



Civil and Administrative Tribunal New South Wales

Case Name: **Patel v Globe Ventures Aust Pty Ltd**

Medium Neutral Citation: **[2024] NSWCATCD**

Hearing Date(s): 16 February 2024; submissions to 2 May 2024

Date of Orders: 12 December 2024

Date of Decision: 12 December 2024

Jurisdiction: Consumer and Commercial Division

Before: G Sarginson, Deputy President

Decision:

- (1) The respondent, Globe Ventures Aust Pty Ltd, is to pay the applicant Dhara Chintan Patel, the amount of \$1,120 immediately.
- (2) The respondent, Globe Ventures Aust Pty Ltd, is to perform rectification work to the applicant's residence in respect of Item 2 (water leak to garage) and Item 3 (front façade misaligned) as set out in the scope of works for each of those defect items contained in the report of Mr Gordon Xue dated 23 August 2023 (set out in Annexure A to this decision). Such work is to be completed by 4 months from the date of this decision.
- (3) The work in order 2 above is to be performed by suitably licensed persons exercising due care and skill.
- (4) The applicant's claim for rectification of defective work is otherwise dismissed.
- (5) The applicant is to give the respondent and any employees or sub-contractors of the respondent reasonable access to the premises to perform the work.
- (6) The issue of costs is to be determined as follows:

(a) The applicant is to file with the Tribunal and serve on the respondent, by person or by post and additionally by email, all costs submissions and documents by 24 January 2025.

(b) The respondent is to file with the Tribunal and serve on the applicant, by person or by post and additionally by email, all costs submissions and documents by 7 February 2025.

(c) The applicant is to file with the Tribunal and serve on the respondent, by person or by post and additionally by email, any costs submissions in reply by 14 February 2024.

(d) The costs submissions of the parties are to include whether they agree to an oral hearing on the issue of costs being dispensed with under s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) and if not, why not.

(e) Either party may apply in writing to the Tribunal (with a copy sent to the other party) to extend or vary the procedural directions for costs submissions.

(f) Subject to consideration of the submissions of the parties the Tribunal may determine the issue of costs on the papers and without a further oral hearing.

Catchwords: BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – breach of statutory warranties – whether established – whether work order or damages appropriate remedy – s 48MA Home Building Act 1989 (NSW)

Legislation Cited: Australian Consumer Law 2010 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)
Fair Trading Act 1987 (NSW)
Home Building Act 1989 (NSW)

Cases Cited: Bellgrove v Eldridge [1954] HCA 36; (1954) 90 CLR 613
BuildPlatinum v Micalfeff [2021] NSWCATAP 129
Catapult Constructions Pty Ltd v Denison [2018] NSWCATAP 158
Deacon v National Strategic Constructions Pty Ltd; National Strategic Constructions Pty Ltd v Deacon [2017] NSWCATAP 185

Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23
Leung v Alexakis [2018] NSWCATAP 11;
Lieschke v Lieschke [2023] NSWCA 241
Petropoulos v CPD Holdings Pty Ltd t/as The Bathroom Exchange [2018] NSWCATAP 72
Petropoulos v CPD Holdings Pty Ltd t/as The Bathroom Exchange [2019] NSWSC 897
Reprefix Industries Pty Ltd v FBD Group [2020] NSWDC 514
Robinson v Hindmarsh Construction Australia Pty Ltd [2021] NSWCATAP 51
Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344
Shakiri v Holland [2024] NSWCATAP 28
Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd [2009] HCA 8 [17]; (2009) 236 CLR 272
Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd [2017] NSWCA 27
Wheeler & Anor v Ecroplot [2010] NSWCA 61
Williams v McFarlane [1996] NSWCA 559

Texts Cited: NSW Fair Trading Guide to Standards and Tolerances 2017

Category: Principal judgment

Parties: Dhara Chintan Patel (Applicant)
Globe Ventures Aust Pty Ltd (Respondent)

Representation: Solicitors:
Birch Partners (Applicant)

File Number(s): 2023/00393587

Publication Restriction: Nil

REASONS FOR DECISION

- 1 This is a dispute between an owner (the applicant) and a builder (the respondent) under the *Home Building Act 1989* (NSW) (HBA).
- 2 Primarily, the dispute involves alleged breaches of the statutory warranties under s 18B of the HBA.

Background

- 3 The parties entered into a written residential building contract on 8 October 2020 in the standard form drafted by the Housing Industry Association. The contract was to construct a freestanding 2 story new 3 bedroom dwelling. The contract price was \$590,000, subject to variations and adjustments for prime cost and provisional sum items.
- 4 The owner's husband, Chintan Patel, was involved in various negotiations with the builder. He was also a party to the contract. He has not been identified as a co-applicant to the proceedings, or any application made to join him as a party. However, Ms Patel, as a party to the contract, has standing to bring proceedings in the Tribunal.
- 5 The house was constructed between approximately February 2021 and October 2022.
- 6 On 18 October 2022, the private certifier issued an interim occupation certificate and the owner took possession.
- 7 In late April 2023, the owner sent the builder an email stating that "landscaping was now complete" and enquiring from the builder how to obtain a final occupation certificate. External landscaping works were not part of the scope of works under the contract between the parties.
- 8 On 4 May 2023, the final occupation certificate was issued by the private certifier.

- 9 There is no contractual dispute between the parties that the owner paid the builder all sums owing under the contract. The owner paid the builder a total amount of \$647,997.59 for the building works.
- 10 On 29 May 2023, the owner commenced proceedings in the Tribunal. The owner was self-represented in the proceedings at that stage.
- 11 The application filed by the owners sought “work or services to the approximate value of \$100,000”. The owner identified a “serious waterproofing issue.” According to the owner, the builder had “failed to properly drain the slopy (sic) land” which had led to “water in the garage every time when it rains since handover day (19 October 2022)”. The owner also identified:
- (1) Water “leaking from (sic) the side of the house” (near the laundry side) “when we do watering in the backyard.”
 - (2) Water leaking “from” (sic) the upstairs bedroom, which was first noticed on 15 May 2023.
 - (3) The façade at the front of the house was “not constructed as per design.” The owner asserted that this had been “brought to the attention” of the builder “from early stage (sic)” but the owner had not “reached agreement” to “fix” the façade because “of other important and urgent issues/defects arises (sic) and not fixed yet.”
 - (4) The upper floor wooden flooring was not level.
- 12 There were other “defects” that the owner had reported to the builder but they were not repaired; or not repaired adequately. The owner identified the alleged building defects that the owner had listed and sent to the builder on 18 April 2023. 15 items were listed. Some of those items were minor in nature (e.g. repairing a loose toilet holder in the guest bathroom).
- 13 On 11 July 2023, the matter was listed for a directions hearing at the Tribunal. The owner appeared; and Mr Gupta (an employed manager of the builder)

appeared. The Tribunal made procedural directions for the filing and serving of Points of Claim; Points of Defence; lay evidence; and expert evidence.

- 14 On 12 September 2023, Mr Birch Solicitor wrote to the Tribunal and the builder stating that his firm was acting for the owner and sought leave to appear (s 45 *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act)).
- 15 On 10 October 2023, the proceedings were listed for directions. Mr Birch appeared for the owner and Mr Gupta appeared for the builder. The Tribunal made procedural directions granting both parties leave to be legally represented in the proceedings and gave written reasons.
- 16 The Tribunal also granted leave for the owner to rely on Points of Claim and lay and expert evidence filed on 29 September 2023.
- 17 The lay and expert evidence that had been filed on 29 September 2023 by the owner in addition to the Points of Claim relevantly included:
 - (1) A witness statement of the owner dated 29 September 2023.
 - (2) A building consultant expert report of Mr Gordon Xue (Jim's Building Inspections) dated 23 August 2023. The report of Mr Xue contained a Scott Schedule. Five (5) defect items were identified.
- 18 The defect items identified by Mr Xue were as follows:
 - (a) Item 1-Front columns not plumb.
 - (b) Item 2-Base of garage seeping water to the internal area of the garage.
 - (c) Item 3-First floor front façade not aligned with the ground floor façade.
 - (d) Item 4-Stair landing not levelled.

(e) Item 5-Bedroom 3 timber floor not levelled.

