvious water staining of the ceiling on his inspection (p 14 of Mr Wallace’s report of 5 July 2021) Mr O’Donnell stated there was staining and that the homeowner complained of water staining. The Tribunal accepts that the photographic evidence at pp 196-197 of Mr O’Donnell’s report of 11 October 2021 shows water damage of a cornice and water staining of ceiling gyprock.

60 The Tribunal accepts the appropriate method of rectification is as set out in the second Joint Scott Schedule and the cost of rectification is $6,817 (exclusive of builder’s margin and GST).

61 The builder’s submission in respect of Item 5 is that it was a “design defect” and he built the property in accordance with the plans and specifications. The Tribunal does not accept that a builder merely constructing a dwelling in accordance with plans and specifications relieves the builder from its duty to comply with s 18B of the HB Act. The Tribunal will return to this issue when it

deals with the builder's argument that it has a defence under s 18F of the HB Act.

*Item 6-Additional Roof Flashings*

62 This item involves Mr O'Donnell's assertion that the bottom edge of corner flashings on the roof are inadequate due to significant gaps at the base; and in one case the flashing being lapped the wrong way with the lower edge over the higher sheeting. Mr O'Donnell identifies this as a separate defect to Items 1-5.

63 According to Mr O'Donnell, the appropriate method to address and rectify this defect is for a roof plumber to barge step the flashing apron while gutters are removed at a cost of $1,648 (exclusive of builder's margin and GST).

64 According to the homeowner's expert in cross examination, because there was no eave such work would be "prudent" to ensure that the roof did not leak. Mr O'Donnell proposed to "strip back the flashing and reinstate the flashing".

65 Mr Wallace asserted that such work was unnecessary to rectify the water ingress through the roof and guttering system. He believed the rectification work in Items 1-5 would adequately rectify the defects. Mr Wallace described Mr O'Donnell's proposal as a "belt and braces" approach that was excessive and unnecessary.

66 The builder submits that the Tribunal should (a) prefer the evidence of Mr Wallace over Mr O'Donnell because Mr Wallace holds a licence as a roof plumber in addition to holding a license as a builder; and Mr O'Donnell only holds a licence as a builder; and (b) the defect is not a "major defect" under s 18E of the HB Act.

67 In respect of the qualifications of the respective experts, the Tribunal is of the view that both are suitably qualified and experienced to provide expert evidence. Both experts have given evidence in Tribunal and Court proceedings on many occasions, and both have complied with the NCAT Expert Witness Code of Conduct in the preparation of their reports.

68 Both experts gave evidence in a clear, concise, and creditable manner at the hearing.

69 The Tribunal does not accept that the fact that Mr Wallace holds a roof plumber's licence in addition to his builder's licence should, of itself, cause the Tribunal to give greater weight to his evidence in respect of the method of rectification of the water ingress through the roof and guttering system. Mr O'Donnell, in his capacity as a licensed builder who has engaged and supervised roofing work has equivalent expertise.

70 Ultimately, there is little point of difference between the experts on this issue. Considering the history of water ingress at the premises, the Tribunal is satisfied that the method of rectification proposed by Mr O'Donnell is necessary to achieve compliance with the contract (including the statutory warranties under s 18B of the HB Act) and is a reasonable course to adopt. The Tribunal does not accept that it is unreasonable or unnecessary to perform the additional work proposed by Mr O'Donnell to rectify the roofing defects.

71 The builder's submission that Item 6 is not a "major defect" is rejected. The relevant defects involve water ingress into the residential dwelling through the roof and guttering system. The Tribunal has previously found that Items 1-5 fall within the definition of "major defect" under s 18E of the HB Act, and it follows for the same reasons that Item 6 also a "major defect". If the builder's submission was accepted, it would result in the Tribunal taking an arbitrary and inappropriately narrow approach to what is a "major defect" under s 18E of the HB Act. Such an approach also confuses the nature of the defect (water ingress through the roof and guttering system) with the damage caused by the defect and the scope of work necessary to rectify the defect.

72 Mr Wallace did not propose a different costing for the scope of works proposed by Mr O'Donnell and the Tribunal accepts the evidence of Mr O'Donnell on the cost of rectification of Item 6.

