



Civil and Administrative Tribunal New South Wales

Case Name: Babhoota v AMT Grand Homes Pty Ltd

Medium Neutral Citation: [2022] NSWCATCD

Hearing Date(s): 13 October 2022

Date of Orders: 18 October 2022

Date of Decision: 18 October 2022

Jurisdiction: Consumer and Commercial Division

Before: D Ziegler, Senior Member

- Decision:
1. Within 14 weeks of the date of these orders the respondent is to carry out the works specified in the Schedule attached to these orders, in a proper and workmanlike manner.
 2. The application is otherwise dismissed.
 3. If there is a costs application, the costs applicant is to file and serve submissions and documents on the costs application by 14 days from the date of these orders.
 4. The costs respondent is to file and serve submissions and documents on the costs application by 28 days from the date of these orders.

5. The costs applicant is to file and serve costs submissions in reply by 35 days from the date of these orders.
6. The costs submissions of the parties are to state whether the parties seek an oral hearing on the issue of costs, or consent to the costs application being determined on the papers in accordance with s 50 (2) of the Civil and Administrative Tribunal Act 2013 (NSW).
7. The Tribunal may determine it appropriate to deal with any costs application on the papers and without a further oral hearing.

Catchwords: BUILDING AND CONSTRUCTION – *Home Building Act 1989 (NSW)* – Defective building work – Variation of contract – whether exchange of emails satisfied requirement for variation to be in writing and signed – expert evidence.

Legislation Cited: *Electronic Transactions Act 2000 (NSW)*
Home Building Act 1989 (NSW)

Cases Cited: *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305
Paraiso v CBS Build Pty Ltd [2020] NSWSC 190

Texts Cited: Nil

Category: Principal judgment

Parties: Rajeev Babhoota (Applicant)
AMT Grand Homes Pty Ltd (First Respondent)

Representation: Self-represented (Applicant)
Birch Partners (Respondent)

File Number(s): HB22/11283

Publication Restriction: Nil

REASONS FOR DECISION

- 1 This is a residential building dispute involving construction of a new dwelling in Dural, New South Wales.
- 2 In this decision any reference to “the homeowner” is a reference to the applicant, Mr Bahboota, and any reference to “the builder” is a reference to the respondent, AMT Grand Homes Pty Ltd.
- 3 Mr Taki is a director of the builder.
- 4 Numbering used in this decision to identify alleged building defects mirrors the numbering used in the joint conclave report prepared by the parties’ respective experts.
- 5 On 15 December 2018 the parties entered a contract to perform residential building works (the Contract). The Contract is in the form of the Master Builders Association BC 4 standard form contract. Mr Bahboota’s wife Savita Bahboota is also a party to the Contract but she was not named as a party to these proceedings.
- 6 The works involved demolition of an existing structure and construction of a new dwelling. The Contract price was \$870,500.
- 7 Attached to the Contract are a number of architectural drawings prepared by the homeowner’s architect.
- 8 Practical completion of the project occurred in about May 2020.
- 9 In about June 2020 the homeowner’s expert, Mr Nakhla, carried out a “pre-handover” inspection and provided a report identifying approximately 50 defective or incomplete items.

- 10 In September 2021 a rectification order was issued to the builder by NSW Fair Trading in relation to five items of defective work and one item of incomplete work.
- 11 In January 2022 NSW Fair Trading issued a building inspection report identifying several water ingress issues.
- 12 Some of the issues identified by NSW Fair Trading and in the pre-handover report have since been attended to by the builder.
- 13 This application was lodged on 15 March 2022.

Jurisdiction

- 14 There is no dispute between the parties that the applicant's claim is a 'building claim' for the purposes of section 48A of the *Home Building Act 1989* (NSW) (the 'Act') and that the Tribunal has the jurisdiction to hear and determine the claim under section 48K of the Act.