- 19 Mr Xue identified in his report that the total cost of rectifying the above defects was \$253,823.
- 20 A USB key was filed with the statement of the owner, with various videos and photographs.
- 21 On 27 November 2023, the builder filed and served an expert report of Mr Dipak Patel (no relation to the owner or her husband).
- 22 The report of Mr Patel comprises 15 pages, plus 25 pages of annexures.
- 23 Mr Patel identifies his qualifications (relevantly) as licensed builder and member of “Engineers Australia.” Mr Patel asserts that he was provided with instructions by Mr Gupta; and “conducted inspections with a group of witnesses” being Mr Vrajesh Patel (“qualified carpenter and foreman”); Mr Ravji Kerai (“qualified carpenter and structural expert”) and Mr Garry Singh (“structural engineer and stormwater engineer”).
- 24 Mr Patel assert that he has read, and agrees to be bound by, the NCAT Expert Witness Code of Conduct (Practice Note 3).
- 25 Mr Patel’s report attaches an “stormwater expert witness report” of Global Consulting Engineers, and other documents.
- 26 Mr Patel asserts that, other than the first floor stair landing and the bedroom 3 floor not being suitably level there were no issues. The costs of rectification works to the first floor stair landing and bedroom 3 were insignificant (a total of \$2,500 inclusive of GST) as only minor works were required to rectify the defects.
- 27 In December 2023, the builder filed and served a further expert report of Mr Kumar of Global Consulting Engineers Pty Ltd. The report is dated 5 December 2023. In the report, Mr Kumar states he holds “a current qualified Structural,

Civil and Drainage Engineering Certificate:” and is a member of the “Institution of Engineers, Australia.” He states that he has read the NCAT Expert Witness Code of Conduct.

- 28 Mr Kumar asserts that it is the landscaping work engaged by contractors for the owner who has caused any inadequate drainage problems; and that the builder complied with the plans and specifications and Australian Standards. However, Mr Kumar recommended extra absorption trenches be installed around the rear landscaped area to assist drainage of surface water, and set out a scope of works on p 8 of his report.
- 29 In February 2024, the builder filed and served an expert report of Mr Connell (Precision Builders Australia). Mr Connell is a licensed builder and building consultant. His report dated 1 February 2024 states that he has read and understands the NCAT Expert Witness Code of Conduct. Mr Connell refers to the report of Mr Xue, and the most of the defect items identified in Mr Xue’s report. Mr Connell does not refer to the external drainage issue. However, Mr Connell refers to the purported defects in respect of the front external columns; the front external façade; the first floor; and the floor of bedroom 3. Mr Connell asserts that none of those work items are defective.

THE CLAIM

- 30 The Points of Claim filed and served in September 2023 identify the owners cause of action as breach of statutory warranty under s 18B of the HBA. It is pleaded that the date of completion of the works pursuant to s 3B of the HBA is 4 May 2023 (i.e. the date of the final occupation certificate, as distinct from the date of the interim occupation certificate; or the date the owners took occupation; or the last date the builder performed work on site).
- 31 The Points of Claim identify that the owner is seeking damages “not limited to”:
- (a) The costs of rectifying “defective contract works;”
 - (b) Costs (sic)

(c) Interest (sic)

32 The matter was listed for a 1 day special fixture hearing at the Tribunal in Penrith on 16 February 2024.

33 Proximate to the hearing, the owner filed and served an outline of written submissions dated 14 February 2024 prepared by her Solicitor.

34 The outline of submissions did not formally seek leave to amend the application or the Points of Claim. The outline of submissions stated that the owner was seeking:

(1) An order that the builder rectify the defects as identified in the report of Mr Xue.

(2) An order that the builder pay “relocation costs” of the owner and her family whilst rectification work is performed.

(3) An order for costs.

35 The builder, although not legally represented, filed and served a written outline of opening submissions.

36 Relevantly, the builder submitted:

(1) The measurements taken by Mr Xue of the front columns were incorrect.

(2) Soon prior to handover on 18 October 2022, the owner complained to the builder of water ingress into the garage behind a wall. The builder had constructed the stormwater system according to the plans and engineering detail. The owner’s landscaping works (including the construction of paths in the side yard; a large concrete slab; and concrete steps) had failed to redirect order to the surface drains provided by the builder. The owner had “also created new surface drains with agg (sic) lines.” The owners landscaping works, rather than any defective

works by the builder was the sole cause of any water ingress into the garage.

- (3) In respect of the front façade, the change was required to accommodate the box cutter and drain, which was “communicated to the client both verbally during the site meeting as well as via a What’s App message on 8 February 2022”. Further, the front page states “illustration only, actual may differ from image.” The builder also relied upon the opinion of Mr Connell that the purportedly misaligned front façade was not a defect requiring rectification.
- (4) In respect of the first floor stair landing, the builder submitted that the NSW Fair Trading Guide to Standards and Tolerances relied upon by Mr Xue was a guide only, and the floor complied with the National Construction Code. The builder relied upon the expert opinion of Mr Connell that there was no defect.
- (5) In respect of the bedroom 3 flooring, the builder submitted that there was no defect, and again relied upon the expert opinion of Mr Connell.
- (6) The builder submitted that but no basis for making an order for damages due to the cost of relocation whilst rectification works is being performed, as there were no defects.

37 The matter was listed for hearing at the Tribunal on 16 February 2024. Mr Birch, solicitor, appeared for the owner. Mr Gupta, manager, appeared for the builder.

38 No joint expert report had been prepared in the proceedings. The Tribunal had not directed a joint expert report be prepared. The reason for that is set out in the directions of Wilson SM dated 28 November 2023. In those directions, it was stated that the purported expert evidence of the builder involved employees of the builder, and there was no purpose in ordering a joint expert report. However, as discussed previously, the builder had subsequently filed

and served an expert report of Mr Connell, who is not an employee of the builder.

39 Neither party sought an adjournment of the hearing. The Tribunal gave the parties the opportunity to raise any adjournment application, or issue that would lead to an adjournment application, and made clear that if an adjournment application was made it would be considered and dealt with after hearing submissions from the parties. No adjournment application was made.

40 At the commencement of the hearing, the Tribunal confirmed the orders that were sought and the evidence each party relied upon. In circumstances where the Tribunal has the power under s 48O of the HBA to make a work order; and s 48MA of the HBA identifies that a work order is the preferred option if defective work in breach of the statutory warranties under the HBA has been found, the Tribunal allowed the owner to formulate her claim the basis that the owner was seeking a work order; and consequential loss damages for the cost of moving out of the residence whilst rectification work was performed. Arguing the claim in this manner did not prejudice the builder, as it did not affect the evidence that the parties were relying upon; and the issue of what orders, if any, should be made based upon factual findings arising from the evidence was a matter of legal argument.

41 At the hearing, the Tribunal identified the documentary evidence that the parties would be seeking to rely upon. The owner's solicitor had prepared a tender bundle. That tender bundle included the statement of the owner; the expert report of Mr Xue; the report of Mr Kumar dated 5 December 2023; and the report of Mr Connell.

42 The owner also sought to rely upon various short videos contained on a USB key (which had been filed and served in accordance with Tribunal directions); and 8 photographs that have been taken by the owner on 14 February 2024. Those photographs, in particular, related to the issue of water ingress into the garage.

- 43 The builder also sought to rely upon the statement of Mr Patel dated 24 November 2023. Although that statement was not, in the view of the Tribunal, an independent expert report compliant with the NCAT Expert Witness Code Of Conduct, it was a statement that Mr Patel could be cross-examined upon, and contained information that may have been relevant to making factual findings to determine the real issues in dispute (s 38 of the NCAT Act; *Shakiri v Holland* [2024] NSWCATAP 28).
- 44 Accordingly, the statement of Mr Patel was admitted into evidence subject to weight and relevance.
- 45 The documents in the joint tender bundle; the USB key; and the photographs taken by the owner; or admitted into evidence, subject to weight and relevance.
- 46 At the hearing, the owner was cross-examined by Mr Gupta.
- 47 Mr Xue, Mr Connell and Mr Kumar were directed to prepare a joint expert report, setting out areas of agreement and disagreement, prior to them giving joint expert evidence. A handwritten report was prepared by Mr Xue, and signed by the experts. Mr Xue and Mr Kumar dealt with the issue of water ingress into the garage. Mr Xue and Mr Connell dealt with the other defect issues.
- 48 Accordingly, the experts were questioned by Mr Birch and Mr Gupta on all relevant issues, including the extent to which, if any, they agreed with each other about the issues including: (a) defects; (b) method of rectification.
- 49 Mr Birch did not require Mr Patel for cross examination.
- 50 At the completion of the hearing, it was agreed between the parties that, if the Tribunal awarded damages for the cost of the owner and her family moving out of the residential premises whilst rectification work was being performed, the appropriate daily amount was \$120 per day. The witness statement of the owner dated 29 September 2023 did not provide any evidence quantifying the cost of alternative accommodation, or identifying what would be appropriate

alternative accommodation whilst rectification work (if found) was being performed. However, Mr Xue referred to that issue in his expert report (at p 32).

