



Civil and Administrative Tribunal

New South Wales

Case Name: Lamproglou v CTY Construction Pty Ltd

Medium Neutral Citation: [2022] NSWCATCD 165

Hearing Date(s): 2 March 2022

Date of Orders: 25 July 2022 [amended 27 July 2022]

Decision Date: 25 July 2022

Jurisdiction: Consumer and Commercial Division

Before: P French, Senior Member

Decision: Pursuant to Section 63 of the Civil and Administrative Tribunal Act 2013, orders published are amended to read as follows:

(1) Leave is granted to the homeowners to amend the amount in dispute.

(2) CTY Construction Pty Ltd is to carry out the following work in a proper and trades-person-like manner before 30 September 2022:

(a) Apply or re-apply grout as necessary to the downstairs bathroom and main bathroom floor and wall tiles.

(b) In the main bathroom: remove existing shower screen, realign, re-hang and seal, supplying new door jambs and hinges.

(c) Supply and install missing screw to main bathroom door hinge.

(d) Permanently fix handrail joiners on balcony balustrades on ground and first floor.

(e) Clean and fill gap between stairs and porch with flexible sealant.

(f) Sand, fill and paint as necessary the cladding on the exterior face, balcony, and alfresco area to remove cracks.

(g) Sand, fill and paint as necessary the render at the tile screed bed on the front veranda and balcony to remove cracks and smooth.

(h) Replace the skirting and make good the pier in the rear alfresco area.

(i) Smooth the render under the front eave and repaint.

(j) Sand, fill, and repaint as necessary the upper level window frames to remove cracks.

(k) Remove and replace any area of water damage to eaves.

(l) Paint eaves with exterior (water resistant) paint.

(m) Install drip edge or groove around eave perimeters.

(n) Replace cracked front door jamb and make good to door.

(3) If order (2) is not complied with then at any time before 28 February 2023 this application may be renewed.

(4) The application is otherwise dismissed.

(5) Any application for costs is to be filed with the Tribunal and served on the other party by 5 August 2022.

(6) Any reply to any application for costs is to be filed with the Tribunal and served on the other party by 19 August 2022.

(7) The Tribunal proposes to dispense with a hearing in relation to any application for costs. The parties are to include any submission they wish to make in relation to this proposed order in any application or reply to an application for costs.

Catchwords: BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – statutory warranties – due care and skill – materials – limitation period – minor defects – preferred outcome

Legislation Cited: Home Building Act 1989 (NSW) – s 18B, 18E, 18G, 48I, 48K, 48MA

Category: Principal judgment

Parties: Anthony Lamproglou (First Applicant)
Amy Lamproglou (Second Applicant)
CTY Construction Pty Ltd (Respondent)

Representation: First Applicant (self-represented)
Second Applicant (self-represented)

GEA Lawyers (Respondent)

File Number(s): HB 21/42734

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

1 This is an application by Anthony and Amy Lamproglou (**the homeowners**) for an order pursuant to s 48O(1)(a) of the *Home Building Act* 1989 (NSW) (**HB Act**) that would require CTY Constructions Pty Ltd (**the builder**) to pay them \$77,642.50 being an amount they contend is necessary to cover the cost of rectification of various building defects in their home, which was constructed by the builder. The homeowners contend that they are entitled to this order because the builder is in breach of the statutory warranties that are implied into contracts for residential building work by s18B of the Act. This application was made to the Tribunal on 14 October 2021 (**the application**).

- 2 For reasons set out in greater detail following, the Tribunal has determined that the builder is in breach of the statutory warranties implied by s 18B in relation to the building work with respect to some items of the homeowner's claim. Consistent with the preferred **outcome** in building disputes of this kind, which is expressed in s 48MA of the Act, it has therefore made a work order that will require the builder to rectify these defects by 30 September 2022. The application has otherwise been dismissed.