Evidence

- 15 The homeowner relied on the following documents:
 - (1) An expert report prepared by Steven Nakhla of SJN Building Consultants dated 3 June 2022 (the Nakhla Report);
 - (2) The pre-handover report prepared by Mr Nakhla (entitled "Building Quality Inspection Report") which is undated but refers to an inspection on 6 June 2020 (the Pre-handover Report);
 - (3) A rectification order issued by NSW Fair Trading dated 8 September 2021; and
 - (4) A building investigation report issued by NSW Fair Trading on 14 January 2022.

- 16 The respondent relied on the following documents:
- (1) A witness statement of Mr Taki dated 23 August 2022;
 - (2) An expert report prepared by Doug Coombes of Doug Coombes & Associates Pty Ltd dated 29 July 2022 (the Coombes Report); and
 - (3) A series of emails tendered at the hearing and marked Exhibit R1.
- 17 The parties also relied on a joint conclave report prepared by the parties' respective experts on 11 August 2022 (the Joint Report).
- 18 Both the Nakhla Report and the Coombes Report have been substantially prepared in accordance with NCAT Procedural Direction 3 – "Expert Evidence".
- 19 At the hearing, Mr Bahboota was cross-examined by the builder's solicitor Mr Birch, and Mr Taki was briefly cross-examined by Mr Bahboota. The two experts, Mr Nakhla and Mr Coombes, gave oral evidence concurrently and were cross-examined by Mr Birch and Mr Bahboota respectively.

Issues

- 20 The homeowner claimed a total of 30 items which he said are defective and in breach of the statutory warranties in s 18B of the Home Building Act 1989 (the Act). These are numbered 1 to 5 in the Joint Report. Item 5 (headed "Incomplete works and miscellaneous defects") is subdivided into a further 26 separate items.
- 21 Since the commencement of the proceedings the disputed items have been narrowed as follows:
- (1) The homeowner has confirmed that the remedy he seeks is a work order rather than a money order.

- (2) During the hearing the parties agreed that the scope of works jointly developed by the experts in respect of the water ingress to bedroom 1 should be carried out within four weeks of the hearing, and consent orders were made accordingly on the day of the hearing.
- (3) The builder concedes liability in respect of item 2 (water ingress to garage) and item 4 (Roof and stormwater drainage issues) so that the only issue in dispute in relation to those items is the appropriate method of rectification.
- (4) The parties agree to rectification and the method of rectification in respect of the following items:
 - (a) Item 4 insofar as it relates to the rainwater tank only;
 - (b) Item 5(4) – external window frames;
 - (c) Item 5(5) – Rear bi-fold doors;
 - (d) Item 5(9) – Entry door lock;
 - (e) Items 5(11), (13), (15), (20), (22), (23): - internal doors in laundry, ground floor WC, ground floor bedroom, upstairs bathroom, bedroom 4 (balcony bedroom), upstairs master bedroom and master ensuite;
 - (f) Item 5(18) – Double doors to media room;
 - (g) Item 5(19) – Cupboards under sink in media room; and
 - (h) Item 5(25) – Rear hinged door latch.

22 Following cross-examination of the homeowner's expert, the homeowner confirmed that items 5(12), 5(14) and 5(24) are no longer pressed.

23 The parties agree that item 5(10) is not an alleged defect.

Statutory warranties

24 The homeowner relies on s 18B of the Act pursuant to which the following warranties 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.

Item 1 – Front facade

25 The first item complained of by the homeowner is that the front façade of the house was not constructed in accordance with the plans and specifications set out in the Contract, and that therefore there has been a breach of the warranty in s 18B(1)(a) of the Act.

26 It was not disputed by the respondent that the construction of the front façade departs from the architectural drawings which formed part of the Contract. The drawings depict a projection at the top of the front façade forming a parapet

over a window identified in the drawings as W4. The parapet has not been constructed and instead an aluminium shade hood has been installed.

27 The homeowner says that he did not agree to this variation and that the variation did not have development consent.

28 This reasoning is problematic for a number of reasons.

29 Firstly the evidence does not establish that development approval was required for this relatively minor change. The homeowner's expert Mr Nakhla asserted that in his experience as a builder such a change would require development approval. The builder's expert Mr Coombes asserted that in his opinion a minor change of this nature would not require development approval. Neither expert has expertise in planning regulation and law and no evidence from such an expert was provided.