*Items 7, 8 and 9-Damage to Internal Plasterboard (Gyprock) Ceilings and Walls*

73 Items 7 and 8 involve water damage to internal plasterboard ceilings. Item 9 involves water damage to internal plasterboard walls. In the supplementary Joint Scott Schedule dated 16 December 2021, both experts agree that the method of rectification and cost of rectification of Item 8 is included in Item 7.

74 Both experts agree that water ingress through the roof has caused water damage to plasterboard ceilings and cornices. Again, the disagreement between the experts is of narrow compass and involves the appropriate method of rectification and cost of rectification.

75 Mr O'Donnell believes that the water ingress damage is sufficiently significant to require removal and replacement of all plasterboard ceilings at a cost of $4,768 (excluding builder's margin and GST).

76 Mr Wallace believes the water ingress damage to plasterboard ceilings is of a limited nature, and it is sufficient to patch and repaint the affected areas at a cost of $1,722.36.

77 Both parties made extensive written submissions on Items 7 and 8. The homeowner criticises Mr Wallace for not taking moisture readings at multiple areas, and that his opinion on this issue is essentially based on his opinion that there is no clear evidence of water staining or other visual cues to demonstrate significant plasterboard damage.

78 The builder criticises Mr O'Donnell for not taking more extensive photographs demonstrating "popping nails" in plasterboard; the use of a photograph of an "entirely different property" to support his opinion that the gyprock may eventually sag and collapse; and his reference to further opinions being sought from a plasterer and painter.

79 The Tribunal is satisfied that the water ingress damage to plasterboard ceilings is sufficient that the appropriate method of rectification is replacement rather than patching and painting. In this regard, the Tribunal accepts the evidence of Mr O'Donnell that there is sufficient moisture in the plasterboard due to water ingress events since mid-2016 that the plasterboard is damaged; and the necessity of replacement is supported by the reference to the CSR manufacturer's recommendations set out at p 194 of Mr O'Donnell's report of 11 October 2021 (and Appendix 6 of that report).

80 The Tribunal is satisfied that the method of rectification and cost of rectification of Items 7 and 8 proposed by Mr O'Donnell is necessary to achieve compliance with the contract and a reasonable course to adopt.

81 The builder submits that Items 7 and 8 are not “major defects” under s 18E of the HB Act. As with Item 6, the Tribunal does not accept this submission and is satisfied that the defects are major defects. The damage to the plasterboard ceilings is attributable to the water ingress through the roofing system and is consequential damage cause by the major defects in the roofing system.

82 Items 7 and 8 are not discrete defects such as the plasterboard ceilings were not properly attached; or the materials used were not fit for purpose. Rather, they are defects that are directly attributable to water ingress (i.e. the failure to adequately waterproof the building works) leading to the destruction or likely destruction of part of the residential premises; and accordingly fall within the definition of “major defects” under s 18E of the HB Act.

83 Item 9 involves damage to the plasterboard southern wall due to water ingress. The issues involving Item 9 is, in substance, the same as Items 7 and 8. Mr O’Donnell believes the plasterboard wall needs to be removed and replaced because the water damage is sufficiently serious, having detected moisture in the wall and he saw “popping” nails at various points in the plasterboard. Mr O’Donnell believes the cost of the rectification work is $4,160 (excluding builder’s margin and GST).

84 As with Items 7 & 8, Mr Wallace believes that patching and painting of the wall is sufficient to rectify the defect and address water ingress damage to the southern wall plasterboard at a cost of $892.90.

85 For the same reasons expressed in Items 7 & 8 the Tribunal accepts the evidence of Mr O’Donnell regarding the nature of the defect; method of rectification; and cost of rectification. Further, for the same reasons as expressed previously, the Tribunal is satisfied the defect is a “major defect” under s 18E of the HB Act.

*Item 10-Windows*

86 The defect issue is water ingress into the residential premises through external windows.

87 The supplementary Joint Scott Schedule dated 16 December 2021 summarises the respective opinions of Mr O’Donnell and Mr Wallace.

88 Mr O'Donnell believes that all of the external windows (11 windows) require replacement because:

(a) Window sill flashings do not comply with Australian Standards AS 2047 and AS 4654.2 allowing water ingress during storms; particularly when the water is blown by winds. Mr O'Donnell stated that he had viewed a video submitted by the homeowners which verified that there was water ingress through windows.