Procedural history

- 3 The application first came before the Tribunal, differently constituted, in a Group List for Conciliation and Hearing in a Virtual Meeting Room (VMR) on 15 October 2021 in accordance with NCAT's COVID-19 Revised Hearing Procedure. The amount in dispute listed on the application was \$25,000.00 which resulted in the Group Listing, rather the application being allocated to a Home Building Directions List. Both homeowners attended that listing of the application, but there was no appearance on behalf of the builder.
- 4 A Notice of Hearing addressed to the builder at the address given by the applicants in the application form had been returned to the Registrar unopened. The homeowners had failed to comply with the Registrar's direction that they provide an ASIC Company Search that set out the builder's registered address for service. Consequently, the Tribunal made an order for substituted service of its orders to an email address for the builder and directed the builder to file details of its appearance.
- 5 Directions were also given to the parties for the filing and exchange of evidence. These directions included a requirement that the parties file Scott Schedules and expert evidence in accordance with NCAT Practice Direction 3: Expert Evidence. It appears that the homeowners made no application, and in any event no leave was given, for the amendment of the claim to increase the amount in dispute at this listing of the application.
- 6 The application next came before the Tribunal, differently constituted, for a Special Fixture Hearing on 10 January 2022. Both homeowners attended that listing of the application. Mr Junqi Tang, who is noted on the Tribunal's file as a Site Supervisor, attended the hearing on behalf of the Builder. Just prior to that

listing of the application, Mr Tang had applied to the Tribunal for an adjournment of the hearing on the basis that the builder had only just engaged its expert and was yet to file evidence. That application was referred for determination at the hearing.

- 7 At the hearing the Tribunal granted the builder an adjournment. As neither party had at that time filed a Scott Schedule, further directions were issued for them to do so. Additionally, the parties' experts were directed to consult each other with a view to narrowing points of difference and identifying remaining points of difference, and to file a document with the Tribunal incorporating this information before the final hearing. The builder applied for leave to be represented in the proceedings by an Australian Legal Practitioner which was granted. The application was otherwise adjourned to another Special Fixture Hearing. Again, it appears that the homeowners made no application, and in any event no leave was given, for the amendment of the claim to increase the amount in dispute at this listing of the application.

Evidence and hearing

- 8 Over the course of the proceedings, the homeowners filed three bundles of evidence on 28 October 2021, 30 November 2021, and 21 January 2022. These bundles contained substantial duplication, but each was admitted into evidence and marked Exhibits A1 to A3 respectively. The respondent filed two bundles of documents on 7 January 2022 **and** 11 February 2022, and a further Affidavit of Mr Tang dated 25 February 2022. These were marked Exhibits R1 to R3 respectively.
- 9 No joint Scott Schedule or other document containing points of agreement and difference was filed. In this respect, in his Affidavit dated 25 February 2022, Mr Tang states:
3. To comply with order 5 in Order made on 10 January 2022 (date), on 24/02/2022 at 14:32pm (time) we called Joshua Gunning of Gunbuild Pty Ltd on his mobile [number set out]. He was aware of the Scott Schedule we submitted on 11 February 2022, but he said he was not instructed to narrow down the points of differences between two Scott Schedules.
- 10 The final Special Fixture Hearing was conducted in a VMR in accordance with NCAT's COVID-19 Revised Hearing Procedure. Both homeowners attended the hearing. Mr Lamproglou gave oral evidence. The homeowners called as

their expert witness Mr Joshua Gunning. Mr Li, solicitor, attended the hearing on behalf of the builder. The builder called as a witness its Director, Mr Tang, and its expert witness Mr John Ge. The parties had the opportunity to present their respective cases, to ask each other questions, and to make final submissions to the Tribunal.

Issues to be determined

- 11 The issues to be determined in the proceedings are:
- (a) Does the Tribunal have jurisdiction to deal with the application at all?
 - (b) If the answer to (a) is “yes” should the homeowners be granted leave to amend their claim to increase the amount of the money order sought?
 - (c) Is the builder in breach of the s 18B statutory warranties in relation to the building work?
 - (d) If the answer to (c) is “yes”:
 - (i) What is the effect, if any, of the allowance made for building defects in the contract for sale?
 - (ii) Is the “preferred outcome” contained in s 48MA to be applied in this case?
 - (iii) If the answer to (d)(ii) is “no” what economic loss has been proved by the homeowners in relation to any building defects?

Material facts

- 12 The homeowners are the registered proprietors of a home in Miranda (**the home**). The home is Lot 1 in Strata Plan 96091. The homeowners purchased Lot 1 from Evertop International Investment Group Pty Ltd (**Evertop**) on 18 February 2021 for \$1,325,000.00. They settled the purchase on 14 May 2021. They are therefore successors in title who are entitled to any subsisting statutory warranty applicable to the residential building work by operation of s 18D(1) of the Act (as to which see following).
- 13 Evertop was the developer of the residential lots in Strata Plan 96091. Its principals or operatives were Gavin Li and Kenny Wu.