30 Moreover, Mr Nakhla's own evidence given under cross-examination was that the development was ultimately approved by a certifier and an occupancy certificate was issued.

31 Having considered the available evidence, I am not satisfied that the modification of the front façade required planning approval.

32 In any event, the evidence establishes that the homeowner approved the change. In this regard Mr Taki relies on the following email exchange which he says occurred between the parties on 6 March 2020:

Mr Taki: I am just confirming that we are replacing the small louvre roof over window 4 with an aluminium shade-hood. This for both window 4 and sliding door 1 ... can you please confirm this change as we are liable to pay a deposit. Once you have agreed to this replacement it is final..."

Mr Bahboota: Hi Adam, thanks for your email. As discussed, I am confirming.

33 A copy of the email exchange is attached to the Coombes' Report.

- 34 The homeowner did not present any evidence refuting that this email exchange took place, and did not cross-examine Mr Taki in relation to his evidence in this regard. I accept Mr Taki's evidence and am satisfied that this exchange between the parties took place
- 35 Clause 14 of the Contract (which is in the form of the Master Builders Association BC 4 standard form contract) deals with variations to the work to be done under the Contract. Interpretation of that clause was discussed in detail in *Paraiso v CBS Build Pty Ltd* [2020] NSWSC 190 (*Paraiso*) at [32]-[57] and [60]. The Court found that Clause 14(d)(i) is to the same effect as cl 1(2) of Pt 1 of Sch 2 of the Act, which is statutorily imported under s 7E. That is, any agreement to vary the contract, or the plans and specifications for work to be done under the contract, must be in writing signed by or on behalf of each party.
- 36 This interpretation is also consistent with clause 1(c)(ii) of the Contract.
- 37 In *Paraiso* the Court suggested at [60] and at [62] that variations to a building contract which do not bear a handwritten signature but which are transmitted by email may nonetheless satisfy the requirements of the *Electronic Transactions Act 2000* (NSW). Sections 8 and 9 of that Act relevantly provide:

8 Writing

(1) If, under a law of this jurisdiction, a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication, where—

(a) at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference, and

(b) the person to whom the information is required to be given consents to the information being given by means of an electronic communication.

...

9 Signatures

(1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if—

- (a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated, and
- (b) the method used was either—
 - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement, or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence, and
- (c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).

38 Under section 5 of the *Electronic Transactions Act* “consent” is defined to include “consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with”.

39 It is also relevant in this regard to refer to clause 30 of the Contract which states:

All notices (and/or other documents) will be deemed to have been given, received or served if sent to the other party at the relevant address, email address or facsimile number nominated in the Contract or the address last communicated in writing to the person giving the notice.

40 The email address provided for the homeowner in the Contract is Mr Bahboota's email address.

41 Given the current prevalence of email communication as a preferred means of communication, and that the Contract specifically permits provision of notices by email, I am satisfied that the email exchange of 6 March 2020 satisfies the requirements of s 8 of the *Electronic Transactions Act* and that the exchange of emails on 6 March 2020 detailed the proposed variation to the plans *in writing*.

42 Considering now the requirement for the agreed variation to be signed:

- (1) The use of email as contemplated by the Contract, together with the wording of Mr Taki's email, and in particular the words “Can you please

confirm this change, as we are liable to pay a deposit. Once you have agreed to this replacement, it is final”, together in my view satisfy the requirements of s 9(1)(a) and 9(1)(b)(i) of the *Electronic Transactions Act*.

- (2) Although neither party specifically stated that they consented to the requirement for a signature being met by way of the email exchange, it can be reasonably inferred from the conduct of the parties (including in particular the statement in Mr Taki’s email “Once you have agreed to this replacement it is final” and the homeowner’s response “I am confirming”), that both parties consented, for the purposes of s 9(1)(c), to the requirement for a signature being met by way of the email exchange,

and that therefore the email exchange satisfies the requirement for a *signature* of each party.

