Civil and Administrative Tribunal

New South Wales

Case Name:	Jacques v S & J Harris Building Services Pty Ltd
Medium Neutral Citation:	[2023] NSWCATAP 10
Hearing Date(s):	5 September 2022
Date of Orders:	19 January 2023
Decision Date:	19 January 2023
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President L Wilson, Senior Member
Decision:	1. Appeal is dismissed. 2. The conditional stay order made on 14 July 2022, Order 10, is lifted. 3. The appellant must pay the respondent's legal costs of the appeal on the ordinary basis. 4. The orders made at first instance are affirmed with the proviso that if the parties cannot agree on the time by which order 2 is to be complied with by the Builder they have leave to apply to the Consumer and Commercial Division for appropriate orders, such application to be made within two months of the date of these orders.
Catchwords:	APPEAL – Home Building – Contract interpretation – APPEAL – Home Building - Exercise of discretion – Consideration of evidence
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Regulations 2014
Cases Cited:	Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd (2019) 99 NSWLR 419 House v R (1936) 55 CLR 499 Nelson v The Owners – Strata Plan No.49504; The

	Owners – Strata Plan No.49504 v Nelson [2020] NSWCATAP 194 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 Tom v Commissioner for Fair Trading [2022] NSWCATAP 303
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Theresa Jacques (Appellant) S&J Harris Building Services Pty Ltd (Respondent)
Representation:	Counsel: C Mobellan (Respondent) Solicitors: Beazley Lawyers (Appellant) Arch Law (Australia) Pty Ltd (Respondent)
File Number(s):	2022/00188229
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	01 June 2022
Before:	D Goldstein, Senior Member
File Number(s):	HB21/17092 & HB21/19049

REASONS FOR DECISION

Introduction

1 On 19 April 2021 the respondent (Builder) lodged an application against the appellant (Homeowner) for unpaid invoices in the amount of $21,784.76 (subsequently amended to a higher amount).

2 On 30 April 2021 the Homeowner lodged her original application against the Builder in which she claimed $120,000 for defective work.

3 On 13 and 14 December 2021 both applications were heard by Senior Member Goldstein.

4 On 1 June 2022 (subsequently amended on 14thJune 2022) Senior Member Goldstein handed down the decision in both applications (Decision). In summary, the orders made in the Decision were:

(1) In the Builder's claim the Homeowner must pay the Builder $30,759.81 (Order 1);

(2) In the Homeowner's claim the Builder must do the work listed in paragraphs [132] and [133] (Work Order);

(3) Homeowner must provide access for the Builder to do the works;

(4) Leave for Homeowner to renew the proceedings if the Work Order is not complied with;

(5) Directions about making a costs application.

5 On 28 June 2022 the Homeowner lodged this appeal. The appeal has been lodged within time.

Notice of Appeal and Reply

6 The Homeowner's grounds of appeal were written in the Notice of Appeal as follows (formatting added):

> Order 1 is challenged on the basis that:
>
> a. The Senior Member failed to properly construe the contract and mis-applied the facts to form the conclusion that the Owner had reduced the work of the Builder entitling him to compensation [27]-[33]. [The Senior Member] failed to appreciate the fact the owner had paid more than the contract sum. Consequenlt [sic] there cannot have been any loss to compensate.
>
> b. The Senior Member failed to give proper weight to the evidence in relation to the Owner's claims: the Senior Member gave no weight to the Owner's expert and failed to give proper weight to the evidence to form the conclusion at [127]. There was a leak. Fact. [T]here was water damage. Fact. The leak can only have been caused as a result of a failure to properly waterproof. Fact. The failure to properly waterproof the bathroom and the consequential damage caused to the ceiling and the walls ashould [sic] have been the subject of a rectification order.

7 The orders the appellant asked the Appeal Panel to make were described on the Notice of Appeal as follows:

> Order 1 be varied "The amount payable to the Builder was the admitted sum of $2,557.67 [8] to be paid after the Builder fixes the works in the owner's claim."
>
> Interest should not be payable until the builder has fixed its building works.
>
> Order 2 to include the fixing of the waterproofing of the bathroom and the fixing of the resulting damages done as a consequence.

8 The Builder opposes the Appeal and contends the orders made in the Decision should not be disturbed. In its Reply to Appeal the Builder wrote:

> The Appellant has not identified the relevant question of law and/or errors of law in relation to the alleged failure by the Tribunal to properly construe the Contract.
>
> …
>
> Save for the identified alleged errors of law, the Appellant has not identified any of the circumstances necessary for the grant of leave and leave to appeal should be refused…

The Appeal Hearing

9 Both parties were legally represented at the appeal hearing.

10 The Homeowner relied on a paginated, bound folder of evidence with 615 pages. The respondent (Builder) relied on its written submissions filed 24 August 2022 and its submissions dated 11 February and 18 February 2022 filed in the original proceedings. The Builder did not file any evidence on the appeal and referred instead to the bound folder of 615 pages that the appellant filed.