- 14 CTY Construction Pty Ltd is the builder of the home. It entered a standard form HIA NSW Residential Building Contract with Evertop dated 12 October 2017 for the construction of the home. The contract price was \$594,000.00.
- 15 The home reached practical completion on or about 29 June 2019. An Occupation Certificate was issued on 26 November 2019. After the Occupation Certificate was issued, the home was leased to tenants under a residential tenancy agreement.
- 16 In or about March 2020 Mr Li and Mr Wu commissioned a building report from Bay Property Inspections which was completed by Mr Mark Davis, a Building Surveyor on 31 March 2020. The report describes a series of defects in 10 sections which required rectification by the builder (**the first Davis report**). The homeowners **obtained** a copy of the first Davis report either in the pre-purchase period or after the exchange of contracts (it is not clear which).
- 17 In or about March 2021 the homeowners engaged Wade Property Inspections to inspect the home again to ascertain if the defects identified in the first Davis report had been rectified. In a report dated 6 April 2021 Mr Davis reported that having regard to his first report some defects had been rectified satisfactorily, while others had not been addressed, and some remedial work was unsatisfactory (**the second Davis report**). He identified items falling into these categories using the item numbers from his first report.
- 18 The remaining defects were the subject of contract negotiations between the parties in the pre-settlement period. These negotiations resulted in the Contract for Sale including Special Conditions 2 and 23, which are set out following:

Purchaser's acknowledgements

Subject to Section 52A(2)(b) of the *Conveyancing Act, 1919* and the regulations pursuant thereto the purchaser acknowledges and agrees that:

- a. the purchaser buys the property in its present condition and state of repair relying upon the purchaser's own knowledge, inspection and enquiries and subject to any infestation and dilapidation. ...

Special Condition 23

The vendor agrees and undertakes to rectify the defects listed in the revised attached list titled 117A President Ave Defect List – RECTIFICATION REQUIRED, in a proper and workmanlike manner within 14 days of the tenants vacating the property, works to be assessed by a certified building inspector. The purchaser is not entitled to rescind, terminate the contract or

delay the settlement rising out of the issues under this clause. However, the vendor agrees to reimburse the purchaser with an invoice up to \$4,000.00 (exc GST) for the cost of any work needed to be undertaken to rectify any of the defects listed after settlement. The amount is to be withheld by the selling agent or the purchaser's solicitor in trust pending satisfactory completion of the outstanding works and the presentation of invoices in respect of the work. This clause does not merge on completion.

117A President Ave Defect List – RECTIFICATION REQUIRED

[a list of 34 defects in the second Davis report is set out].

19 In his Affidavit dated 10 February 2022 Mr Tang states the following in relation to the agreement between Evertop and the homeowners that was incorporated into Special Condition 23:

6. On 31 March 2020, for selling purpose, a Building Report was issued by Mark Davis of Bay Property Inspection (the "Report") ...

7. In the Report, the Property was considered "in a satisfactory structural condition and are (sic) adequate for residential use" and "no significant inspection findings".

8. In February 2021, the Applicants negotiated with Vendor for their purchase of the Property. During the negotiation and prior to exchange of contract, the parties' legal representatives narrowed down a list of defects (the "Defects List") according to the Report, and Vendor agreed to reimburse Applicants \$4000.00 upon completion, which was reflected in the exchanged contract

...

10. In accordance with Special Condition 2 of the Property Contract, the purchaser (Applicant) acknowledges and agrees that he buys the property in its present condition and state of repair with their own knowledges and inspection.

11. In addition, in accordance with Special Condition 23, Vendor agreed to reimburse Applicant \$4000.00 for the cost of any work need to be undertaken to rectify the listed defects.

...

20 The homeowners' claim relates to the defects identified in the second Davis report. They rely upon quotations for the rectification of the defects alleged provided by Gunbuild Pty Ltd (\$76,147.50) and Megasealed (\$995.00). The defects are set out following.

Contentions of the parties

21 The homeowners contend that their application has been made within the time limit imposed by s 18E on the basis that time is to be measured from the date the occupation certificate was issued and on the basis that some of the alleged defects are major defects in relation to which a six-year warranty applies. They

submit on these bases that the Tribunal has jurisdiction to deal with the application. They contend that the defects constitute a breach of the s 18B warranties by the builder, which entitles them to damages for the costs they will incur in the rectification of the defects. They contend that the appropriate order is a money order that will enable them to engage another contractor to complete this work because the builder has had a reasonable opportunity to rectify the defects but has failed to, and because their relationship with the builder has now broken down.