51 At the conclusion of the hearing, the Tribunal reserved its decision, and made procedural directions for both parties to file and serve written submissions (including submissions in reply). The Tribunal did not direct the parties to provide a written transcript. However, parties were directed that, if the submissions referred specifically to oral evidence given at the hearing, they must identify the time the evidence was given in the audio recording of the hearing.

52 The owner provided written submissions in chief dated 11 March 2024.

53 The builder provided written submissions in chief dated 12 April 2024. The builders written submissions (which comprised of 32 pages) also included further evidence that the builder sought to rely upon.

54 The fresh evidence of the builder was an inspection report of Paragon Building Certifiers dated 11 March 2023. That inspection report indicated the footings and slab were “satisfactory,” subject to “documents been provided.” The second piece of evidence was a very brief statutory declaration from Mr Patel dated 10 April 2024. That statutory declaration asserted that Mr Patel “did not fulfil the role of a supervisor for the works,” and did not receive any payment from the owner.

55 The Tribunal has not admitted this fresh evidence. To allow such evidence to be taken into account after the conclusion of the hearing would be obviously procedurally unfair to the owner. The builder was directed to file and serve all of the documentary evidence it was relying upon prior to the hearing. In substance, the builder was seeking leave to reopen its case to rely upon fresh evidence. Leave is refused. No satisfactory explanation or justification has been provided by the builder as to why such evidence could not have been filed and served prior to the hearing, in accordance with Tribunal directions. In any event,

the fresh evidence sought to be relied upon as little, if any, relevance to the issues in dispute.

56 The owner filed and served submissions in reply dated 2 May 2024.

57 The Tribunal summarises the submissions of the parties as follows: –

Owner's Submissions

58 After setting out general factual matters (many of which were not in dispute); and provisions of section 18 of the HBA, and a quote from *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613 (*Bellgrove v Eldridge*); , the owner submitted that there were five defect items in dispute.

Item 1 – Front Façade

59 The owner submits that Mr Connell did not take any independent measurements, but relied upon the measurements of the builder. Mr Xue had taken measurements, and determined the columns had a lean. According to the owner, both experts agreed the columns had a “lean.” The owner had given evidence at the hearing that the columns did not look straight when viewed from outside the residence. The owner submitted that Mr Connell did not provide any alternative method of rectification or costings to Mr Xue, and the Tribunal should accept the evidence of Mr Xue in respect of defect and method of rectification. The owner submits that the proposed method of rectification by Mr Xue was not excessive or unreasonable in the sense identified by the High Court in *Bellgrove v Eldridge*.

Item 2 – Water Leak to Garage

60 The owner submits that all experts agree there is water ingress into the garage; the water ingress is coming from behind the concrete downturned beam; and water ingress into a residential structure is a breach of the National Construction Code (P 2. 2. 1). Mr Kumar believe the water is coming from the catchment area from the land adjacent to the rear of the property. The owner

(at paragraph 34 of the submissions) refers to various asserted concessions Mr Kumar made during questioning. The owner submits the builder had: –

- (a) Not designed or constructively stormwater works so they comply with “any other law.”
- (b) Not constructed the stormwater works with “due diligence.”
- (c) Constructed the stormwater works in a manner that produced a dwelling not reasonably fit for occupation.

61 Despite the owner asserting in the owner’s opening submissions that only a work order for rectification of defects was sought, the owners submissions assert that the Tribunal should award the owner damages for the cost of rectifying this alleged defect (\$21,872, plus matters including builders margins, preliminaries, and GST).

Item 3-Incorrect Façade Construction

62 The owner submits that the façade does not comply with the plans and the contract was not varied. The owner’s evidence was that she wanted the house constructed according to the plans. The Tribunal should find that a defect exists, and accept the scope of works to rectify of Mr Xue and the costings of Mr Xue. Again, the owner refers to an award of damages being made, not a work order that the builder rectify.

Item 4 – Stair Landing Not Level

63 The owner submits that Mr Xue and Mr Connell agree that the first floor landing has been constructed out of level. Mr Connell believes the defect can be rectified by installing a step forward/lip at the top of the stair going; whilst Mr Xue regards that method of rectification as unsatisfactory, because it will create a trip hazard at the top of the stair.

- 64 The owner submits that if Mr Connell's methodology for rectification is accepted, the stair landing would create a "ramp in the middle of the hallway." The builder submits that Mr Xue's evidence was that this was unacceptable, and not good building practice.
- 65 The owner submits that the stair landing has not been constructed in accordance with the plans and specifications, and accordingly, is a breach of statutory warranty under s 18B of the HBA.
- 66 According to the owner, Mr Xue's proposed method of rectification (which involves demolition and reconstruction of the relevant area) is not unreasonable within *Bellgrove v Eldridge* principles, and should be accepted by the Tribunal. Again, an award of damages is referred to.

Item 5 – Bedroom Floor Not Levelled

- 67 The owner submits that both Mr Xue and Mr Connell agree that floor has not been installed "level" (and so, the owner submits, is a defect); and agree with Mr Xue's method of rectification.
- 68 Again, despite the owner submitting that a work order was sought against the builder rather than an award of damages for the cost of rectifying the defect, the owners submissions are that the Tribunal should award the owner damages in the amount of \$8,118, plus matters including preliminaries, profit margin and GST.
- 69 In respect of the statement of Mr Patel of the builder, the owner submits that no weight should be given to that statement irrespective of the owner electing not to cross examine Mr Patel. In particular, no weight should be given to any assertions by Mr Patel that the owner orally agreed to any variation of the contract by the builder.

Consequential Loss Damages

- 70 The owner submits that the parties agreed at the hearing that \$120 per day was an appropriate quantum of loss for the cost of obtaining alternative accommodation whilst rectification works were performed.
- 71 The owner submits that Mr Xue's evidence was that if all of the defects in the residence that Mr Xue asserts exist and the method of rectification identified by Mr Xue is found as appropriate by the Tribunal, it would take 8 weeks to perform the rectification works. According to the owner, Mr Connell has provided no alternative opinion regarding the amount of time it would take a builder to perform the rectification works; and accordingly the Tribunal should accept the opinion of Mr Xue.
- 72 The owner seeks damages of \$6,720 for the cost of obtaining alternative accommodation after moving out of the residence whilst rectification works are performed.
- 73 In respect of the remedy sought by the owner, there is an inconsistency between the opening submissions and the closing submissions. In the owners outline of submissions dated 14 February 2024 the following is clearly stated:

"Money Order Or Work Order And Costs?"

14. The owner submits the Tribunal should make a work order adopting the scope of works from Mr Xue's report".

- 74 In the owners submissions of 11 March 2024 it is submitted at paragraphs 63 – 71 that the Tribunal should make an award of damages in favour of the owner in the amount of \$240,003.02 for the cost of engaging another builder to rectify the defects; and additionally \$6720 for consequential loss damages in respect of moving out of the property whilst rectification works are performed.
- 75 The owners submissions also assert that (at paragraph 69) there are reasons why the Tribunal should depart from the "preferred outcome" under s 48 MA of the HBA and make an award of damages for the cost of rectification rather than

an order that the builder perform rectification works. One of the issues raised was the owner has “lost confidence” in the builder.

- 76 There is no explanation in the owners closing submissions as to why it has departed from its position that a work order should be made rather than an award of damages, as expressed in its opening submissions. The owner, for example, does not submit that it has changed its position, or give an explanation as to why it has changed its position, and why any change of position does not cause any prejudice or unfairness to the builder. Rather, the owner simply ignores what was expressed in the owners written outline of opening submissions dated 14 February 2024. The owner also does not refer to what was said at the hearing, when the Tribunal enquired what orders were being sought by the owner.
- 77 The owner also submits that the Tribunal should award legal costs in favour of the owner.

Builder’s Submissions

- 78 The builder’s submissions in chief are dated 12 April 2024. As discussed previously, they comprise of 32 pages (exclusive of the fresh evidence the builder seeks to rely upon attached to those submissions, in which the Tribunal has not taken into account for reasons expressed previously). The submissions are prepared under the name of Mr Gupta.
- 79 The builder submissions are summarised as follows: –
- 80 The owner originally provided plans for construction of the house to the builder; and the original agreement was for the builder to build the dwelling in accordance with the owners plans. However, it was subsequently agreed (before execution of the building contract) to build a house in accordance with a design created on the basis of consultation between the builder and the owner. In referring to this submission, the Tribunal notes that a submission is not evidence, nor is it a substitute for evidence.