11 The Homeowner's representative briefly mentioned some fresh documents (documents filed for the first time on the appeal and not before the Tribunal below) in her Notice of Appeal but made no mention of them in her submissions. The representative did not ask for leave to rely upon any fresh documents and therefore did not explain the basis for their tender. The Builder's counsel opposed any fresh documents being filed on the appeal. Although an application was not made we refused leave for the Homeowner to rely on any fresh documents in the appeal so to the extent any of the 615 pages in the bound folder contains fresh evidence those were not considered by us.

12 The Homeowner explained there were two parts to the appeal: primarily that the Senior Member made an error of law by misinterpreting cl.14 of the

contract between the parties and secondly he made a “House v King” error by failing to take into consideration or give proper weight to the plumber’s evidence to prove the defect described in [93(d)] of the Decision and in paragraph 12(d) of the appellant’s submissions at first instance which are on page 459 of the folder.

Consideration

Ground 1 – whether the Member misinterpreted cl.14 of the Contract

13 On 12 February 2020 the parties entered into a Master Builder’s Cost Plus contract (Contract). A cost plus contract does not have a fixed contract sum but rather provides an estimate based on the contracted scope of works and contains provisions for how the Builder can charge the Homeowner for work which is carried out including works which are added or omitted from the Contract scope of works.

14 The Member described the estimated cost of works at [24] and the scope of works at [25], concluding “[i]t was logical given the design had not been developed or even commenced, that the parties entered into a cost plus contract”.

15 On 24 November 2020 the parties signed an agreement to amend the scope of works. The agreement described work carried out by the Builder and work to be the responsibility of the Homeowner, that is, reduced from the Builder’s scope of works (November Agreement): pages 131 -142 of the folder. The Builder subsequently used the formula in cl.14 of the Contract to seek compensation from the Homeowner for the reduction in the works performed under the Contract. That is the subject of this appeal.

16 The Homeowner admitted that she removed some works which the Builder was initially contracted to perform but denies that other works which are described in the November Agreement were ever the responsibility of the Builder.

17 The Builder claimed the Homeowner removed $302,850.06 worth of works from the Contract scope of works: Decision [32]. This comprised 16 items of omitted works listed in [32] of the Decision. The amount of $22,713.75 claimed by the Builder from the Homeowner (and awarded by the Tribunal) is 7.5% compensation calculated in accordance with cl.14 of the Contract. It was

initially $18,895 including GST but was amended during the hearing to $22,713.75: [18] Decision.

18 Invoice 661 is the claim for payment contested in this appeal. It was issued on 18 February 2021 in the amount $17,177.27 plus GST: page 83 of 615 of the folder. It describes "Compensation claim as per Clause 14(e) – Variations – Changes to the Scope of Works Post Contract… costings/quotings have been obtained to provide the estimate below. We note that this estimate is very conservative as the jobs/scope grew considerably from the initial Council drawings provided prior to the commencement of works. The estimate includes the following…"

19 Clause 14 of the Contract is as follows (page 108 of 615, emphasis in the original):

> **14. Variations – changes to the scope of works post contract date**
>
> (a) The works as initially understood at the time of contracting may be varied by:
>
> (i) the execution of additional work;
>
> (ii) changes in the character or quality of any material or work;
>
> (iii) changes in the levels, lines, positions or dimensions of any part of the works;
>
> (iv) deletions or omissions from the works.
>
> For the sake of clarity a variation is established by:
>
> - **written** instructions from the **Owner** or the **Owner's** representative; and or
>
> - the supply to the **Builder** of post contract details such as drawings; and or
>
> - the discovery of an otherwise unknown or latent condition,
>
> which alters the work done, the work to be done or requires adjustments to an existing situation or the work which was otherwise expected to be done.
>
> …
>
> **(e) Deletion or omission of work**
>
> If the **Owner** reduces the work to be done by the **Builder**, the **Builder** will be entitled, as compensation for the loss of work, to a payment which will be calculated as follows:
>
> (i) 50% of the percentage fee listed in **Schedule 1 Part B**,
>
> (ii) applied to the cost of the work now not required to be done,
>
> If a nominated lump sum is listed in **Schedule 1 Part B** then the percentage fee in **Sub-Clause (i)** will be treated as 20%.