- 22 The builder contends that some of the alleged defects are wear and tear rather than building defects to which any warranty applies and that to the extent that they are building defects they are not major defects. It contends that the warranty period runs from the date of practical completion and that, accordingly, the applicable two-year warranty period had lapsed before the application was made. It submits on this basis that the Tribunal does not have jurisdiction to deal with the application. In the alternative, the builder submits that if the Tribunal does determine that any warranty applies in relation to the items the subject of the homeowners' claim, the appropriate order is a work order that will allow it to rectify the defect. It contends that the money order sought by the homeowners is manifestly excessive for the work required for rectification.

Jurisdiction

- 23 There is no issue that the application is a "building claim" within the meaning of s 48I and 48K of the Act.
- 24 Section 48K(7) of the Act provides that the Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty if the date on which the claim is lodged is after the end of the period within which proceedings for a breach of the statutory warrant must be commenced.
- 25 In this respect, s18E relevantly provides:

18B 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 ...

...

(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 or warranty

“Becomes apparent” when any person entitled to the benefit of the warranty becomes aware (or ought reasonably to have become aware) of the breach.

...

(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 party of the building, or

(ii) 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.

“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.

26 To determine if it has jurisdiction to deal with this application the Tribunal must pose and answer the following questions having regard to s 18E:

(a) When does time start to run for the warranty limitation periods?

(b) When was the application made?

- (c) When did the homeowners “become aware” of a breach of statutory warranty (to the extent that there was any breach)?
- (d) What is the applicable warranty period? That is, do any of the alleged breaches of statutory warranties concern “major defects”?

- 27 Section 18B(1)(e) of the Act provides that the warranty period starts “on the completion of the work to which it relates”. That is the date of practical completion unless some other date is proved. The date of practical completion in this case was 29 June 2019. The homeowners have not proved any other date of completion of the building work. Time does not run from the issuing of an Occupation Certificate. That is a regulatory outcome which may or may not be related to when building work is completed.
- 28 As noted above, the homeowners lodged this application with the Tribunal on 14 October 2021, 2 years, 3 months, and 15 days after the date of practical completion on 29 June 2019.
- 29 With one exception, it’s clear that the homeowners “became aware” of the alleged breaches of statutory warranty on 6 April 2021 when they received the second Davis report. Thus, to any extent that these breaches concerned other than major defects it was within the last six months of the warranty period, which lapsed 28 June 2021. By operation of s 18B(1)(e) the homeowners were therefore entitled to commence proceedings within a further six months from 29 June 2021, that is, before 28 December 2021. They have done so.
- 30 The exception is item (f) (the shower screen in the en-suite bathroom). In the first Davis report, it is reported as defective on the basis that the “shower roller assembly [is] damaged”. However, in the second Davis report that item is recorded as having been rectified to a satisfactory level. I can find no other complaint by the homeowners about the en-suite shower enclosure before it is itemised in the Gunbuild quotation dated 24 November 2021. I am thus satisfied that any defect in the en-suite shower manifested after the statutory warranty period had lapsed. They can pursue no claim in relation to this item.
- 31 Items (a), (b) and (o) appear to concern waterproofing. They are therefore potentially “major elements” for the purposes of 18B(4)(c). However, the defects alleged have not caused, nor are they likely to cause the inability to

inhabit or use the home or part of it, the destruction of the building or any part of it, nor do they threaten its collapse. The defects are therefore not major defects by operation of s 18B(4)(a). None of the other alleged defects concern internal or external load-bearing components of the building that are essential for its stability. They therefore also do not constitute major defects.

- 32 I thus conclude that this dispute concerns alleged building defects that are not major defects and that the claim has been brought within the six-month extension period after the lapse of the two-year statutory warranty permitted because these defects became apparent in the last six months of the warranty period.

Applicable law

- 33 Section 18B of the Act contains warranties by the holder of a contractor licence, or a person required to hold a contractor licence, that are implied in every contract to do residential building work. It 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 license 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, of 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 who the work is done expressly makes known to the holder of the 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 judgement.

- 34 Section 48O contains the Tribunal's order making powers in relation to building claims. It relevantly provides:

48 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 and specified service or any obligation arising under this Act or the terms of any agreement, or

...

(2) The Tribunal can make an order even if it is not the order that the applicant asked for.