(b) The manufacturer of the windows no longer exists and the windows cannot be verified by the manufacturer as compliant with their specifications for installation.

(c) There were inadequate seals for the windows at their joints.

89 Mr O'Donnell stated that the cost of removing and replacing the windows was $9,962 (exclusive of builder's margin and GST). In the further conclave on 16 December 2021, Mr O'Donnell revised the amount for the cost of rectification downwards because he accepted that the sliding door and louvered windows were compliant windows and replaced (although sill and flashings required removal and reinstallation).

90 In his report of 5 July 2021, Mr Wallace gave a brief opinion on water ingress into the property through external windows. The only issue identified was that "some of the windows require sealing to the reveals above" (p 26 report of 5 July 2021) although Mr Wallace also referred to external wall cladding not having any sill and toe flashings in place.

91 According to Mr Wallace, the cost of minor sealing work was $704 (exclusive of builder's margin and GST).

92 Mr Wallace also made the following comment in his report of 5 July 2021:

> Three of the photographs in the CSI report appear to be the external area of the enclosed porch which as a class 10 area of the building.

93 The reference to "class 10 area of the building" is a reference to the National Construction Code. No copy of the relevant provision was attached to Mr Wallace's report of 5 July 2021.

94 In the conclave and supplementary Joint Scott Schedule, Mr Wallace altered his opinion. He stated that he had viewed the video submitted by the homeowners which Mr O'Donnell had viewed. Mr Wallace stated that he agreed that there is evidence of "water entry through the windows however it is

not clear to me whether the water is entering through joints in the metal framing extrusion components or where the glazing is seated into the framing".

95 Mr Wallace further stated that he had said in the original Joint Scott Schedule that the builder should engage a window manufacturer to inspect the windows and report whether the manufacturer would "certify the windows to be compliant". Despite being a licensed builder and experienced expert witness building consultant, Mr Wallace stated that he was "not qualified to state whether the windows can be certified as being compliant and exactly what work, if any, can be done to the windows to prevent water entry".

96 Mr Wallace stated in the supplementary Joint Scott Schedule that looking at the plans of the building work performed by the builder, two new windows ("windows W2 and W5") had been installed in the east elevation of the new hall/activities room and a new hinged door and side light to the existing porch. Mr Wallace asserted that "if it was found" windows needed to be removed and replaced, he believed that only windows W2 and W5 needed to be removed and replaced at a cost of $4,676.44 (excluding builder's margin and GST).

97 Mr Wallace also stated in the supplementary Joint Scott Schedule dated 16 December 2021 that "the porch is a class 10 building under Part 2.2 of the NCC the damp and weatherproofing requirements for a class 10 (sic) building does not apply".

98 At the hearing Mr Wallace and Mr O'Donnell were extensively cross examined about Item 10 as it was one of the largest quantum items in dispute. The enclosed "porch" area was also referred to as "the airlock". Much of the cross examination was upon the issue of whether the enclosed porch was a class 1 or class 10 building under the National Construction Code.

99 Mr Wallace asserted that this area was "non-habitable" (equivalent to the standards applicable to a garage) and fell within Class 10 of the National Construction Code rather than Class 1, and the windows/skylight in this area were sufficiently compliant with Class 10. Mr O'Donnell disagreed and was of the opinion that the area fell within Class 1, and that the windows in this area did not sufficiently prevent water ingress.

100 The submissions of the homeowner dated 17 January 2022 attached a copy of the relevant provision of the National Construction Code to which the experts referred to in their oral evidence. It states as follows:

> **1.3.3 Multiple classifications**
>
> Each part of a building must be classified separately and-
>
> (a) Classes 1a, 1b, 10a and 10c are separate classifications; and
>
> (b) a reference to-
>
> (i) Class 1-is to Class 1a and 1b; and
>
> (ii) Class 10-is to Class 10a, 10b, and
>
> (c) where parts have a different purpose-if not more than 10% of the floor area of a Class 1 building is used for a different classification, the classification of Class 1 may apply to the whole building.

101 The homeowner submits that:

(1) The windows are leaking and require rectification;

(2) Mr O'Donnell deals with the issue of the nature of the defect in far more detail than Mr Wallace.