43 For these reasons I am satisfied that pursuant to the exchange of emails on 6 March 2020, the parties consented to vary the plans and specifications attached to the Contract insofar as they related to the front façade parapet, and that the exchange of emails satisfied the requirements of the Contract and of the Act that the variation be detailed in writing signed by or on behalf of the parties.

44 There is no evidence which establishes that the works done by the builder are inconsistent in any way with the variation detailed in the exchange of emails (and indeed Mr Nakhla conceded during cross-examination that although he had not taken any measurements of the shade-hood, visually it appeared consistent with what was agreed in the email exchange).

45 Accordingly, I am not satisfied that the works were not done in accordance with the plans and specifications set out in the contract and therefore this part of the claim fails.

46 I would add that even if the analysis above was incorrect, and there was no valid variation to the plans and specifications for the front facade, I would nonetheless have declined to make the work order sought by the homeowner. Under s 48O of the Act, the Tribunal is empowered to make any one or more of a range of orders when determining a building claim “as it considers appropriate”. In this case:

- (1) The builder asked the homeowner, in the 6 March exchange of emails, to confirm his consent to the variation;
- (2) The homeowner was on notice that once he consented, the builder would consider the change final and would be outlaying a deposit for the new shade hood;
- (3) The homeowner represented to the builder that he consented to the variation;
- (4) The builder proceeded to build the façade in accordance with the 6 March email exchange and with no objection from the homeowner until well after the dwelling had been constructed;
- (5) The builder relied on the homeowner’s representation and built the façade accordingly;
- (6) There is no evidence that the change requires development approval;
- (7) The works proposed by the homeowner to change the façade to conform with the original drawings are not trivial. Mr Nakhla estimates a cost of \$42,194 for this work and Mr Coombes estimates \$10,239.

47 Considering all of the circumstances, in my view it would be inappropriate to compel the builder to incur the cost of changing the front façade.

Item 2 – Water ingress to garage

- 48 The parties' experts agree that there is water penetration into the garage ceiling which requires rectification, but disagree as to the source of the water ingress and the appropriate method of rectification.
- 49 The experts also agree that once the defects are rectified, the garage ceiling will need to be patched and repaired.
- 50 Mr Nakhla says that he has identified the following defects in the construction of the garage roof:
- (1) The far left garage downpipe in box gutter has no sump and the pipe is installed flush with the box gutter;
 - (2) On the far right side over the garage there are large visible gaps at the junctions of the masonry column and stone cladding;
 - (3) There is no water stop angle behind the sliding doors (required by AS 4654.2) and no overflow provision installed to the enclosed balcony.
- 51 With regard to the installation of the far left garage downpipe and absence of a sump, the Nakhla Report provides no explanation as to why these issues render the installation of the pipework defective, and no explanation as to why Mr Nakhla has formed the view that these issues have resulted in water ingress. For example, the report does not refer to any relevant standard or code requirement, nor any other literature or materials used to support Mr Nakhla's opinion (other than photographs), and the report identifies no tests or investigations conducted to establish that these issues have resulted in water ingress.
- 52 Similarly, with regard to the gaps observed at the junctures of the cladded wall and the rendered masonry, the report does not contain any measurements or other data, or any reference to industry standards or code requirements, which support Mr Nakhla's conclusion that the gaps constitute defects. Moreover,

there is no reliable evidence that the gaps have caused the water ingress. In particular, there is no evidence of tests or investigations carried out by Mr Nakhla in this regard and indeed there is no evidence at all which shows that the gaps penetrate further than the surface of the wall.

53 In short, Mr Nakhla's evidence in relation to the first two of these issues do not establish the facts on which his opinions are based in order that I can be satisfied that there is a proper foundation for his opinion that those aspects of the garage roof are defective: see *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 at [85] (*Makita*).

54 With regard to the water stop angle, Mr Coombes says that it is not possible to state conclusively that there is no water stop angle alongside the door frame. He says it is possible that the water stop angle is concealed by the timber strip which has been installed alongside the door frame. He also refers to a copy of a waterproofing certificate certifying that the work has been done in accordance with AS 3740 (although no copy of the relevant standard has been provided).