- 35 Section 48MA stipulates the preferred outcome in proceedings determining a building claim. It provides:

48MA Rectification of defective work is the 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 have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

Consideration

Should the homeowners be granted leave to amend their claim?

- 36 It is not satisfactory that the amount in dispute in an application is radically different at the final hearing from that specified in the application filed without an applicant having been granted leave prior to the final hearing to amend the amount in dispute. The fundamental issue is one of fairness. A respondent to an application is entitled to know the case they are to answer well in advance of the final hearing. The amount of the claim may make a significant difference to the resources a respondent invests in defending a claim, including in relation to incurring the costs associated with obtaining expert evidence and of

obtaining legal representation. There are also case management implications for the Tribunal. Home building claims where the amount in dispute exceeds \$30,000.00 are case managed differently to lower value claims.

37 However, in this case, despite the irregularities, it's clear that the builder has been on notice as to the homeowners' amended claim well in advance of the hearing. Its' expert evidence addresses the amended claim, and it has engaged, and been granted leave for, legal representation to defend the amended claim. No unfairness would result from allowing the homeowners to amend their claim in these circumstances. The amended claim is capable of being dealt with to finality at the final hearing.

38 Leave for the amendment is therefore granted.

The effect of the allowance made in the contract for sale

39 The contract for sale was between the vendor, Evertop, and the homeowners. It did not involve the builder. The Special Condition pursuant to which Evertop allowed the homeowners \$4,000.00 in relation to unrectified defects was in consideration of the homeowners agreeing not to assert any right to rescind or terminate, or delay settlement of, the contract on the ground of the defects. The builder did not obtain the benefit of this arrangement either expressly or impliedly under the terms of that contract.

40 In any event, even if there had been such an intention by Evertop (and I am not satisfied that there was) s18G of the Act would render this agreement void because the s 18B warranties cannot be excluded. In this respect, s 18G provides:

18G Warranties may not be excluded

(1) A provision of an agreement or other instrument that purports to restrict or remove the rights of a person in respect of any statutory warranty is void.

Has there been a breach of statutory warranties?

41 The alleged defects are:

(a) Deficiency of grout in the tiled floors and walls of the first level and main bathrooms.

42 I am satisfied that the homeowners have established on their evidence an insufficiency of grout in the lower-level bathroom and main bathroom floors and

wall tiles. That is admitted by the builder's expert. This constitutes a breach of warranties in relation to due care and skill, and materials. I am satisfied on the evidence that the appropriate remedy is the regrouting of the areas of insufficiency.

- (a) Water leak from en-suite and main bathroom shower wall and glass junction.

43 However, the homeowners have not established any failure of waterproofing in either bathroom. Specifically, no water leaks from the showers of either bathroom have been proved. The water "leak" reported in the first Davis report, as far as I can make out from the small photograph he uses to illustrate this, is a water run under the shower door due to the absence of a hob, or deficient fall to the waste, but nothing of this nature features in the claim pursued now.

44 The Megasealed quotation the homeowners rely on in relation to this element of the claim states:

Inspection report – Downstairs shower

Upon visual inspection, it was evident that due to grout deterioration water and moisture travelled below the tiled surface. The grout in its present condition is inadequate to resist any water or moisture travelling below the tiled surface ...

It's clear that Megasealed did not undertake any form of flood testing. Nor is there any photograph or other evidence to demonstrate the water penetration contended for by the homeowners. This statement is therefore incapable establish any failure of waterproofing. The builder's expert, Mr Ge, did undertake moisture testing around the area of the missing grout and found no water leakage outside.

45 This element of the claim is dismissed.

- (a) Defectively installed shower screen in main bathroom.

46 Both experts agree that the shower screen in the main bathroom is defectively installed. It is misaligned, the lower hinge is not secure, and the jambs and hinges are cracked. I am satisfied that this constitutes a breach by the builder of the warranties in relation to due care and skill and materials. The shower screen must be reinstalled to remedy this defect.

- (a) Chipped tile in main bathroom.

47 I am not satisfied that the chipped tile is a building defect. It is more likely than not wear and tear. The chip was first noted in the first Davis report in March 2020, which was three months after the Occupation Certificate had been issued and after tenants had been occupying the home. There is no earlier record of the tile chip. I note that the chip cannot be seen in the photograph contained in the first Davis Report, and that there is no photograph of it in either the second Davis report or in the Gunbuild quotation. There is no satisfactory basis upon which I could conclude this is a building defect that engages the s 18B warranties.