81 The builder agrees that all monies owed under the contract were paid by the owner; an interim occupation certificate was issued on 18 October 2022; and a final occupation certificate issued on 4 May 2023.

82 In respect of the defect items: –

Item 1 – Lean To The Front Columns

83 The builder submits that there were inconsistencies and deficiencies in the methodology applied by Mr Xue to conduct measurements, and the Tribunal should not accept his evidence. Rather, the Tribunal should accept the expert evidence of Mr Connell. No breach of the National Construction Code is established and the “deviation to plum is within the tolerance.” Further, there were “inconsistencies” in the evidence of the owner in cross examination as to whether any deviation in the columns could be seen from the front of the residence. Any deviation did not affect the aesthetics of the residence.

84 If the Tribunal finds a defect, the builder will rectify. According to the submission (but noting that no expert evidence was contained in the report of Mr Connell regarding any method of rectification, if Mr Xue’s evidence was accepted and a defect found) the builder would rectify by applying render to fix the deviations and repaint the columns. According to the builder, this would cost approximately \$2,800 plus GST. The builder submits that the method of rectification and the cost of rectification identified by Mr Xue is unreasonable and excessive.

Item 2 – Water Leak To Garage

85 The builder submits that the landscaping and other works performed by the owner is the cause of any water ingress into the garage. The builder constructed the stormwater drainage according to the approved stormwater plan, and Mr Kumar confirmed that the stormwater works were compliant with the plans and relevant Australian Standards. The owners works involved landscaping; concrete pathways and side yard; a large concrete slab in the backyard; concrete steps at the front and left side of the house; decking on the right side of the house; and construction of retaining walls. Such works have

caused drainage points to be altered, and none of the owners works are appropriately certified by a storm water engineer or other expert.

- 86 The builder submits that, when the owner complained of water ingress into the garage in October 2022 it drilled “water release drain holes” adjacent to the newly cast steps by the owner, and a trapped water “started to come out”. The builder submits that the owner made no further contemporaneous complaints of water ingress into the garage. The owner obtained a “comprehensive building inspection report prior to handover” from Ezy Build Inspect dated 7 October 2022, and that report does not mention any water leak in the garage.
- 87 The builder submits that in cross examination, the owner confirmed that the relevant landscaping and structural landscaping works were performed by tradespersons directly engaged by the owner and/or her husband. Such works were not within the scope of works under the contract with the builder. The builder submits that none of the owners works were properly certified or the subject of any engineering approval.
- 88 The builder submits that Mr Xue has not taken into account all of the works performed by the owner; with such works causing water not to drain into the stormwater drains constructed by the builder pursuant to its obligations under the contract.
- 89 The builder submits that if the Tribunal does find a defect caused by the works of the builder; the cost of rectification identified by Mr Xue is excessive. The builder submits that a work order should be made, and identifies a scope of works in its submissions at cost of \$4,000 plus GST.
- 90 As discussed previously, submissions are not evidence. It is one thing for the builder to make a submission regarding an appropriate scope of works. It is an entirely different thing to provide evidence, either being direct evidence by the builder, or evidence from an independent expert witness.

Consequential Loss Damages

91 The builder submits that all repair works (if the builder scope of works is accepted) can be performed by the builder in a period of 5-7 days; and be performed in a manner that does not cause any significant inconvenience to the owner or her family. The builder submits that there is no need for the owner to vacate the property whilst rectification works are performed. Accordingly, no damages should be awarded.

Item 3 – Incorrect Façade Construction

92 The builder submits that the owner “is referring to the design which is illustrated in architectural plans but is unable to interpret or read the architectural plans.” According to the builder, the owner was made aware of “design changes due to structural integrity and inadequate drainage to the box gutters and rain water head;” and had “agreed” that no further works were required. This submission is made on the basis that the owner “agreed to (sic) fix the façade at a later stage...The owner agreed that they (sic) prioritise water ingress issues over the façade issue.”

93 The builder submits that Mr Xue conceded in cross examination that he was not aware of “discussions” between the owner and the builder regarding the façade.

94 The builder submits that, if a defect is found, the method of rectification and cost of rectification by Mr Xue is excessive and unreasonable. The builder makes a submission regarding methodology to rectify the defect which is costed at \$2,500 plus GST.

95 In respect of this item, the builder again submits that even if a defect is found, it is unnecessary for the owner and her family to move out of the property whilst the defect is rectified.

Item 4 – First Floor Out Of Level

- 96 The builder submits that Mr Xue’s measurement of the floor was near the first floor stair landing, and the floor was out of level by 12 mm. According to the builder, Mr Connell referred to the floor being “slightly out of level by up to 9 mm. The builder submits that the floor being out of level by 9 mm is not a defect. However, if it is a defect. The builder submits the appropriate method of rectification is to raise the stair landing by way of the installation of a riser of 5 mm.
- 97 The builder disagrees that the installation of a stair riser would create a trip hazard. The builder asserts that the house has a number of areas, such as bathrooms, where there are different heights in flooring, and they are not trip hazards. The builder further submits that the owner has not established any breach of the National Construction Code (Code), either by way of the level of the floor; or that the proposed method of rectification by way of installation of a stair riser would breach the Code.
- 98 The builder submits that Mr Xue’s method of rectification, which would involve the demolition and reconstruction of flooring in the amount of \$39,661 plus other matters including GST is excessive and unnecessary. The builder submits that the cost of installing a stair riser to rectify the defect would be \$2,000 plus GST, and the builder is ready, willing, and able, to perform such rectification work.

Item 5 – Bedroom 3 Floor Not Levelled

- 99 The builder submits that Mr Connell assesses the level of the floor to be “slightly out of level by up to 6 mm”. Whilst that is beyond the tolerance set out in the New South Wales Fair Trading Guide to Standards and Tolerances (which allows tolerance of up to 4 mm), there is no failure to comply with the National Construction Code. The floor is a hybrid floating floor, according to the builder.
- 100 If a defect is established, the builder submits that Mr Xue’s methodology should not be accepted. The methodology of Mr Xue (which will cost \$8,118, plus GST) a timber floor, which is inappropriate for a hybrid floating floor.

101 The builder submits that, if a defect is found, the appropriate methodology is to remove the flooring; level the substrate; and re-install the hybrid flooring total cost of \$1,700, plus GST.

Further Issues

102 At pages 30 – 32 of the builder’s submissions, the builder makes further submissions that Mr Xue’s evidence should not be accepted; and that is method of rectifying defects involves unreasonable and unnecessary work. The builder submits that Mr Xue’s costings are excessive. The builder further submits that a work order should be made, rather than an award of damages if any defects are found.

Owner’s Reply Submissions

103 The owner’s reply submissions are dated 2 May 2024.

104 The owners reply submissions are summarised as follows: –

105 The Tribunal should not accept the written evidence of Mr Patel; nor the submissions of Mr Gupta where he has asserted a scope of works to rectify the defects; without there being evidence to support such a scope of works.

106 To the extent that the builder invites the Tribunal not to accept items that were agreed upon by experts in a prepared a joint expert report on the morning of the hearing, that should be rejected.

107 The builder had not provided any evidence to support its submission with respect to the purported differing thicknesses of the applied render referred to in the builder’s submissions. The columns are to be constructed straight and without any lean, and consequently are a defect.

108 Both Mr Xue and Mr Kumar accept that there is water ingress into the garage; the seepage is from behind the concrete downturned beam; and moisture entering a building is a breach of the National Construction Code. Mr Kumar

believes the water ingress is from uncontrolled catchment rear of the property. Mr Xue believes it is from a breach in the damp proof course.

- 109 The builder submissions regarding design and construction of the staircase (asserting that somehow Mr Patel was not acting on behalf builder, and that the design was orchestrated between Mr Patel and the owner's husband) is not supported by any evidence, and should be rejected.
- 110 The builder's submission that there was no breach of the damp proof course established on the evidence of Mr Xue should be rejected, and the evidence of Mr Xue should be accepted.
- 111 Further, Mr Kumar made a number of concessions in cross examination at the hearing. Most importantly, Mr Kumar agreed that the landscaping undertaken by the owner was not causing the stormwater in the backyard to channel back into the garage; and the design of the stormwater system by the builder should have included installation of a stormwater absorption pit.
- 112 In respect of the front façade is, that area does not comply with the plans; and the contract was not varied.
- 113 In respect of the stair landing; Mr Connell's methodology "is only a Band-Aid solution" (installation of a stair riser); while Mr Xue's methodology rectifies the defect. The owner submits that both Mr Connell and Mr Xue accept there is a defect; what they did not agree upon is the method of rectification.
- 114 In respect of the floor of Bedroom 3 not being level, the owner submits that Mr Xue agree on the issue of defect and also agree that Mr Xue's method of rectification is appropriate. As Mr Connell has not commented on the issue of costing, the builder's submission that the cost opined by Mr Xue is excessive should be rejected.
- 115 The owner repeats earlier submissions on all other issues. Notably, the owners reply submissions again fails to identify why the owners written opening

submissions (and oral submissions at the hearing) referred to only a work order plus consequential loss damages for the cost of moving out of the premises whilst rectification work is performed being sought; and the owners closing submissions in chief seek damages the cost of rectification in the sum of approximately \$240,000.