55 Mr Coombes was not cross-examined in relation to this evidence and no persuasive explanation was given by Mr Nakhla as to why he does not agree that the water stop angle may be concealed. Having considered the evidence of both experts in relation to this matter, I am satisfied that it is possible that the water stop angle is concealed by the timber strip identified by Mr Coombes and therefore am not satisfied that the builder has failed to install a water stop angle.

56 Mr Coombes says that there are no emergency overflow provisions to the enclosed balcony or the two box gutters at either end of the balcony. He also says that the water damage to the garage ceiling at the southern end is due to the installation of the outlet pipe which is immediately above this location. He says there is no flange around the top of the outlet pipe and consequently water can travel down the outside of the pipe as well as down the inside.

57 Mr Coombes recommends an invasive inspection of the pipework within the ceiling void so that it can be inspected for leaks at the joins. He also

recommends installation of a flange around the top of the outlet pipe and installation of 50 mm emergency overflow pipes through the masonry walls of both box gutters and the enclosed balcony.

58 Mr Coombes was not cross-examined about his evidence in relation to any of these matters. Moreover, his report provides a more detailed explanation of the facts and observations on which his opinions regarding the water ingress are based, so that I am comfortably satisfied that there is a proper foundation for his opinions in relation to these matters.

59 For these reasons I prefer Mr Coombes' evidence in relation to the cause of the water ingress and the method of rectification and am making an order that rectification works to the garage roof be done in accordance with the scope of works in the Coombes Report.

Item 4 – Roof and stormwater drainage issues

60 The parties' experts agree that there is water penetration causing damage to the alfresco area and that whilst some steps have been taken by the builder in an attempt to rectify the issue, these have not been successful to date. The experts agree that steps are required to address the water penetration but disagree as to the cause of the issue and the method of rectification.

61 Mr Nakhla asserts that there are three reasons for the water ingress which require rectification:

- (1) Aspects of the roofing above the alfresco area are defective;
- (2) There are issues with the design of the roof stormwater drainage system;
and
- (3) There are issues with the rainwater tank.

62 I will deal with each of these in turn.

Roof

- 63 Mr Nakhla asserts that the roof above the alfresco area is defective in the following respects:
- (1) The flashings have been “poorly notched with excessive gaps at perimeters of roof”;
 - (2) No sumps have been installed to the box gutter outlets; and
 - (3) The entire roof above the alfresco area drains onto the lower roofs with “1 main spreader to alfresco roof ... 3 main spreaders over bifold doors”.
- 64 Mr Coombes disagrees that the roof is defective or that the issues identified by Mr Nakhla are contributing to the water ingress.
- 65 During cross-examination Mr Nakhla conceded that he is unable to confirm that the spreaders referred in his report are in fact defective.
- 66 With regard to the flashings, the Nakhla Report provides no explanation as to how Mr Nakhla formed the view that the flashings are ‘poorly notched’ or that the gaps are excessive. For example, the report does not refer to any relevant standard or code requirement, nor any other literature or materials used to support Mr Nakhla’s opinion. Moreover, the report refers to no measurements or other tests or investigations on which Mr Nakhla has relied.
- 67 Similarly with regard to the absence of sumps in the box gutter outlets, the Nakhla Report provides no explanation as to why the absence of sumps constitutes a defect in this instance. He has referred to nothing in the plans and specifications requiring installation of sumps, and has identified no standard, code or other materials which support his view that sumps should have been installed. Mr Coombes agrees that there are no sumps installed but opines that the absence of sumps is not of concern in this instance because there are rainwater heads installed, and in such circumstances sumps are not required.

68 Overall, Mr Nakhla's evidence in relation to both the flashing and the box gutter outlets does not sufficiently establish the facts on which his opinions are based in order that I can be satisfied (per *Makita*) that there is a proper foundation for his opinion that those aspects of the roof are defective.

69 Accordingly, I am not satisfied that the defects to the roofing above the alfresco area are established.

Hydraulic system

70 There was much discussion during the hearing about the adequacy of the design of the existing hydraulics system which discharges stormwater from the roof, and the most appropriate way to address the system's failings.