> By way of example;
>
> - **Owner** instructs **Builder** in **writing** not to do x.
>
> - The fee at **Schedule 1 Part B** is 25%.
>
> - x costs or would cost the **Owner** $10,000 plus GST.
>
> - Compensation to the **Builder** is 50% x 25% x $10,000 = $1,250 plus GST.
>
> (f) **All Directions Concerning Work to be given to the Builder in writing**
>
> Neither the Owner nor any duly appointed representative will give or are entitled to give at any time directions to the **Builder's** workers or subcontractors concerning the works or any part thereof. All instructions are to be given to the Builder and are to be in **writing**.

20 The Senior Member considered the meaning of the words "If the **Owner** reduces the work to be done by the **Builder"** in [35] as followings:

> I find that this language means if the owner herself, or in the circumstances of this case by her interior designer Ms Georgia Gregory, acted either directly or indirectly to omit, reduce or diminish the work to be done by builder (meaning the work the builder was required to carry out under the contract) either by its own resources or by its sub-contractors or suppliers. The words "the work done by the builder" in the circumstances of these proceedings means any aspect of the work or the supply of materials that comes within the descriptions of work to be completed by the builder as described in Schedule 3 of the contract, or Notes 1 – 20 as stated in Sheet 1 of the architect's drawings as referred to at Schedule 3(c) of the contract. Given the broad descriptions of the work, I find that the work to be done by the builder as referred to in this contract is as a consequence, capable of a wide interpretation.

21 The Senior Member made findings of fact about the contracted scope of works at [25]:

> I find that because the work to be carried out was described generally in Schedule 3 of the contract and in the Notes to Drawings at Sheet 1 of the architect's drawings, the work to be carried out had not been designed as at 12 February 2020. If there were designs prepared, they were not referenced in the contract. There is also the fact that Schedule 3 of the contract did not refer to a specification. As a result of these factors it is my view that the estimate of cost could not be considered as anything more than provisional until such time as the design was developed. It was logical given the design had not been developed or even commenced, that the parties entered into a costs plus contract.

Appellant's submissions

22 The crux of the Homeowner's arguments was that the Senior Member was in error by not accepting the Homeowner's submissions made at first instance. Included in the folder on appeal were her submissions made below: pages

446ff. The Homeowner submitted that the correct interpretation of clause 14 is set out in her original submissions to the Tribunal below.

23 The Homeowner accepted that her interior designer Georgia Gregory was her agent and could vary the contract on her behalf. The issue argued in the appeal was that the instructions by the Homeowner herself or her agent Ms Gregory about varying the scope of works in the contract, in particular variations which reduced works, were not in writing and therefore cl.14 could not apply to those instructions.

24 The further submission was that the Senior Member made an erroneous finding of fact that $303,850 worth of work omitted from the Contract was work the Builder was contracted to perform. The Homeowner submitted that those works – listed in the Decision at [32] - were never part of the scope of works so were not “removed”, and therefore the Builder is not entitled to compensation under cl.14.

25 During the appeal hearing we asked whether the Homeowner’s submissions were that the November Agreement contained an implied term that the Builder would not rely on cl.14 to claim any compensation from the Homeowner for the reduction in the scope of works but the Homeowner confirmed this was not a submission she was making.

26 The Homeowner’s submission was that, while the November Agreement is entitled “Amendment to Scope of Works stamped plans – dated 15/1/2020” it was not a record of an amendment to the scope of works. Rather the Homeowner submitted that it was a document to confirm what works the Builder would carry out and what works the Homeowner would be responsible for, and this had not changed since the Contract had been entered into. The Homeowner then made a possibly contradictory submission that the Builder needed the November Agreement to confirm what work he was liable to insure and what work would be the Homeowner’s responsibility. If the Contract always established the work to be performed by the Builder and the work to be the responsibility of the Homeowner one must question why the November agreement was required at all.

27 The next aspect of the Homeowner's contention that the Senior Member misconstrued cl.14 did not appear in the Homeowner's written materials but was argued in oral submissions during the appeal hearing. The Homeowner's submissions were, variously, as follows (being extracts from the sound recording of the appeal hearing):