CONSIDERATION

Jurisdiction

- 116 The dispute involves a “building claim” arising from the provision of “building goods and services” within the meaning of s48O of the HBA.
- 117 Time limits for bringing of proceedings for breach of statutory warranty under s 18B of the HBA are contained in s 48K; 3B; and 18E of the HBA. In essence, if Tribunal proceedings are brought within two years of the date of completion of the works (as defined s 3B), all defects may be claimed. Otherwise, if Tribunal proceedings have been taken outside that period, “major defects” as defined in section 18 E can only be claimed, up to 6 years from the date of completion of the works (with a limited extension if the defect first becomes apparent in the last 6 months of the major defects period).
- 118 In this matter, the owner filed Tribunal proceedings on 25 May 2023. Completion of the work by the builder as defined in s 3B of the HBA clearly occurred after 25 May 2021. It is not disputed that the handover occurred on 18 October 2022; and an interim occupation certificate was issued on 19 October 2022.
- 119 Accordingly, the Tribunal does not need to distinguish between “major defects” and non-major defects under s 18E of the HBA.
- 120 In respect of defect items 4 and 5 (in particular, item 5) there is a potential jurisdiction issue, which was not referred to in the parties submissions. Section 2(3)(k) of Schedule 1 of the HBA excludes from the definition of residential building work under the HBA:

“any work involved in the installation of any material that forms an upper layer or wearing surface of a floor (even if installed as a fixture) and that does not involve any structural changes to the floor, but not including work involved in the installation of floor tiles unless the regulations otherwise provide,’

121 The builder submits that the floor was a “floating hybrid floor.” However, there was no specific evidence on that issue by the experts; nor any direct evidence by the builder (such as a witness statement, affidavit of statutory declaration that may also have included documentation from suppliers or sub-contractors regarding the construction of the floor).

122 However, it is unnecessary to make a finding as to whether the floor is excluded from the definition of residential building work (and accordingly, the statutory warranties under s 18B of the HBA would not apply to that aspect of the work). Under Part 6A of the *Fair Trading Act 1987* (NSW), the Tribunal would still have jurisdiction to hear that aspect of the claim. Under s 60 of the *Australian Consumer Law 2010* (NSW) (ACL), services are to be provided with due care and skill. That is materially no different to the statutory warranty in s 18B(1)(a) of the HBA that work is performed with “due care and skill”. The purported “defect” identified by the owner in respect of Items 4 and 5 is that the work has not been performed with due care and skill. For reasons set out later in the decision, the Tribunal is not satisfied that the owner has proved on the balance of probabilities that the work in respect of Items 4 and 5 was not performed with due care and skill. The evidence does not change, and it is immaterial whether that finding applies to a cause of action raised under s 18B of the HBA or s 60 of the ACL.

Breach of Statutory Warranty and Remedy-General Principles

123 Section 18B of the HB Act states:

18B Warranties as to residential building work

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

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

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

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

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

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

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

(2) The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in a contract under which a person (the principal contractor) who has contracted to do residential building work contracts with another person (a subcontractor to the principal contractor) for the subcontractor to do the work (or any part of the work) for the principal contractor.

124 The principles applicable to whether a breach of the statutory warranties in s 18B of the HB Act were summarised by the Appeal Panel of the Tribunal in *Deacon v National Strategic Constructions Pty Ltd; National Strategic Constructions Pty Ltd v Deacon* [2017] NSWCATAP 185 (Deacon) as follows (at [46]):

Although objective standards such as Australian Standards, the Building Code of Australia and the Guide are of significant relevance in establishing whether work has been performed in a proper and workmanlike manner (*Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [10]), the absence of such evidence does not automatically mean a homeowner has failed to establish breach of statutory warranty. In our view, the relevant principle was succinctly stated by Senior Member Goldstein in *G MacFayden and Anor v G Tadrosse* [2014] NSWCATCD 194 at [46] as follows:

...[E]vidence that work does not comply with the Building Code of Australia would establish a basis for a finding that sub section 18B(c) of the Act has been breached. Evidence of the details in which work does not comply with the contractual plans and specifications would form the basis for a finding that sub section 18B(a) of the Act has been breached. Evidence of work not being carried out in a proper and workmanlike manner would in my view involve identification of the work in question, a statement of how the expert would expect it to be carried out in a proper and workmanlike manner and then identification of the factors which establish that the way in which the work has been carried out falls short of it being carried out in a proper and workmanlike manner. Evidence of this nature, if accepted, would form the basis for a finding that sub section 18B(a) of the Act has been breached.

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

- (1) Whether the owner has established on the balance of probabilities that works have not been performed in accordance with s 18B of the HB Act.
- (2) If a 'defect' (in the sense of failure to comply with s 18B of the HB Act) is established, what is the appropriate method to rectify that defect

126 The onus is upon the owner to establish not only that there is a "defect" (i.e. a breach of statutory warranty in the sense discussed in *Deacon*), but the appropriate method and the cost of rectification of rectification (if an award of damages is made, rather than a work order): *Catapult Constructions Pty Ltd v Denison* [2018] NSWCATAP 158 at [59]-[61].

127 If the Tribunal is satisfied that the defect has been established with an appropriate method of rectification that involves works that are necessary to achieve compliance with the contract, and a reasonable course to adopt, the Tribunal must consider whether a work order or an award for damages for the cost of rectification is appropriate.

128 Section 48 MA of the HBA states as follows: –

48MA Rectification of defective work is preferred outcome in proceedings.

A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the responsible party) is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

- 129 The Tribunal can depart from the “preferred outcome” under section 48 MA in appropriate circumstances. In that regard, the Tribunal has a discretion which is exercised in all the relevant circumstances of the matter. Considerations include whether or not the builder is licensed to perform rectification works; whether the builder has refused to perform rectification works; and whether the relationship between the parties is such that the Tribunal can have no confidence that a work order will be complied with (*Leung v Alexakis* [2018] NSWCATAP 11; *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 at [41]-[46]; *Robinson v Hindmarsh Construction Australia Pty Ltd* [2021] NSWCATAP 51 at [66]).
- 130 The appropriate method to rectify is considered in the context of the nature and degree of the relevant defect (*Deacon* at [57]-[59]). The method of rectification is the work necessary to achieve compliance with the contract, provided that method is a reasonable course to adopt (*Bellgrove v Eldridge*).
- 131 In *Bellgrove v Eldridge* at 616, Dixon CJ, Webb and Taylor JJ addressed the circumstances in which damages for rectification of defective works are an appropriate remedy as follows:

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

As to what remedial work is both “necessary” and “reasonable” in any particular case is a question of fact...”

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

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

133 Further, when assessing whether the proposed method of rectification is reasonable, the Tribunal must consider whether the cost is “out of all proportion to the achievement of the contractual objective” of the particular contract (*Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (*‘Ruxley’*); *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd* [2017] NSWCA 27 at [186]-[187]; *Wheeler & Anor v Ecroplot* [2010] NSWCA 61 at [81]; *Repfix Industries Pty Ltd v FBD Group* [2020] NSWDC 514 at [174]-[179]).

Assessment of the Alleged Defect Items

Item 1-Lean to Front Columns

134 Mr Xue, in his report of 23 August 2023, identifies the defect (at pp 9-13 of the report) as breach of AS 3700-2018 because the “variance in height is 36 mm...as such it exceeds the maximum tolerances”. Mr Xue sets out a table, that identifies the relevant standard as “maximum deviation from the plumb in the total height of the building (from the base) +/- 25mm”.

135 Mr Xue assets that he conducted measurements of the columns. In the handwritten joint expert report (Exhibit JR) he referred to the measurements being taken with a laser line.

136 Mr Xue states in his report the columns “to be out of level by 6mm/m or 36mm overall...as such it exceeds the maximum tolerance. In other words, Mr Xue’s assessment is that it is beyond the standard when assessed over the whole of the length of the columns, as distinct from the total height of the building.