71 The experts agree that the current system is not fit for purpose and that modifications are required. The dispute is as to what those modifications should be.

72 The Nakhla Report proposes that a hydraulics engineer be engaged to "assess roof catchment volumes and assess rear lower roof dispersion of drainwater" and prepare a "remedial design to drain most water to the street and bypass the rainwater tanks".

73 Mr Taki says that the builder, at its own cost, has already engaged its own hydraulics engineer (Ben Carruthers of Engineering Studio Pty Ltd) to provide a revised hydraulics design to discharge rainwater from the roof. The revised design is provided at page 57 of Exhibit AT-1 to Mr Taki's statement (Revised Hydraulics Design). Attached to the Coombes Report is a compliance certificate prepared by the hydraulics engineer which certifies that the Revised Hydraulics Design complies with the Building Code of Australia.

74 The Coombes Report says that the implementation of the Revised Hydraulics Design has been commenced by the builder and should be completed. This would involve replacement of the existing gutter from the middle section at the rear of the building with a 200 mm wide half round gutter, and installation of a

rainwater head to the northwest corner of the alfresco and connect to the box gutter. The Joint Report indicates that Mr Nakhla agrees that these works should be carried out.

- 75 Both Mr Coombes and Mr Nakhla conceded that they are not experts in hydraulics and neither party submitted expert evidence from a hydraulics engineer. The best evidence therefore that is available to me in this regard is the Revised Hydraulics Design which forms the basis of Mr Coombes' recommendations. Mr Nakhla criticised the revised design as being "inadequate" but as he is not a hydraulics expert, and as the Revised Hydraulics Design has been certified as compliant, I prefer Mr Coombes' evidence in this regard.
- 76 In any event Mr Nakhla's proposed solution – which would be to engage a hydraulics engineer to provide a report and carry out works "as detailed by hydraulics engineer" is not an acceptable one. It is the role and responsibility of the Tribunal to make a determination, with the assistance of expert evidence, as to the appropriate work order to be made. If Mr Nakhla's solution was adopted, the Tribunal would effectively be delegating that function to an unidentified third party with an unknown outcome. It was open to the homeowner to obtain the opinion of a hydraulics expert in preparation for the hearing. He did not do so. To require the builder to obtain such an opinion in lieu of the Tribunal making its own determination on the matter would be entirely inappropriate.
- 77 For these reasons I am ordering that the hydraulics repairs be carried out in accordance with the scope of works in the Coombes Report.

Rainwater tank

- 78 The experts agree that the defects associated with the rainwater tank can be addressed by modifying the inlet pipe currently discharging into one tank so that it discharges over four tanks and I am making a work order accordingly.

Rectification of damaged ceiling linings

79 The experts agree that the damaged alfresco ceiling linings will need to be repaired once the water ingress issue has been addressed. During cross-examination Mr Coombes conceded that the scope of works in this regard is more comprehensively set out in section 6 of part 8.4.6 of the Nakhla Report and I am making an order accordingly.

Item 5(1) – Driveway finish

80 The Nakhla Report asserts that the concrete finish on the driveway is “inconsistent and requires repair”. No further details are provided.

81 Mr Coombes says that the swirled non-slip finish provides better tyre grip and added safety for pedestrians, noting the relatively steep gradient of the driveway.

82 Mr Nakhla has referred to nothing in the Contract, or the plans and specifications attached to the Contract, or to any standard or code, which support the assertion that the driveway finish is defective. The only supporting material he relies on are photographs of the driveway which show a swirled finish on areas of the driveway. Moreover, when cross-examined on this issue Mr Nakhla agreed that the swirled finish on the graded section of the driveway provides appropriate extra traction. He also conceded that his concern with the driveway is an aesthetic one only.

83 Having considered the available evidence I am not satisfied that the finish on the driveway is defective.

Item 5(2) – Driveway drainage grate

84 The Nakhla Report states that the drainage grate requires a leaf guard cover and that it is “already filling with leaves”. No further details regarding this issue have been provided in the Nakhla Report (other than supporting photographs).