> HO solicitor: See, the contract provided for $750,000 worth of work. That's what the bargain was. For him to receive compensation he needs to show that the scope of work was substantially reduced such that he didn't receive $750,000 worth of work. Now the evidence shows he received $785,000 worth of work. That is what he received at the end of the contract. Now he now wants compensation for additional $300,000 worth of work. Now the bargain wasn't for a million dollars worth of work it was for $750,000 and he was paid $780,000. There is a fundamental requirement for compensation it should be that he received less than the bargain was, what the original agreement was.
>
> Deputy President: It seems to me clause 14 operates in this way; that you identify the scope of work originally as per the original date of the contact, identify facts that are said to lead to a reduction in that scope of works, and you put a value on that reduction, then you follow procedure to see if Builder gets compensation for the reduction in those items removed from the scope. It may be separate and apart from that the Builder got extra work because of other variations that added to the scope other words some things taken off other things added on. It seems to me the Member concentrating on the reduction part I am not sure I understand the relevance of looking at the contract sum overall, because the clause does not work in that vein.
>
> Sol: well it talks about compensation for things removed from the contract. The first thing you do is look at what the contract price was and look at what he was paid. That is a fair indication on whether or not one has reduced the scope of works.
>
> …
>
> Sol: the test to see whether or not he was entitled to compensation is whether he has made a loss.
>
> SM Wilson: Where does it say that?
>
> Sol: well sorry what do you mean where does it say that?
>
> SM: [started talking but sol cut off]
>
> Sol: I put it to you and I have said this is my submissions, he bargained for under the contract for $750,000 worth of work. He got $785,000 worth of work.
>
> DP: Is that because some variations increased the scope?
>
> Sol: I don't know you would have to go through every bill he ever invoiced. Fact is he says he invoiced $785,000. There were no new plans. There were no section 96 variations to the plans. It could only be from a result of work done based upon the original plans that he has billed and received $785,000. It has to be the purpose of section 14 of the contract that if the builder has agreed to do $1m worth of work but only gets paid half a million worth of work entitled to some compensation for the amount of work being reduced ...

> Nothing to compensate him here because he received what he received what he was always going to receive $750,000 plus a bit more.
>
> DP: That is fine so long as the scope remains static or is reduced, but your argument does not have any force if along the way there was some increase in the scope.
>
> Sol: Doesn't give evidence of an increase in scope. No evidence in increase in what he was asked to do. The only evidence is that he was asked to do less but that is not what the evidence shows. That is my submissions in respect of the first point.
>
> SW: Thank you.
>
> …
>
> [The following were submissions in reply]
>
> Sol: Now posing the question that you did to my friend Deputy President about the changing of the scope of work. If the contract required a straight staircase and half way through the build changed the scope of work to a spiral staircase does the Builder get the right to charge you for the work taken away - being the straight staircase, and add the cost of the spiral stair case or is the scope of works simply to provide a staircase. It would be ludicrous in my respectful submission that every um change to the type of work contemplated to change it to a different type of work it would be ludicrous to allow the Builder to charge you for what could have been and bill you for that compensate the Builder for that in addition charge you for what you actually did in replace of what you could have should have originally contemplated.
>
> SW: But that sort of variation requires the Builder's consent which is regulated by para 14(a)(b) and (c) [interrupted by sol] then have to look at what 14(e) directed to which is directed to work to be done. Seems to be concentrated on value rather than on things. Tentative view about that.
>
> Sol: That is why I put to you about the overall contract price or estimation is key to whether or not there is any compensation claimable because he was paid more than what he bargained for.

Respondent's submissions

28 The Builder provided extensive written submissions on the appeal in accordance with the Appeal Panel's directions of 14 July 2022. In large part they try to grapple with the imprecision of the grounds of appeal, exacerbated by the lack of written submissions on the appeal that were directed to be provided by the Homeowner by 3 August 2022 (Order 4(c)) but never done.

29 The Appeal Panel has read and considered the Builder's written submissions on appeal, many of which became redundant after the Homeowner confined her grounds of appeal during the appeal hearing. In relation to this first ground of appeal the Appeal Panel paid particular regard to the Homeowner's written

submissions at paragraphs 40 to 66 and its oral submissions at the appeal hearing.

Determination of first ground of appeal

30 Contained in the Homeowner's submissions made at first instance is a misunderstanding of the nature of a cost plus building contract. The Homeowner submitted, in her original submissions and during the appeal hearing, that there was an agreed price or a contract sum of $750,000. As the Senior Member below correctly explained at [24] a cost plus contract can only provide an estimate of the amount the homeowner will pay because the work is done according to the homeowner's instructions and a predetermined margin is applied. This is clear from reading the Contract. For example the $750,000 figure is written above the words "Estimated Cost of Works and Fees inclusive of GST pursuant to Schedule 1 Parts A and B": page 91 of the folder. At the top of the same page it is written "The Contract Sum or amount to be paid by the **Owner is not known as at the date of contract**. The amount of money payable to the **Builder** by the **Owner** is dependent upon the costs incurred by or payable by the **Builder** in carrying out work under the Contract". Lower down the page it continues "The amount to be paid by the Owner is and will be determined by reference to the contract and the work done by the Builder and the costs incurred by the Builder. This will be influenced by and subject to adjustment by reason of such things as…" thereafter many clauses are referred to including cl.14.

31 The Homeowner's submission that she paid more than $750,000 to the Builder goes nowhere because it is based on a misunderstanding of the terms of the contract.