- 137 According to the table identifying AS3700-2018 in Mr Xue's report (at p 9) the "maximum deviation from plumb within a storey from a vertical line through the base of the member" is "the lesser or +/- 10 mm per 3 m height or 0.05 times the thickness of the leaf"; and the "horizontal position of any masonry element specified or shown in plan at its base or at each storey level" is "+/- 15 mm". However, Mr Xue's opinion at paras 8.1.3 and 8.1.4 of his report only refer to the failure to comply with the standard being in respect of the maximum deviation in plumb from the total height of the building.
- 138 Mr Xue in his report does not assert that the columns have not been constructed in accordance with the plans and specifications; nor that the columns have not been constructed with due care and skill. To the extent that any reference was made to those issues during oral evidence, significantly diminished weight is given because the sole breach identified in Mr Xue's report is AS 3700-2018.
- 139 On the basis of Mr Xue's measurement, the deviation from the standard is 11 mm assessed over the total length of the columns.
- 140 However, the information contained in Mr Xue's report about how he conducted his measurements is also brief, and lacks detail. He elaborated upon this in cross examination by Mr Gupta.
- 141 Mr Xue asserts that the appropriate method of rectification is to demolish the columns and reconstruct them so that they are compliant with AS 3700-2018. His proposed scope of works is set out at para 8.1.8 of his report. The scope of works involves very significant work, with the demolition taking approximately 2 days; the reconstruction a further 2 days; and props will be required to support the roof. Mr Xue asserts the cost of such rectification work is \$30,307 exclusive of matters including preliminaries; profit margin; and GST.
- 142 Mr Connell his report of 1 February 2024 asserts that he and the builder performed measurements of the columns. However, there is very little detail of how those measurements were performed. Page 7 of the report contains 2 photographs, one of which shows a tape measure, but there is no detailed

reference to any other measuring instrument. The only reference is part of one sentence that refers to measurements of the columns being take “using an extension ladder, tape measure, and laser level.”

- 143 Mr Connell asserts that the column deviation is 4 mm over the length of the columns; and so is within AS 3700-2018. Accordingly, he asserts there is no defect. He also asserts that no visual or aesthetic affect to the premises.
- 144 In the joint expert report obtained at the hearing (which was prepared by Mr Xue, but signed by both Mr Xue and Mr Connell), it is stated the experts agree there was a “lean” to the columns. Mr Connell took his measurements at the ground level; and Mr Xue took his measurements at first floor height.
- 145 The joint expert report states that Mr Connell believes there is “no loss” to the owner by reason of the columns, but further states that if a defect is found both experts “agree with methodology of rectification.” Mr Connell makes “no comment to cost.”
- 146 At the hearing, the experts were questioned by Mr Birch and Mr Gupta. Most of that questioning related to the manner in which measurements were taken. During the course of oral evidence, Mr Xue referred to the plans of the dwelling requiring “straight” columns, and the columns were not “straight” so had not been constructed according to the plans.
- 147 The Tribunal does not accept the brief oral evidence of Mr Xue given at the hearing that there is a defect in the columns because they are not constructed in accordance with the plans. As discussed previously, there is no mention of that issue in his report. There is no reference to the plans and the measurements on the plans. To simply assert that the columns on the plans were “straight” does not identify their dimensions as specified in the plans, or how the columns deviated from the plans. To assert that a surface length needs to be “straight” is not sufficient to establish a defect in respect of the statutory warranty; particularly where it was a comment made in oral evidence and there is an absence of detailed discussion of this issue in the report of Mr Xue.

- 148 Mr Xue also briefly referred in his oral evidence to having returned to the property “yesterday” and that he stands by the measurements in his report. To the extent Mr Xue was giving fresh evidence, no weight is given to it. There was no detailed explanation as to what fresh measurements were taken; nor was the builder given a reasonable opportunity to respond to any fresh evidence.
- 149 Having considered the evidence of both experts, the Tribunal is not satisfied that the measurements of either expert gives a sufficiently detailed explanation of the divergence from “plumb” that the Tribunal can be satisfied on the balance of probabilities that the columns do not comply with the applicable Australian Standard.
- 150 The Tribunal accepts that there is some “lean,” as this was agreed by the experts in the joint expert report. However, it is the owner who bears the onus of establishing breach of s 18B of the HBA. The extrapolation by Mr Xue of his measurements from first floor height to assess the divergence from plumb throughout the length of the columns, rather than taking detailed measurements from ground floor height “in the total height of the building” is not sufficiently detailed and consistent that the Tribunal is able to accept the evidence of Mr Xue regarding the measurements taken. In that regard, the Tribunal notes the relevant standard is “deviation from plumb in the total height of the building (from the base), which involves assessment “from the base” to the “total height of the building.”
- 151 The evidence of the owner regarding the visual aspect or aesthetics of the front of the dwelling is given limited weight. That evidence is inherently subjective in nature. The key consideration is whether the columns have been constructed in accordance with the applicable Australian Standards, which form part of the National Construction Code (*BuildPlatinum v Micaleff* [2021] NSWCATAP 129 at [27]-[28]).
- 152 The Tribunal is not satisfied the builder has failed to construct the columns in accordance with Table 12.1 (d) of AS 3700-2018 because the maximum deviation from plumb in the total height of the building exceeds 25 mm.

153 Accordingly, no breach of statutory warranty is established, and it is unnecessary to make a finding as to whether Mr Xue's proposed method of rectification is necessary to achieve compliance with the contract and a reasonable course to adopt.

Item 2-Water Ingress Into Garage

154 The joint expert report on this issue prepared on the morning of the hearing involved Mr Xue and Mr Kumar. Mr Connell had not provided any opinion on the issue of water ingress into the garage (which further involved the landscaping and other works performed by the owner; and the stormwater drainage system installed by the builder).

155 Mr Xue states in his report of 23 August 2023 that the owner had reported water ingress into the garage to him; and showed him photographs of the water ingress. Mr Xue had inspected the area, and found "an opening that had been cut open in the wall to the garage by the builder." Mr Xue observed a water mark to the base of the timber frame.

156 Mr Xue states that he also observed mould "to the skirting adjacent to the area where the wall has been cut."

157 Mr Xue's report contains photographs, both taken by himself on inspection and provided by the owner. Mr Xue also performed moisture tests to the base of the wall and the wall just below the stair.

158 Mr Xue refers to Pt 2.2.1 (b) and 2.2.3 (b) of the National Construction Code in respect of water ingress; and states the builder has failed to construct the garage in accordance to those standards. In respect of the cause of the water ingress, Mr Xue states as follows:

"In my opinion, there is a breach in the damp proof course under the concrete slab and during rain events rain water is entering the building."

159 At pp 15 of his report, Mr Xue sets out a scope of works to rectify the defect. The scope identifies 3 days of work, that includes constructing a concrete hob

to redirect water away from the building; and drainage works. He identifies the cost of such works as \$21,827 exclusive of matters including preliminaries; profit margin and GST.

160 Mr Kumar's opinion is concisely summarised at p 7 of his report dated 16 November 2023. He assets that:

- (1) The builder installed the drainage in accordance with the stormwater plan prepared by Aussie Structural Engineers.
- (2) The catchment area behind the site coverage is creating an insufficient stormwater runoff from the site.
- (3) The builder installed weepholes in the garage wall "to accommodate the problem...without any obligation..."
- (4) The site seepage "drains behind the wall only under extreme conditions.
- (5) Mr Xue had not taken into account the source of the seepage behind the wall.
- (6) The drainage system installed by the builder was not the cause of the water ingress.

161 At p 8 of the report, Mr Kumar goes on to recommend "extra absorption trenches around the rear landscaped area" and provides a scope of works.

162 At the hearing, both Mr Xue and Mr Kumar were extensively questioned.

163 Importantly, Mr Xue gave a detailed explanation as to why formed the opinion that the damp proof course under the slab had been breached. The builder had constructed the damp proof course under the slab.

164 Mr Kumar also made concessions in cross examination regarding absorption pits. Mr Kumar believed that an absorption pit should have been installed by

the builder, irrespective of the further works that were subsequently performed by the owner.

165 Further, in the handwritten joint expert report signed by Mr Xue and Mr Kumar, it is stated that if a defect is found, the experts agree with Mr Xue's method to rectify the defect.