(3) The appropriate method of rectification is to remove and replace the windows rather than merely seal them.

(4) The windows in the "enclosed porch" or "airlock" part of the dwelling fall within the standards applicable for a Class 1 rather than Class 10 of the National Construction Code.

102 The builder submits that:

(1) The "airlock" area is a Class 10 area.

(2) The windows of the building were all deemed satisfactory in respect of the issue of an Occupation Certificate which "implies that the various compliance certificates required for the construction have been reviewed and accepted"

(3) The written contract contained a term that "the works will be deemed to comply with the requirements of any Authority upon the issuing of a certificate of compliance or similar document by the relevant Authority"; and the homeowner had the contractual responsibility for obtaining an Occupation Certificate.

(4) The windows "are deemed to comply with the certifications issued and as a consequence there should be no liability for this item".

103 The Tribunal is satisfied that all of the windows do not adequately prevent water ingress and are non-compliant with Australian Standards AS 2047 and AS 4654.2 as set out in Mr O'Donnell's report. Further, Mr Fisher gave clear

evidence of water ingress through windows, and Mr Wallace accepts that a video taken by Mr Fisher clearly shows water ingress through windows. The evidence of Mr O'Donnell on this issue was comprehensive, and the Tribunal accepts this over the more limited evidence of Mr Wallace. Accordingly, the Tribunal is satisfied that the builder has breached the statutory warranties under s 18B of the HB Act in respect of the condition of the windows.

104 The Tribunal is satisfied that the "enclosed porch" area is part of the dwelling and is a Class 1 rather than Class 10 area for the purpose of the National Construction Code. It is clear that the area forms part of the structure of the dwelling, being an enclosed area where the former front porch was. Photographs show the area being used to store items such as umbrellas and shoes in circumstances where persons are entering the dwelling through that area. It is not a mere "airlock".

105 In any event, even if it was construed that, in isolation, the enclosed porch was a Class 10 area, it is deemed to fall within Class 1 by reason of there being no evidence it constituted more than 10% of the floor area of the residential dwelling.

106 The builder's submission that the fact that an Occupation Certificate was issued meant the windows were "compliant" and therefore not defective is rejected. The issue of an Occupation Certificate by a private certifier or local Council that certifies a residential dwelling as fit for habitation and compliant with the terms of the Development Consent under the applicable provisions of the *Environmental Planning and Assessment Act 1979* (NSW) is a separate issue as to whether the statutory warranties under s 18B of the HB Act have been breached; and if so whether the defect is a "major defect" under s 18E of the HB Act.

107 The Tribunal is satisfied that the windows of the dwelling are non-compliant with Australian Standards and do not adequately prevent water ingress into the residential premises. That constitutes breach of s 18B of the HB Act. The Tribunal is satisfied that the defect is a "major defect" within s 18E of the HB Act, because waterproofing is a "major element" of the building; and the water

ingress is sufficiently serious to cause the destruction of part of the building or the likely destruction of part of the building.

108 The Tribunal accepts the evidence of Mr O'Donnell in respect of the appropriate method of rectification of the defective windows; and the cost of rectification.

*Item 11-Flashing In The External Metal Cladding*

109 Item 11 involves the absence of flashing in the external wall cladding at the base of the cladding. Both experts agree this is a defect (being non-compliance with Australian Standard AS 1562.1), and there is little dispute between them on method of rectification and cost of rectification.

110 Mr O'Donnell sets out a scope of works to rectify at a cost of $4,054. Mr Wallace does not disagree to any significant extent with Mr O'Donnell's scope of works, other than asserting that $1,440 should be deducted if the Tribunal accepts that windows only need to be sealed rather than removed and replaced. As the Tribunal has found that the windows require removal and replacement, that point of difference disappears.

111 The submissions of the builder state that the builder generally "agrees with" the homeowner's "outline" in respect of this item, but that the Tribunal should accept the evidence of Mr Wallace over Mr O'Donnell. No submission was made that Item 11 is not a "major defect" under s 18E of the HB Act.

112 As Item 11 involves the failure to prevent water ingress, for the same reasons as given in respect of earlier defects pertaining to water ingress the Tribunal is satisfied that Item 11 is a "major defect" within s 18E of the HB Act.