32 To the extent the Homeowner submitted that the test to see if the Builder is entitled to compensation is whether the Builder made a loss, measured against the $750,000 estimate in the Contract, she is misconceived. The Appeal Panel asked the Homeowner's solicitor where that test came from and her solicitor was not in our respectful view able to answer the question. To be clear, "the test" as to whether the Builder is entitled to compensation under cl.14 is contained in cl.14 which contains provisions as to how compensation is to be

calculated. Clause 14 is not referrable to the estimated contract sum in this cost plus contract.

33 Further, the calculation of compensation payable to the Builder in cl.14 is based on the reduction of work to be performed under the Contract. The Builder does not have to prove or establish it suffered actual loss or damage from the reduction in the scope of works; cl.14 permits the Builder to charge 50% of the percentage fee in Schedule 1 Part B against the value of the removed work. The Homeowner's submission that cl.14 contains a proviso that overall the reduction in works cannot leave the Builder worse off or that the Builder can only claim compensation if it meets the "overall worse off" test which is performed by a comparison between the contract sum and the amount paid, is rejected. There is no basis for these assertions.

34 There is also no strength in the submissions that something is proved by the date the contested invoice – invoice 611 – was issued. The Homeowner suggested during the appeal hearing that the fact that the invoice for compensation under cl.14 was issued in February, some 12 weeks after the November Agreement was entered, proves that it was "a grab for extra money". There is no limitation period in the Contract preventing the Builder from claiming compensation pursuant to cl.14, for example a maximum number of weeks after the Homeowner reduces works to be performed under the Contract. No inference should be drawn about the 12 week period from the written variation to the issuing of the invoice for the variation. It was not a ground of appeal that the Member made an error by not drawing such an inference. These submissions are rejected.

35 At the appeal hearing, the Homeowner's' solicitor submitted that cl.14 does not apply if the parties mutually agree to vary the Contract, and it only applies where the Homeowner "takes work off the Builder". There was no authority provided to support this submission. The submission is not made out. Clause 14 speaks for itself; the variation of the scope of works must be in writing and this can include a written contract that both parties sign rather than a written demand by the Homeowner alone.

36 We find no error in the way the Senior Member interpreted cl.14. The clause required the Senior Member to first establish what was the Builder's scope of works in the Contract. He did that in [21], [22] and [35] of the Decision and the Appeal Panel finds no error in those factual findings. The Member's findings in this regard are consistent with cl.14(a) which states "a variation is established by … the supply to the Builder of post contract details such as drawings… which alters… the work to be done".

37 Next the Member must be satisfied the Homeowner reduced the work to be done by the Builder: see [28],[31] and [44] of the Decision. The Senior Member found on the evidence before him that each of the 16 items listed in [32] were included in the scope of works and were reduced by the Homeowner, entitling the Builder to charge 7.5% to the cost of the work not required to be done by the Builder. The Senior Member explained the factual basis for finding each of the 16 items were removed from the scope of works, including at [38] the reference to the Homeowner's statement in which she said the variation of the Contract was to make it very clear "that it was no longer part of the Builder's contract". In other words, the scope of works was reduced. The Senior Member also analysed the November Agreement as an amendment to the scope of works, as it was described by the parties, at [39] to [42]. Further the Senior Member made reference to admissions by the Homeowner "that work was removed from the Builder's scope of work" at [43]. Of the 16 "removed" items listed in [32] the Senior Member found the Homeowner admitted ten were removed from the Contract. The remaining six were listed in [46] of the Decision.

38 The remaining six items which the Homeowner did not admit were removed from the Contract were considered by the Tribunal at [46] to [74]. The Tribunal found some of the remaining six items were part of the Builder's scope of works and were removed from the Builder's scope of works such that cl.14(e) applied. The Tribunal found some of the items had never been part of the Builder's scope of works and thus could not be removed from the scope of works so that cl.14(e) did not apply. Ultimately the Tribunal found the Builder was entitled to $22,042 plus GST, not $22,713 plus GST.

39 The Homeowner has not established that the Tribunal made an error in construing cl.14 of the Contract or in the application of that clause to the findings of fact. The Homeowner's submission that the starting point in calculating compensation under cl.14 is "the agreed scope of works contained at the commencement of the Contract and contained in the Contract price" is rejected. Subclause 14(a) makes it plain that "the works as initially understood at the time of contracting may be varied" and "a variation is established by the supply to the Builder of post contract details such as drawings". A contract may be varied to include more works, and it can also be varied to reduce the scope of works. Secondly, as already set out in these reasons, this cost plus Contract did not contain a "Contract price" and there was not a static scope of works attached or connected to a "Contract price". There was merely an estimate of the amount payable by the Homeowner under the Contract, as the "amount to be paid by the **Owner is not known as at the date of contract"**. As the Contract explained, the amount of money payable to the Builder by the Owner is dependent upon the costs incurred by or payable by the Builder in carrying out work under the Contract. The estimate of costs payable by the Homeowner had no bearing on the Builder's entitlement to compensation pursuant to cl.14 and to the extent the Homeowner submitted the cost estimate did have a bearing on the calculations in cl.14 she is in error.