166 The owner had also separately provided evidence regarding the water ingress into the garage.

167 Having considered the totality of the evidence, the Tribunal is satisfied that the evidence of Mr Xue on defect and method of rectification should be accepted. Irrespective of the works of the owner, the damp proof course is inadequate to prevent water ingress into the garage. That is sufficient to establish that the building has not been constructed in accordance with the National Construction Code. Separately, the evidence of Mr Kumar would be sufficient to make a finding that the builder had not constructed the premises with due care and skill because an absorption pit had not been constructed. However, it is unnecessary to make a finding that a defect has been established regarding construction of an absorption pit, as the Tribunal accepts the evidence of Mr Xue regarding the nature of the defect and the method of rectification.

Item 3-Incorrect Façade Construction

168 In his expert report, Mr Xue states the first floor and ground floor of the building are not aligned at the front parapet. He asserts the plans attached to the contract show the area to be aligned, and the builder has not constructed the dwelling according to the plans, which is a breach of statutory warranty under s 18B of the HBA. An extract of the building plans is set out at p 20 of Mr Xue's report.

169 At p 21 of Mr Xue's report, he sets out his methodology for rectifying the defect. That methodology involves significant work. The scope of works is to demolish and rebuild the first floor façade. The works will take approximately 4 days. The

total cost of the works, according to Mr Xue, is \$23,442 exclusive of matters including preliminaries, profit margin, and GST.

- 170 Mr Connell in his report of 1 February 2024 states that the façade did not comply with the plans, but he was instructed by the builder that this was done to “ensure adequate storm water drainage in relation to the requirement to change the top parapet to allow the installation of a rainhead on the upper roof”. Mr Connell asserts there is no loss of amenity or living space by reason of the non-compliance with the plans; nor any breach of the National Construction Code.
- 171 No method of rectification in the alternative to the method of rectification set out by Mr Xue is identified in the report of Mr Connell.
- 172 In the handwritten joint expert report, it is stated that if a defect is found the experts agree on the methodology to rectify and Mr Connell makes no comment as to cost.
- 173 In cross examination of the owner by Mr Gupta, it was put to her that her husband had orally agreed to the change in the façade due to the builder having to modify the guttering. She did not agree with that proposition. Mr Gupta also questioned Mr Xue as to whether he had received any instructions about any oral agreement to vary. He had not, but he stated it made no difference because the building was not constructed in accordance with the plans.
- 174 Failure to construct according to the plans and specification is a breach of statutory warranty (see, for example, *Petropoulos v CPD Holdings Pty Ltd t/as The Bathroom Exchange* [2018] NSWCATAP 72 and *Petropoulos v CPD Holdings Pty Ltd t/as The Bathroom Exchange* [2019] NSWSC 897). The Tribunal is satisfied that the façade does not comply with the plans and specifications. Accordingly, breach of statutory warranty under s 18B of the HB Act is established. There is no evidence the parties varied the contract in accordance with the terms of the contract by a written variation. Further, the builder has not raised a defence under s 18F of the HBA.

175 The next issue is what works are necessary to achieve compliance with the contract and a reasonable course to adopt. There is no alternative method of rectification proposed by Mr Connell, and the submissions of Mr Gupta regarding an alternative scope are not evidence.

176 The Tribunal is satisfied that the scope or works set out at page 21 of Mr Xue's report is the appropriate scope of works to rectify the defect.

Item 4-First Floor Out of Level

177 In his report of 23 August 2023, Mr Xue assert the floor "at the first floor stair landing" is "out of level by 12mm/m"; and "the ceiling under the stair landing to be also out of level by 13 mm/m".

178 Mr Xue refers to the *NSW Fair Trading Guide to Standards and Tolerances* 2017, which relevantly states as follows:

4.3 Straightness of steel and timber frame surfaces

Frames are defective if they deviate from plane (horizontal or vertical bow) by more the 4mm in any 2 m length of wall. Refer to Diagram E on page 13 of this Guide.

Figure 6-NSW Guide to Tolerances 2017 Clause 4.3

179 Mr Xue does not provide a copy of Diagram E in his report.

180 Mr Xue then makes the following assertion:

"In my opinion, the builder has not constructed the floor framing with due care and diligence in accordance with the Home Building (sic) 18B(1)(a)".

181 Mr Xue then discusses method of rectification. He asserts that because the top treated of the stair is flush with the stair landing, if the stair landing is raised it will be at least 12 mm higher than the top stair, which will mean it will exceed the requisite standard under Clause 3.9.1.2(a)(iii)(B) of the National Construction Code. Mr Xue asserts that the appropriate method of rectification is to demolish and reconstruct the stair landing area. This involves a significant amount of work. The scope of works is set out at pp 23-24 of Mr Xue's report.

The work (when all different activities are taken into account) would exceed 1 week.

- 182 Mr Xue provides an assessment of the cost of the work of \$39,661, exclusive of matters including preliminaries; profit margin; and GST.
- 183 Mr Connell, in his report, accepts that the floor is “slightly out of level,” with his measurement being “up to 9mm/m”. He states the floor is structurally sound and “fit for purpose.” Mr Connell does not agree the floor has not been constructed with due care and skill. Mr Connell states the floor does not breach any applicable Australian Standards/National Construction Code.
- 184 In the handwritten joint expert report it is stated the experts agree the floor is “out of level” but Mr Connell asserts that this can be rectified (if a defect is found) by way of the installation of a step/lip at the top of the stair going. Mr Connell does not comment on Mr Xue’s costings of his proposed method of rectification. However, although Mr Connell referred to the installation of a step/lip in the joint expert report and in oral evidence, he did not refer to this in his report, nor provide a written scope of works.
- 185 At the hearing, both Mr Xue and Mr Connell were extensively questioned on this defect item. Both experts maintained their position in respect of the measurements they had taken and whether or not there was a defect. Mr Xue disagreed that a step/lip would rectify the defect, asserting that this would create a “trip hazard.” Mr Connell said it would “potentially” create a trip hazard, and accepted that a builder would not usually construct stairs with a lip at the top. However, he maintained his position that the floor was not defective.
- 186 In respect of whether or not there is a defect, it is important not to lose sight that Mr Xue’s opinion is based solely on his assertion that the floor has not been constructed with due care and skill. In that regard, his reliance is on the NSW Fair Trading Guide to Standards and Tolerances (the Guide).

- 187 The Guide is not an Australian Standard, and is relevant to whether or not, assessed objectively, the owner has established the builder had not performed the work with due care and skill (*Deacon* at [46]). Fundamentally, to establish breach of statutory warranty, the owner must satisfy the Tribunal that a builder exercising due care and skill would have constructed the floor differently.
- 188 There are flaws in the methodology of Mr Xue. The Tribunal does not accept that the mere fact the floor is uneven to a slight degree (either 9mm/m on the assessment of Mr Connell or 12-13mm/m on the assessment of Mr Xue) is sufficient to establish that the builder has not exercised due care and skill. The purported non-compliance with the Guide identified by Mr Xue is Clause 4.3. However, that refers to framework, and that the frame is defective if there is a deviation of “more than 4 mm in any 2 m length of “wall”.
- 189 Mr Xue has not referred to any measurements of a wall. The framework he is referring to does not support a wall, it supports a floor. All he has measured is the floor. From that, he has made an assumption that the framework that supports the floor does not comply with Clause 4.3. He has not explained in his report how Clause 4.3, which refers to framework supporting a wall applies to framework supporting a floor.
- 190 The Tribunal is not satisfied that Clause 4.3 applies to the floor. Even if it did apply to the floor, mere failure to comply with the Guide does not, of itself, establish a defect. There was no sufficient other evidence to indicate that the floor is so uneven that it affects the amenity of the owner; nor that the floor is structurally unsound or creates a danger, such as a danger of falling in its current condition.
- 191 The Tribunal is not satisfied that the first floor has not been constructed with due care and skill. As the owner has failed to establish a defect, it is unnecessary to make any findings about what is an appropriate method of rectification that is necessary to achieve compliance with the contract, and a reasonable course to adopt.

Item 5-Bedroom 3 Flooring Not Levelled

192 In his report of 23 August 2023, Mr Xue states that the floor of the “south east corner of bedroom 3” is “6 mm/m and 10mm/m out of level”. Mr Xue asserts that the floor has not been constructed in accordance with Clause 15.8 of the Guide, which states as follows:

15.8 Levelness of timber flooring

New floors are defective if within the first 24 months of handover they differ in length by more than 10 mm any room or area, or more than 4 mm in length in any 2 m length

Also, the overall deviation of floor to level to the entire building footprint shall not exceed 20mm within 24 months of handover. Refer to Item 1 of this Guide where the new floor is to adjoin an existing floor.