48 This element of the claim is dismissed.

(a) Missing screw from hinge of main bathroom door.

49 It is not in issue between the experts that there is a screw missing from the hinge of the main bathroom door, which appears to have been overlooked when the door was mounted. I am satisfied that this constitutes a breach of warranty in relation to due care and skill. The remedy is the instatement of the missing screw.

(a) Defective design and installation of en-suite shower screen.

50 For the reasons set out at paragraph 30 above, no warranty now applies in relation to this item. This element of the claim is dismissed on the basis that the Tribunal does not have jurisdiction to deal with it.

51 I note for completeness that Mr Davis does refer to a “door edge of the en-suite bathroom being damaged” in both his reports. To any extent that it is this that it is contended is the defect, I am not satisfied that it is more than wear and tear for the reason I have given in relation to the chipped tile in the main bathroom.

(a) Insecure junctions of balustrade handrails on first and second level balconies.

52 There is no dispute between the parties’ experts that the joins on the balustrade handrails on the first and second levels are loose and need to be fixed in place. One expert says they should be screwed, the other than they should be welded. Either method would appear to be satisfactory. I am satisfied that this is a defect constituting a breach of the warranty as to due care and skill.

(a) Gap between stairs and porch.

53 The first Davis report records a “movement gap” at the front stairs and states that sealant is required at the stair junction. In his second report, Mr Davis states that the builder has undertaken a “partial repair and reseal” which remains deficient. In the Gunbuilt quotation it is stated the front entry stairs are “not tied into existing slab, therefore dropping away due to settlement”. Gunbuild quotes for the demolition and reconstruction of the stairs. A photograph is included in that quotation which depicts the top stair separating from the porch to which it rises. In his report, the builder’s expert, Mr Ge, accepts that there is “slight settlement noted, between patio floor and steps, though there has not been any movement”. He recommends that the gap should be cleaned and filled with flex filler.

54 The Davis reports and Mr Ge’s report do not support the conclusion that the stairs are so defectively constructed that this requires their demolition and reconstruction. **Nor** is there any satisfactory explanation for why such drastic action is necessary in the Gunbuilt quotation. There is nothing in the evidence that could lead me to conclude that the stairs are at risk of collapse or dangerous. I will allow that the separation is a building defect constituting a breach of the warranty as to due care and skill but I am not satisfied that the remedy required is more than cleaning the area of separation and filling the gap with a flexible sealant.

(a) Surface cracking to external cladding in rear alfresco area.

55 The homeowners contend that the external cladding above the rear alfresco area has surface cracking, which is due to an unsuitable material, Gyprock, being used in this area. The builder denies that the cladding on the exterior face is Gyprock. It contends that this cladding is fibre cement panels which are suitable for external use. Mr Ge’s report includes a photograph of the cladding during the construction of the home before being painted. Mr Ge contends that the photograph depicts fibre cement. Mr Davis’ inspections were visual only. In the absence of the results of an invasive inspection and/or testing it is impossible for the Tribunal to be satisfied that the builder has used a material unsuitable for external use.

- 56 The builder does appear to accept that it used Gyprock in the undercover areas of the balcony and alfresco areas. Mr Ge contends that this material is suitable for use in this area, and that there is no Australian standard that stipulates otherwise.
- 57 Nevertheless, both experts agree that the surface of the cladding has cracks. Photographs of the cracks appear at 8.29 in the first Davis report and on page 18 of Mr Ge's report and in several photographs in Exhibit A2. The cracks appear primarily (but not entirely) to be some minor structural separation of the panels.
- 58 The homeowners contend that the panels require replacement because they are an unsuitable material, but this has not been proved, and the photographic evidence does not support the contention the panels are fatally damaged. Mr Ge contends that the cracks can be satisfactorily treated by sanding and painting. I will allow that the cracks constitute a breach of the warranty as to due care and skill (they have not been finished to provide a seamless surface) and adopt the remedy proposed by Mr Ge.

(a) Weepholes are blocked by cement render.

- 59 The homeowners contend that weep holes are blocked and covered by render. In support of this contention, they rely upon photographs in the first Davis report which depict three blocked weepholes. In his second report, Mr Davis states that this defect has not been rectified. His reports do not indicate where the blocked weepholes are located. Mr Ge states in his report, and in his evidence, that all weepholes had been cleared at the time of his inspection (7 January 2022). He includes photographs of eight weepholes all of which are clear. In the absence of any better evidence, I am unable to conclude that any weephole remains blocked.