40 The Builder's submissions are in our view correct. Page 100 of the folder is Schedule 3 of the Contract. Schedule 3 clause (a) described the work to be completed by the builder and contained a list of eleven bullet points, such as "relocate bathroom upstairs". Clause (b) in Schedule 3 asked "Is any aspect of the work set out in the contract drawings and specifications excluded from the contractual work?" and the "No" box was ticked. This is the agreed scope of work as at the Contract date; a very broad range of renovation building works with no aspect of the work excluded. The Builder referred to the Homeowner's oral evidence at page 519 of the folder at line 2368 of the transcript in which the Homeowner acknowledged what is written at schedule 3.

41 The Builder further drew our attention to the homeowner's acceptance that "the contract scope and drawings and specifications could be amended throughout

the works, just as we've read in the previous passages" at page 519 of the folder at line 2393.

42 The next "pre-requisite to an entitlement to compensation pursuant to Clause 14(e)" in the Homeowner's submissions is "that the Owner instruct the builder in writing to reduce the scope of works": page 446 of the folder. Each of the 16 reductions in works claimed by the Builder were included in the November Agreement which was an agreement to amend the contract scope of works. The requirement for the variation to be in writing was met. The Homeowner's submissions about who prepared the November Agreement and the purposes behind the Builder preparing it are irrelevant to the determination of whether the Builder is entitled under cl.14(e) to claim compensation.

43 The third and final "pre-requisite to an entitlement to compensation pursuant to Clause 14(e)" in the Homeowner's submissions is "the builder would otherwise have been entitled to a builder's margin under clause 17": page 446 of the folder.

44 The Homeowner repeated this submission during the appeal hearing that the Builder was only entitled to payment under the Contract if the circumstances described in cl.17 were met. Clause 17 describes the calculations relevant to the Builder's claim for payment from the Homeowner for the cost of works, materials and supervision of subcontractors. That is for work carried out by the Builder. Clause 14 establishes a contractual right for a Builder to claim compensation for works performed because of variations made to the original scope of works. Subclause 14(d) provides that the "cost of all work arising from any such variation is a cost of the works payable by the Owner and is to be valued and paid as such". One then refers to cl.17 for the calculation of that payment.

45 Clause 14 also establishes a contractual right for a Builder to claim compensation for works the Builder was entitled to carry out under the Contract but which were removed by the Homeowner. Clause 14(e) applies to work the Builder does not perform but could have if the Homeowner did not vary the scope of works. Clause 17 has no bearing on the calculation for compensation for work removed by the homeowner as cl.17 concerns work the Builder did

perform. To be clear, the Builder can claim a contractual right to payment from the Homeowner pursuant to cl.14(e) and this stands apart from any claim the Builder may have for work performed pursuant to cl.17. One does not depend on the other.

46 The Appeal Panel finds no error in the Member's interpretation of cl.14 and this first ground of appeal is dismissed.

Ground 2 – whether the Member made a "House v The King" error

47 This ground concerns the findings by the Senior Member in the Decision at [118] to [127] which includes:

> **Failure properly to waterproof the floor where pipes are located, beneath the bathroom floor, under tiles and failure to seal around the bath tap where it joins the floor**
>
> [118] The Rescue U Plumbing document does not establish that the builder failed properly to waterproof the floor where pipes are located, beneath the bathroom floor and under tiles. The builder's written response to annexure G of the owner's statement makes no admissions in relation to these issues.
>
> [119] As stated on 21 August 2020 Damp Busters provided certificate 2339 to the builder certifying that it had waterproofed among other things the ground floor laundry area and bathroom and a bathroom (1 off) and balcony on the first floor. There were two bathrooms included in the builder's scope of work, refer [21(2)] and [21(6)] hereof. I am satisfied that the certificate refers to the ground floor and first floor bathrooms.
>
> [120] I find that the cross examination of the builder did not establish that the builder failed properly to waterproof the floor where pipes are located, beneath the bathroom floor or under tiles, or secure an admission to that effect.
>
> [121] I find that the owner has not established that there was a failure by the builder to waterproof the floor where pipes are located, beneath the bathroom floor or under tiles. I accept that the builder's subcontractor Damp Busters certified that it had waterproofed among other things, the first floor bathroom and that there is no evidence to suggest that the waterproofing was deficient.
>
> [122] I find that the compelling inference to be that it was the owner's plumber Rescue U Plumbing who did the work to install the bath tap in the upstairs bathroom, a photograph of which is to be found at 296 of exhibit A… In Rescue U Plumbing's invoice 12462 they state that they sealed the penetration in the upstairs bathroom on 19 October and noted the need to install taps once stone was in. This evidence establishes that Rescue U Plumbing did the work to install the bath tap in the upstairs bathroom, as referred to and described by Mr Harris, above. If there is any doubt about this, such doubt is dispelled by the owner's evidence in cross examination that the plumbing work was to be carried out by her plumber dealing directly with her…
>
> [The Senior Member quotes parts of the Rescue U report]
>
> [125] This statement by Rescue U Plumbing which seeks to make the builder responsible for this defect suffers from a deficiency that the builder's