193 Notably, in his report, Mr Xue referred to Clause 4.3 of the Guide when discussing the first floor area proximate to the stairs; and Clause 15.8 when discussing bedroom 3. No explanation was provided in his report as to why different provisions of the Guide applied.

194 In any event, by reason of the failure to comply with cl. 15.8 of the Guide, Mr Xue asserts that the builder has not constructed the floor with due care and skill.

195 Mr Xue identifies a scope of works to rectify the defect (at p 29 of his report). Mr Xue asserts that the appropriate method of rectification is to remove the floor and reinstate it with associated work. The costs identified is \$8,118 exclusive of matters including preliminaries; profit margin; and GST.

196 Mr Connell in his report of 1 February 2024 states that the floor is “slightly out of level, by up to 6 mm/m” but Mr Connell states it is “fit for purpose with no apparent issues in relation to safety when walking on the floor to this area”.

197 The handwritten joint expert report states as follows:

Item 5

1. Experts agree bedroom floor out of level.
2. Experts agree methodology.
3. DC makes no comments as to cost.

198 When cross examined at the hearing, Mr Connell states he agreed that part of the floor that he measured did not accord with the Guide. However, when the totality of his evidence is considered, the Tribunal does not regard what is expressed in the joint expert report, or his answers to questions at the hearing as a concession by Mr Connell that the floor is defective, in the sense that a builder exercising due care and skill would have constructed the floor differently.

199 There are flaws in the methodology of Mr Xue. His expert report only contains 4 photographs of the floor where a spirit level is positioned. Two do not show the reading on the spirit level. Two show the reading. The two photographs showing the reading appear to be close ups of the same area. In other words, it appears the spirit level has been positioned at two parts of the floor. One shows a reading of 10mm/m. The other shows a reading of 6 mm/m. It is not clear that a measurement has been taken over the whole floor length. There is no detailed explanation by Mr Xue of how and where he took the measurements

200 In respect of the one photograph showing 6 mm/m that is one part of the floor and it is not clear that the measurement has been taken over a 2 m length. Even it has, it is only 2 mm outside the Guide in one area of the floor. This discrepancy is minimal.

201 The Tribunal is not satisfied that the evidence of Mr Xue, even taking into account the evidence of Mr Connell that one point of the floor has a reading of 6mm/m is sufficient to establish that the floor has not been constructed with due care and skill.

202 As the owner has failed to establish breach of statutory warranty in respect of item 5, it is unnecessary to make any findings about what is an appropriate

method of rectification that is necessary to achieve compliance with the contract, and a reasonable course to adopt.

Work order or Order for Damages?

203 As discussed previously, the position adopted by the owner in the written outline of submissions were that a work order was sought under s 48O of the HBA regarding rectification of defects. For some reason, which is not explained, the owner departed from that position in the closing submissions.

204 It is unnecessary for the Tribunal to discuss the principles pertaining to legally represented parties being bound by the strategic decisions they make in running their case (*Williams v McFarlane* [1996] NSWCA 559; *Lieschke v Lieschke* [2023] NSWCA 241). Irrespective of whether or not the owner was seeking damages for the cost of rectification of defects; or an order that the respondent rectify the defects, the Tribunal is not satisfied that there are appropriate discretionary reasons to depart from the preferred outcome under s 48MA of the HBA. The builder is duly licensed and the evidence does not establish any reason for the Tribunal not to be confident the builder would comply with a work order of the Tribunal. The defects are not extensive in number; the completion of the build did not take an unreasonably lengthy period of time; the builder has not unreasonably refused to rectify defects (noting that the owner failed to establish a number of the defects claimed) and the subjective view of the owner that the owner has “lost confidence” in the builder is not sufficient to depart from s 48MA.

Consequential Loss Damages for Cost of Moving Out of the Residence

205 An owner can be awarded consequential loss damages if the Tribunal is satisfied that it is necessary for the owner to move out of the residence whilst rectification work is performed (*Deacon* at [98]). Mr Xue commented upon this issue in his report. The parties agree that, if consequential loss damages are found, \$120 per day is the appropriate rate.

206 The Tribunal is satisfied that the rectification work to the façade and garage is such that it will be necessary for the owner and her family to move out whilst the rectification work is performed. The principles for assessment of damages is to put the party in the position they would have been had the contract been performed, and the Tribunal is to assess the amount as best it can on the evidence before it.

207 Considering that there is no obvious reason why rectification work to the façade and the garage cannot be performed at the same time, the Tribunal is satisfied that 10 days is the appropriate period for the owner and her family to require alternative accommodation. Consequently, \$1,120 is awarded.

The Issue of Costs

208 The Tribunal does not regard it as appropriate to determine the issue of costs until both parties have had the opportunity to be heard on that issue. The Tribunal makes orders and procedural directions to facilitate determination of the issue of costs.

Conclusion

209 The owner has established 2 defect items out of 5. The Tribunal is satisfied that a work order should be made for the builder to rectify those defects, in accordance with the scope of works set out in the report of Mr Xue. Considering the nature of the rectification work and the upcoming Christmas/new year period, the Tribunal is satisfied that 4 months is an appropriate period of time to complete the work.

210 The Tribunal is not satisfied an award of damages should be made, other than in respect of consequential loss damages for the cost of alternative accommodation whilst rectification works are being performed. There is no basis established for any award for interest, either under the terms of the contract, or otherwise. The issue of costs is to be determined separately. The timetable for costs submissions takes into account the upcoming Christmas/new year period, which may affect preparation of costs submissions.

211 The scope of works to rectify pursuant to the orders of the Tribunal is set out at Annexure A of the decision.

ANNEXURE A

Scope of Works

Item 2 – Garage

Gain access to work area in accordance with WorkCover requirements.

Cover and protect adjacent surfaces during the rectification work.

Support water damaged wall.

Material allowance for support.

Remove stair, plasterboard and timber framing.

Construct concrete hob to redirect water to the external of the building.

Waterproof internal of hob.

Saw cut concrete driveway.

Trench for stormwater line.

Construct drainage to concrete into stormwater drainage.

Rectify concrete driveway.

Reconstruct timber framing and plasterboard wall.

Reinstall stair.

Paint affected areas to the nearest architectural joints.

Make good any surfaces affected as part of the work.

Clean site and leave in tidy condition upon completion of work.

Item 3 – Front Façade

Gain access to work area in accordance with WorkCover requirements.

Cover and protect adjacent surfaces during rectification work.

Erect scaffolding around columns.

Demolish and remove first floor façade.

Rebuild first floor façade aligned with the ground floor façade including adjustment to timber framing and roofing.

Material allowance for façade rebuild.

Waste removal.

Paint front façade.

Patch affected areas.

Make good any surfaces affected as part of the work.

Clean site and leave in tidy condition upon completion of works.

ORDERS

- (1) The respondent, Globe Ventures Aust Pty Ltd, is to pay the applicant Dhara Chintan Patel, the amount of \$1,120 immediately.
- (2) The respondent, Globe Ventures Aust Pty Ltd, is to perform rectification work to the applicant's residence in respect of Item 2 (water leak to

garage) and Item 3 (front façade misaligned) as set out in the scope of works for each of those defect items contained in the report of Mr Gordon Xue dated 23 August 2023 (set out in Annexure A to this decision). Such work is to be completed by 4 months from the date of this decision.

- (3) The work in order 2 above is to be performed by suitably licensed persons exercising due care and skill.
- (4) The applicant's claim for rectification of defective work is otherwise dismissed.
- (5) The applicant is to give the respondent and any employees or sub-contractors of the respondent reasonable access to the premises to perform the work.
- (6) The issue of costs is to be determined as follows:
 - (a) The applicant is to file with the Tribunal and serve on the respondent, by person or by post and additionally by email, all costs submissions and documents by 24 January 2025.
 - (b) The respondent is to file with the Tribunal and serve on the applicant, by person or by post and additionally by email, all costs submissions and documents by 7 February 2025.
 - (c) The applicant is to file with the Tribunal and serve on the respondent, by person or by post and additionally by email, any costs submissions in reply by 14 February 2024.
 - (d) The costs submissions of the parties are to include whether the agree to an oral hearing on the issue of costs being dispensed with under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) and if not, why not.

- (e) Either party may apply in writing to the Tribunal (with a copy sent to the other party) to extend or vary the procedural directions for costs submissions.
- (f) Subject to consideration of the submissions of the parties the Tribunal may determine the issue of costs on the papers and without a further oral hearing.

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

Registrar

The image shows a handwritten signature in black ink to the left of a circular official seal. The seal features the text "NEW CIVIL & ADMINISTRATIVE TRIBUNAL" around the perimeter and a central emblem.