- 60 This element of the claim is therefore dismissed.

(a) Render movement and cracking at tile screed bed on front veranda and balcony.

- 61 It is not in issue between the experts that there is some render movement and cracking at the tile screed bed on the front veranda and balcony or that this constitutes a breach of the warranty as to due care and skill at least insofar as

it relates to the surface finish. The homeowners appear to contend that this also constitutes a breach of the material warranty because Gyprock has been used and this is unsuitable for external use. As set out above, that has not been proved on the evidence.

62 Because they contend a breach the materials warranty the homeowners say substantial demolition work is required to remove and replace the unsuitable material. In the absence of a finding that the material is unsuitable that remedy is not available. Mr Ge contends that the surface finish can be made good by sanding, filling, and painting the affected areas. I am satisfied that this is a sufficient remedy on the evidence before me.

(a) Timber degradation of external trim in the rear alfresco area.

63 There is no issue between the experts that the skirting to a pier in the rear alfresco area has degraded. The homeowner's expert, Mr Gunning, contends that this is because the skirting is not H3 treated and is not suitable for external use. I understand that to be denied by the builder. In any event it is clear the skirting material, whatever it is, has failed and requires replacement. I therefore am satisfied of a breach of the materials warranty. The experts agree that the remedy is the replacement of the skirting and making good the pier surround.

(a) surface imperfection under front eave

64 The first Davis report notes a render surface unevenness under the front eave. In his second report Mr Davis reports that this has not been rectified. The homeowners have included in Exhibit A2 at p65 a photograph of this area. It is an area of roughly trowelled render. The builder contends that it has already rectified this defect. Mr Ge's report includes before and after photographs of work done in October 2021 apparently in this area. I do not understand the homeowners to deny this work was done, but they maintain that there remains an area of the eave where the render remains uneven. I can only conclude that this area was missed by the builder.

65 The evidence is sufficient for me to conclude that this defect constitutes a breach of the warranty as to due care and skill. I am satisfied that the appropriate remedy is the resurfacing of this area by **sanding** and repainting.

(a) Gaps at upper-level window framing and window reveals

66 The homeowners contend there are gaps in framing and reveals of the upper-level windows. Mr Davis refers to these gaps in his first and second reports as being building deficiencies. He includes two photographs in his first report but nothing sensible can be seen in them due to their size.

67 Mr Ge stated in his report and evidence that he did not find any cracks in the window frames and reveals. He has included photographs of two upper-level windows at page 24 of his report. One photograph depicts a crack between a joint and along a ceiling edge. The other depicts a crack against a wall edge. These cracks are of minor cosmetic significance. They appear to result from some timber contraction which goes to the materials warranty.

68 The homeowners appear to contend that the window frames require replacement, but I accept Mr Ge's evidence that the cracks can be satisfactorily remedied by sanding, filling, and repainting. I will allow that the cracks constitute a breach of the materials warranty and that the remedy is sanding, filling, and re-painting.

(a) Eave linings are not level with concave and are affected by mould

69 In his first and second reports Mr Davis records as a building defect that the eave linings are not level. He includes 3 photographs to illustrate this in his first report but nothing sensible can be seen in them due to their small size. In his second report, Mr Davis also says the following about the eaves at the end of his report:

Additional defect building components:

At the time of inspection the eave line at stairs leading to main entry door has water damage and visible degradation of the lining and surface coating.

Lining appears to be gyprock and is unsuitable for an external application facing to the South and exposed to rain spray, surface runoff from balcony and condensation.

Lining was damp at time of inspection and has concave appearance.

If left unresolved, the eave lining will eventually degrade and collapse.

Eave linings require upgrade and replacement with a more suitable external lining sheet and repainting.

70 In his evidence Mr Gunning states that the dampness and mould in the eaves is due to no drip edge or groove being present around the perimeter of the

eaves or balconies. There are several photographs of mould on the eaves in the homeowners' bundle and in the Gunbuilt quotation.

71 In his report Mr Ge states that there is no Australian standard in relation to the material to be used for eave linings. He states that Gyprock can be used in areas where it does not have direct contact with weather and that external paint can be used to protect it. He also recommends the installation of drip edges or grooves around the external perimeters of the roof and balconies to prevent water retention.