113 In circumstances where there is no significant difference between the opinions of Mr O'Donnell and Mr Wallace in respect of Item 11, the Tribunal accepts that the method of rectification identified by Mr O'Donnell is necessary to achieve compliance with the contract and is a reasonable course to adopt. Accordingly, Mr O'Donnell's costings for the rectification work are accepted.

*Item 12-Window Condition*

114 Both experts agree Item 12 forms part of Item 10. It is unnecessary to consider Item 12 further.

*Item 13-Falls to Window Sill Tiling*

115 Mr O'Donnell believes that window sills and the sliding door have no fall; which does not comply with Australian Standard AS 2047. Mr O'Donnell identifies a scope of works to re-tile the relevant areas at a cost of $1,709.80.

116 Mr Wallace believes the sliding door has a fall; but accepts that the tiles underneath the windows do not have a fall (supplementary Joint Scott Schedule dated 16 December 2021). Mr Wallace believes the enclosed porch area is a Class 10 building, and a fall is not required in this area to comply.

117 In cross examination, Mr Wallace accepted that if the enclosed porch area was a Class 1 building, a fall was required and the absence of one was a defect. He also accepted that if windows were removed and replaced, the relevant area would need to be re-tiled in any event.

118 The submissions of the builder do not assert that Item 13 is not a "major defect" within s 18E of the HB Act, but that the Tribunal should accept the evidence of Mr Wallace.

119 As the Tribunal has previously made findings that the windows require replacement and the enclosed porch falls within Class 1 of the National Construction Code, it logically follows that to rectify the defective windows re-tiling work needs to occur. The Tribunal accepts the evidence of Mr O'Donnell regarding the defect; method of rectification, and cost of rectification.

120 As the absence of falls and the need to re-tile the area is due to the failure of the windows to be adequately waterproof, the Tribunal is satisfied this defect falls within the definition of "major defect" under s 18E of the HB Act, for the same reasons as expressed previously.

*Item 14-Damp Proof Course*

121 Both experts agree that Item 14 forms part of Item 11. It is unnecessary to further consider this item.

*Item 15-Damage to Flooring*

122 This item involves water damage to the floating floor. Both experts accept there is water damage to the floating floor. The only issue is whether the appropriate

method of rectification is to remove and replace the sections of the floor that are water damaged; or remove and replace the entire floor.

123 In his report of 19 April 2021, Mr O'Donnell only refers the floor briefly (page 32 of the report) and states:

> As a result (of water ingress through windows and sliding door) the floating floor has been saturated and is lipping and cupping, water damage to the floor is evident. The water damaged floor has then spread right the way across the floor causing cupping to other areas internally.
>
> A licensed carpenter should be called to make a further evaluation and repairs and rectification as needed.

124 In the Scott Schedule prepared by Mr O'Donnell to this report, he identifies the appropriate method of rectification as removing and replacing (to match) the water damaged areas (54sq. m) at a cost of $3,060.

125 In his "supplementary report" of 11 October 2021, Mr O'Donnell refers to a quotation the homeowners had obtained from Southern Highlands Carpet Court dated 5 November 2020 to replace the entire floating floor (including the moving of furniture and trims; refitting skirting boards; and disposal of the existing floating floor) in the amount of $19,667.87. That quote was provided to Mr O'Donnell as part of a further letter of instructions from the homeowner's Solicitor.

126 In his supplementary report of 11 October 2021, Mr O'Donnell states (at pp 52-53):

> There is 54m2 square measure by the writer from the plan and site visit measurements, which would cover an area of the extension only. This assumes matching of the remaining floating floor area, which at present is the same material. The water ingress damaged the whole area, in the writer's opinion. The cupping and twisting and swelling are from one side to the other
>
> …(after referring to the Southern Highlands Carpet Court quote)
>
> The figure quoted includes all of the work, furniture removal, trims removal, expansion joints, scotia and refit skirting where required. The amount or quantity is 181.13 m2 for the office, mud room, hallway, family room, kitchen and pantry, is based on matching all the flooring for continuity for the Owners (sic) floor for their $137,500 new work (this new work contract amount). It is reasonable (sic) their expectation is to achieve uniformity of the flooring they enjoyed prior to the roof and window water ingress damage of the flooring. Therefore reasonable (sic) the Carpet Court Quote (sic).