> instruction allegedly given has not been identified, nor has the way in which the mixer was installed, purportedly in compliance with such instruction, been described. In his statement of 7 July 2021 at [83] Mr Harris on behalf of the builder states that the plumber's statement as extracted above is totally incorrect and did not happen. He refers to annexure K which he states establishes that the mixer was installed at the rough in stage. A colour photograph of annexure K is at page 289 of exhibit A, which shows the mixer having been installed at preliminary stage of the bathroom construction process before the bathroom floor was placed into position. I find that it was Rescue U Plumbing who did the relevant work…
>
> [127] Based on the reasons provided I find that the owner has failed to establish that the builder failed to seal around the bath tap where it joins the floor as alleged by her in her final written submissions. I also for the reasons provided reject the opinion provided by Rescue U Plumbing as referred to at [93] above.

48 Earlier in the reasons the Member explained the Homeowner's claim including what she sought, and that she bore the onus of proof. The Member went on to assess the Homeowner's evidence in the following way, at [91] and [92]:

> [91] The owner did not follow the usual course and engage an appropriately experienced and qualified building expert to prepare a report on defects. As stated, I do not accept her evidence regarding the causes of building defects. The owner relies on a document provided by her plumbers, Rescue U Plumbing Sydney which is at pages [402 and 403 of 615 on the appeal]. It is common ground that Rescue U did the plumbing work at the premises. They were engaged directly by the owner and paid by her. The Rescue U document at page 353 is relied upon by the owner as an expert report. The document does not comply with the NCAT Procedural Direction 3 that relates to expert evidence in the Tribunal. The author of the document is not identified and the experience and expertise of the author have not been stated. There is also the issue that Rescue U did plumbing work at the residence. The report does not make it clear what work was carried out by Rescue U and the issues which it was asked to investigate at the premises. The Rescue U document raises the following issues…
>
> [92] Mr N. Wilson of Rescue U Plumbing gave evidence at the hearing. Mr Wilson said that Mr White prepared the report, but he did the investigation work with Mr White. Mr Wilson stated that he is a licensed plumber and had a renovator's license. He confirmed that Rescue U did the plumbing work at the premises. I will accept the Rescue U report into evidence, but I will be careful with the weight that is to be given to its findings or conclusions.

49 This ground of appeal was difficult to understand. It changed from the way it was written on the Notice of Appeal to the way it was argued at the appeal hearing. The Homeowner never stated whether she contended this ground of appeal was an error of law or a ground for which she required leave to appeal. The appellant did tick "yes" to the question "Are you asking for leave?" on page 3 and again on page 4 of her Notice of Appeal. Under the heading "Decision not fair and equitable" the appellant attempted to reargue the case that she put

to the Senior Member below which he had rejected for reasons given at [91]-[92] and [118]-[127]. An appeal does not provide a losing party with the opportunity to run their case again except in the circumstances specified in s 80(2)(b) and cl12 sch 4 of the Civil and Administrative Tribunal Act 2013 NSW (NCAT Act) : *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10].

50 Under the heading "Decision of the Tribunal against the weight of evidence" on page 5 of the Notice of Appeal, the appellant merely wrote "The tribunal should have given more seight [sic] to the Rescue U plumber's report and oral evidence".

51 Internal appeals against an internally appealable decision may be made as of right on a question of law, or with the leave of the Appeal Panel, on any other grounds: s 80(1) and (2) of the NCAT Act.

52 An appeal in relation to the miscarriage of the exercise of a statutory discretion relating to practice and procedure under the NCAT Act in the sense of *House v R* (1936) 55 CLR 499 (*House v The King*) at 504-5; [1936] HCA 40 raises a question of law: see, for example, *Tom v Commissioner for Fair Trading* [2022] NSWCATAP 303 at [87]. Otherwise leave to appeal must be sought: *Nelson v The Owners – Strata Plan No.49504; The Owners – Strata Plan No.49504 v Nelson* [2020] NSWCATAP 194 at [42].