72 There is insufficient evidence to support the conclusion that the material used for the eaves, if it is Gyprock and not cement fibre, is unsuitable for such use. There is sufficient evidence to conclude that the eaves are retaining water due to the absence of a drip groove or edge around the perimeter of the roof and balconies. I will allow that this is a breach of the warranty as to due care and skill. The remedy to which the homeowners are entitled in relation to this breach is the removal and replacement of the areas of the eaves which are water damaged, the protection of the eaves with exterior paint, and the installation of drip grooves or edges around the eave perimeters.

(a) Rear roof flashing not aligned with external wall cladding.

73 In his first and second reports Mr Davis notes as a building defect that the rear roof flashing is not aligned with the external wall cladding. He includes two photographs in his first report, but nothing sensible can be seen in those due to their small size. There is no reference to this issue in the Gunbuild quotation. In his report Mr Ge states that he inspected the flashing and did not find any defect in alignment. As evidence of this conclusion, he has included one **photograph** of the rear roof and cladding. No misalignment is shown in that **photograph**.

74 This element of the claim is dismissed because there is insufficient evidence of the alleged defect.

(a) Front door jamb cracked.

75 There is no issue between the experts that the front door jamb is cracked and requires replacement. In the absence of any contest, I allow this is a breach of

the due care and skill warranty. The remedy is the replacement of the door jamb and refitting of the door.

The preferred outcome

- 76 As has been set above, s 48MA requires the Tribunal, when determining a home building claim involving an allegation of defective residential building work, to have regard to the principle that rectification of the defective work by the builder is the preferred outcome. That outcome is not a statutory command, but it is a statutory preference. There must be a proper basis for any departure from it. There is an insufficient basis to do so in this case.
- 77 The builder remains licensed and a going concern. It's capable of carrying out a work order. A work order is likely to have a less significant impact on the builder commercially, as compared with a large money order, because it can complete the work at cost (rather than be required to compensate the homeowners at another builder's commercial rate). There has been some history of disputation between the homeowners and the builder, but the state of their relations is not so broken down as to weigh decisively against a work order. The homeowners have a strong preference to have the remedial work carried out by another builder, but that is not the legislative preference the Tribunal must have regard to.
- 78 For the foregoing reasons I will make a work order requiring the builder to carry out rectification of the building defects I have found, rather than the money order the homeowners have applied for. I am permitted to do so by s 48O(2) of the Act.
- 79 However, I will grant leave for the homeowners to renew this application at **any time** before 28 February **2023** if the builder should fail to comply with the work order. Upon such renewal, if non-compliance is found, the Tribunal can make any other appropriate order in place of the work order, including a money order that will require the builder to pay the homeowners the cost of satisfactorily completing any outstanding work.

Orders

- 80 For the foregoing reasons I make the following orders:

- (1) Leave is granted to the homeowners to amend the amount in dispute.
- (2) CTY Construction Pty Ltd is to carry out the following work in a proper and trades-person-like manner before 30 September 2022:
 - (a) Apply or re-apply grout as necessary to the downstairs bathroom and main bathroom floor and wall tiles.
 - (b) In the main bathroom: remove existing shower screen, realign, re-hang and seal, supplying new door jambs and hinges.
 - (c) Supply and install missing screw to main bathroom door hinge.
 - (d) Permanently fix handrail joiners on balcony balustrades on ground and first floor.
 - (e) Clean and fill gap between stairs and porch with flexible sealant.
 - (f) Sand, fill and paint as necessary the cladding on the exterior face, balcony, and alfresco area to remove cracks.
 - (g) Sand, fill and paint as necessary the render at the tile screed bed on the front veranda and balcony to remove cracks and smooth.
 - (h) Replace the skirting and make good the pier in the rear alfresco area.
 - (i) Smooth the render under the front eave and repaint.
 - (j) Sand, fill, and repaint as necessary the upper level window frames to remove cracks.
 - (k) Remove and replace any area of water damage to eaves.
 - (l) Paint eaves with exterior (water resistant) paint.
 - (m) Install drip edge or groove around eave perimeters.
 - (n) Replace cracked front door jamb and make good to door.
- (3) If order (2) is not complied with then at any time before 28 February 2023 this application may be renewed.
- (4) The application is otherwise dismissed.
- (5) Any application for costs is to be filed with the Tribunal and served on the other party by 5 August 2022.
- (6) Any reply to any application for costs is to be filed with the Tribunal and served on the other party by 19 August 2022.
- (7) The Tribunal proposes to dispense with a hearing in relation to any application for costs. The parties are to include any submission they wish to make in relation to this proposed order in any application or reply to an application for costs.

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

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