127 Mr Wallace, in his report of 5 July 2021 only briefly refers to the issue but asserts at page 35 that to "replace damaged flooring" of 19 sq. m the cost is $2,005.08.

128 In the supplementary Joint Scott Schedule dated 16 December 2021, the experts stated as follows:

> Experts discussed this matter and reviewed the area of flooring that had been damaged by water and agree the area is approximately 40m2.
>
> Using Mr O'Donnell's estimated cost of removal at $1,440 plus replacement of 40m2 of flooring at $30 m2 the total cost is agreed by the experts at $2,640.
>
> In relation to whether all other flooring needs to be replaced due to possible non-matching colour is a matter for the Tribunal to determine.
>
> P.O. The price to match provided is a reasonable cost, where the flooring cannot be matched. See Carpet Court Quote Supplementary Report 1 App. 6.

129 At the hearing, neither expert was cross examined to any degree about Item 15.

130 The submissions of the parties on this issue are straightforward. The builder submits that it is appropriate to remove and replace the damaged parts of the floor, and anything beyond this is unreasonable. The homeowners submit that the whole floor should be replaced because this is damage that naturally arises by reason of the builder's breach of statutory warranties; and that the floor should be replaced to put the homeowners in the position they would have been had the contract not been breached.

131 The Tribunal is not satisfied that it is necessary to achieve compliance with the contract and a reasonable course to adopt for the whole of the floor to be replaced.

132 Mr O'Donnell's first report made no mention of the whole floor being replaced to rectify the water damaged area; and there is no clear explanation in his supplementary report as to why he changed his opinion. No report was obtained by a "licensed carpenter" as recommended in Mr O'Donnell's first report. Mr O'Donnell does not clearly state that removal and replacement of the water damaged area will not adequately rectify the defect in his supplementary report, and his comments about what the homeowners would regard as "reasonable" are irrelevant and beyond his field of expertise.

133 Mr O'Donnell's comments that the entire floor is water damaged is undermined by his original assertion that 54sq m of flooring was water damaged; and the subsequent agreement of the experts that 40 sq. m of flooring was water damaged.

134 Further, the quotation of Southern Highlands Carpet Court that Mr O'Donnell refers to does not state that Southern Highlands Carpet Court had inspected the residential premises and that entire replacement of the floating floor was appropriate. It does not state that removal and replacement of part of the floor will not provide an adequate match to the existing floor.

135 The builder makes no submission that the damage to the floor is not consequential damage due to water ingress. For reasons that the Tribunal has previously expressed, the Tribunal is satisfied that the water damage to the floor falls within s 18E of the HB Act.

136 The Tribunal is satisfied that the appropriate method of rectification is to remove and replace only the water damaged areas, at a cost of $2,640.

*Builder's Margin*

137 Both experts agree 25% is an appropriate builder's margin for rectification work.

**Summary of Cost of Rectification**

138 The cost of rectifying defective building work is summarised as follows:

| ITEM | COST |
|---|---|
| 1-5 | $6,817 |
| 6 | $1,648 |
| 7 & 8 | $4,768 |
| 9 | $4,160 |
| 10 | $9,962 |

| | |
|---|---|
| 11 | $4,054 |
| 12 | Included in Item 10 |
| 13 | $1,709.80 |
| 14 | Included in Item 11 |
| 15 | $2,640 |
| Sub-Total | $35,758.80 |
| Builder's Margin | $8,939.70 |
| Sub-Total | $44,698.50 |
| GST | $4,469.85 |
| TOTAL | $49,168.35 |

**Section 18F of the HB Act**

139 As discussed previously, the builder has raised that it is not responsible for defective work causing water ingress through the roof and guttering system because the builder built the dwelling according to the plans and specifications. The builder asserts that the guttering and roof pitch design by the architect was inadequate, and the builder orally raised this issue with Mr Fisher prior to commencement of works.

140 The Points of Defence plead s 18F of the HB Act as a defence. The builder's submissions dated 7 February 2022 assert at pp 3-4 that the s 18F defence should succeed, because the builder built the premises according to the design.

141 Section 18F of the HB Act relevantly stated (prior to amendments made by the *Design and Building Practitioners Act 2020* (NSW), which made a minor amendment to s 18F (4) (a) of the HB Act) :

> **18F Defences**
>
> (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.