53 In *House v The King* at 504-5 Dixon, Evatt and McTiernan JJ stated:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

54 In *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419; [2019] NSWCA 61 Bathurst CJ and Leeming JA at [9]-[10] explained the nature of the error when a decision "is unreasonable or plainly unjust" in the following terms:

> [9] It is one thing for the reasons given by the primary judge to disclose appellable error. If so, that is addressed by the formulations of principle in the first half of the passage from *House v The King*. That is not an end of the matter. There may be cases where the reasons do not disclose why the impugned orders were made. In such cases, even though no error of principle or other well recognised basis for appellate intervention may be discerned on the face of the reasons, an appellate court may nonetheless intervene. The reason is that it may be inferred in light of the result that there was appellable error in the unstated reasons which led to the order. This is plain from the passage when read as a whole:
>
> > "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred." (House v The King at 505)
>
> [10] It is wrong to seek to apply the references to "unreasonable or plainly unjust" in that passage in isolation. The premise of this aspect of the test in *House v The King* is that the reasons do not explain the result reached.

55 It is fundamental that deference is to be given by an appellate court to the discretionary decisions of judges at first instance, insofar as it is insufficient for the appellant merely to persuade the appellate court that it would have decided the matter differently: *AHNA* at [13], [18]-[19] (per Bathurst CJ and Leeming JA).

56 As it appears the appellant's second ground of appeal is an allegation that the Member acted upon a wrong principle or did not take into account some material consideration (the Rescue U plumbing report) and that upon the facts the decision is unreasonable or plainly unjust, the Homeowner is therefore raising an error of law.

Appellant's submissions

57 We asked the Homeowner's representative how the Homeowner could maintain the argument that the Senior Member did not take into account the Rescue U plumbing report when he plainly did. The Senior Member extensively

explained why he accepted the Rescue U report into evidence but would be careful with the weight to be given to its findings or conclusions. The Homeowner answered that while the Senior Member had regard to the report, and admitted the report into evidence, and wrote detailed paragraphs about the report, the Senior Member did not refer to every sentence within the report in his Decision. The Homeowner essentially submitted that unless a member refers to every sentence in a report, even if that report has deficiencies leading the member to be cautious about how much weight to attach to it, the member will make a *House v The King* error if the member does not refer to every finding and conclusion within the deficient report.

58 The Homeowner did not make any submissions which explained how the Senior Member applied the wrong principle when deciding to place little weight on the Rescue U Plumbing report.

Respondent's submissions

59 The Builder's written submissions on this ground were covered in paragraphs 67 to 72 and elsewhere. Oral submissions were also made at the appeal hearing which included that if the Homeowner contends that the Senior Member made an error of fact leave to appeal is required and no leave has been sought. The Builder submitted that the Rescue U Plumbing report stated that there was no waterproofing around the hole in the floor whereas Damp Busters gave evidence that they did install waterproofing and the Senior Member preferred the evidence of Dump Busters: Decision at [121]-[127].

60 The Builder spent some time during the appeal hearing taking us to oral and documentary evidence that was before the Tribunal which supported the Member's conclusion at [127] that "the owner has failed to establish that the builder failed to seal around the bath tap".

Determination of second ground of appeal

61 The Builder's contention that the Senior Member did not take into account some material consideration (the Rescue U Plumbing report) is not established. The Member clearly took into account the Rescue U Plumbing report. There was no error in the Senior Member analysing the report and

concluding that little weight should attach to it and that it was not a persuasive piece of evidence.

62 We are not satisfied that the Decision is unreasonable or plainly unjust. The Member's findings and conclusions are sound and no error has been demonstrated in the sense referred to in House v King (or at all).

63 This second ground of appeal must fail also.

64 If the Homeowner was raising a ground of appeal for which she needs leave, she has not explained why leave should be granted and leave is refused. We also agree with the submissions of the Builder in its written submissions setting out why leave ought not be granted. However, for the preceding reasons, we are of the view the Homeowner was only raising an error of law in this second ground of appeal.

Costs of the appeal

65 During the appeal hearing both parties indicated they wanted an order for costs of the appeal in their favour, should they be successful. Both parties contended Rule 38 of the Civil and Administrative Tribunal Rules applied on the appeal as it did below, and we agree. That is both parties accepted costs should follow the event. The Homeowner has been unsuccessful and the appeal must be dismissed The Homeowner must therefore pay the Builder's costs of the appeal on the ordinary basis.

Further matter raised on appeal – time to comply with Order 2 in the Decision

66 We raised the issue of the work order (Order 2 in the Decision) not having a compliance period. We said during the hearing, and repeat in these reasons, that that can be amended by the Tribunal if the parties consent to amend Order 2, in accordance with regulation 9 of the NCAT Regulations. Order 4 appears to indicate the Tribunal meant to include a compliance period but omitted to do so. Such an irregularity should be corrected. In the absence of consent the parties have leave to make application to the Consumer and Commercial Division of the tribunal for appropriate orders.

67 We make the orders listed on the cover page of this decision.

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