142 A builder who merely constructs a dwelling in accordance with the plans and specifications contained in the written contract signed by the parties cannot rely on a defence under s 18F of the HB Act (*Parsons v Adams* [2019] NSWCATAP 301 at [37]; *Catapult Constructions Pty Ltd v Denison* [2018] NSWCATAP 158 at [26]; *RBV Builders Pty Ltd v Chedra* [2021] NSWCATAP 56 at [67]-[69]; *Stefanis v Oneview Construction Pty Ltd* [2019] NSWCATAP 218 at [48].

143 It is a breach of one of the statutory warranties under s 18B of the HB Act for the builder not to have constructed the dwelling in accordance with the contractual plans and specifications. However, if s 18F of the HB Act was interpreted to provide a defence to the builder merely because the parties had signed a contract with plans and specifications, and the builder had built the dwelling according to those plans and specifications, s 18F of the HB Act would have the effect of removing the other statutory warranties under s 18B of the HB Act and be inconsistent with the provisions of s 18G of the HB Act.

144 For the builder to successfully raise a defence under s 18F of the HB Act, there must be evidence of a written instruction of the homeowner to perform the work in the manner it was performed contrary to the advice of the builder; or there were written instructions (other than the plans and specifications) by a building professional independent of the builder prior to the work being done (or confirmed after the work was done); and that the relevant defects "arise" from that written instruction.

145 In this matter, the builder's evidence goes no higher than Mr Phillips had an oral discussion with Mr Fisher about potential deficiencies in the position of the existing box gutter and the pitch of the roof prior to performing the work; and suggested re-pitching the roof to eliminate the box gutter. That oral discussion is insufficient to enliven a defence under s 18F of the HB Act for the defective work which has been established.

**Section 48MA of the HB Act**

146 Under s 48MA of the HB Act, the "preferred outcome" is that the builder is ordered to rectify its defective work under s 48O of the HB Act. It is well established that the Tribunal can depart from the "preferred outcome" in appropriate circumstances (*Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 at [19]-[56]).

147 In circumstances where the builder does not seek to return to the property to rectify defects and the homeowners do not seek that the builder to return to the property to rectify defects, a work order is not the "preferred outcome" and an order for damages under s 48O of the HB Act for the cost of rectification is the appropriate remedy.

**The Issue of Costs**

148 Both parties are legally represented. The homeowners' Points of Claim seeks a costs order. The amount claimed or in dispute exceeds $30,000 and by reason of Reg. 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) the provisions of s 60 (1) and (2) of the *Civil and Administrative Tribunal Act 2013* (NSW) do not apply.

149 The usual costs order in such circumstances is that the builder pay the homeowners' costs as agreed or assessed on the ordinary basis (*Oshlack v Richmond River Council* [1998] HCA 11; (1998) 139 CLR 72).

150 There appears no reason why the Tribunal should not make a costs order in favour of the homeowners. The Tribunal acknowledges that the parties have yet to be heard on the issue of costs. The Tribunal is satisfied that the appropriate course of action is to make a costs order in favour of the homeowners; but give both parties the opportunity to apply for any other costs order if they wish to make such an application. In the absence of such an application, the costs order remains in force.

**The Issue of Interest**

151 The homeowners' Points of Claim refer to a claim for interest. No contractual basis for such a claim was established, and any claim for interest on unpaid monies pursuant to an order of the Tribunal under Reg. 39 of the *Civil and Administrative Tribunal Rules 2014* (NSW) is premature.

## ORDERS

(1) The respondent, N. Phillips and M. Phillips t/as Arise Building Services, is to pay the applicant, Craig Fisher and Theresa Fisher, the sum of $49,168.35 by 28 days from the date of this decision.

(2) The respondent is to pay the applicant's costs of proceedings in Matter HB 20/51723 as agreed or assessed on the basis set out in the legal costs legislation (as defined in s 3A of the *Legal Profession Uniform Law Application Act 2014* (NSW)).

(3) If either party seeks a different costs order to order 2 above it must inform the other party and the Tribunal in writing within 14 days of the date of this decision.

(4) If an application for a different costs order is made in accordance with order 3 above the Tribunal will issue procedural directions and orders to facilitate the disposition of 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