- 85 The Coombes Report states “I do not agree ... that the contractor is responsible for preventing leaves from entering the driveway drainage grate as this is a long-term maintenance issue for which the owner is responsible. In addition, the installation of leaf guard ... is not included in the contract”.
- 86 The homeowner has not established that there is anything in the Contract requiring a drainage grate, that any code, standard or other document mandates the inclusion of a drainage grate, or indeed that there is any sound basis for requiring a drainage grate. Therefore I cannot be satisfied that the failure to include a drainage grate constitutes a defect for the purposes of s 18B of the Act.

Items 5(3) and 5(6) – Weepholes to window sills

- 87 The Nakhla Report states that the laundry and eastern elevation windowsills are missing weepholes.
- 88 The Coombes Report provides an excerpt from clause 9.6.2.2 of AS 4733.2 which states “weepholes may be omitted at sill flashings” and clause 9.6.2.3(d) of the standard which says “weepholes are only required at 1200 mm maximum centres for openings greater than 1200 mm in width”.
- 89 Mr Coombes goes on to say in his report that he measured the width of the laundry window to be 690 mm and the other windows to be 600 mm, and that therefore in his view weepholes are not required.
- 90 During cross-examination Mr Nakhla referred to AS 3700 which he says contradicts AS 4733.2. However, no copy of, or excerpt from, that standard was provided by Mr Nakhla so it is not possible for me to be satisfied that it is indeed inconsistent with AS 4733.2.
- 91 In the absence of any materials supporting Mr Nakhla’s contention that weepholes are required, and in view of AS 4733.2 and the measurements taken by Mr Coombes, I am not satisfied that weepholes are required on either the laundry or eastern elevation window sills.

Item 5(7) – Slab under airconditioning motor

- 92 The Nakhla Report states that the “damaged slab” under the airconditioning motor “requires repair/patching”. In the photograph attached to the report it is not possible to see the alleged damage to the slab. Mr Nakhla said that he also relies in this regard on a photograph attached to the Pre-handover Report (dated June 2020). However, that photograph shows the slab from an entirely different angle and prior to landscaping having been carried out. In any case, the damage alleged by Mr Nakhla is not clearly apparent from that photograph.
- 93 The Coombes Report states “I observed no apparent damage to the slab under the air conditioning unit. I assume that this item has been rectified and it is my view that the ... slab is for the purpose intended”.
- 94 Having considered all the available evidence I am not satisfied that the slab is defective.

Item 5(8) – Garage floor

- 95 The Nakhla Report says that the garage floor is poorly finished and that he recommends cleaning it and painting with non-slip paint. The photograph attached to the report depicts a mottled, uneven floor surface.
- 96 In the Coombes Report Mr Coombes states that the garage floor is fit for its intended purpose. However, during cross-examination Mr Coombes conceded that the garage floor has not been finished with due care and skill.
- 97 I am therefore satisfied that there has been a breach of s 18B(1)(a) and that rectification is required. In this regard the experts agree as to the method of rectification and I am making an order accordingly.

Item 5(16) – Tiles around shower niche in ground floor ensuite

- 98 The Nakhla Report states that the tiles in and around the shower niche are “poorly cut with visible jagged edges”.

- 99 No other information is provided in the report other than several photographs of the niche taken from what appears to be a close angle. Some minor unevenness in the edges of the tiles is apparent in those photographs.
- 100 However, in the Coombes Report Mr Coombes states “I have observed the tiles in and around the shower niche ... from a normal viewing position at a distance of 1.5 metres as specified in the NSW Guide to Standards & Tolerances and I have formed the view that the tiling to the niche is of an acceptable standard. When viewed at a close distance or magnified through a camera lens the edge of the cut tile around the niche becomes more prominent.”
- 101 Unlike the Coombes Report the Nakhla Report refers to no standard or code or other basis for Mr Nakhla’s conclusion that the tiling is defective. I therefore prefer Mr Coombes’ evidence in this regard and am not satisfied that the tiling around the shower niche is defective.

Item 5(17) – Ground floor main tiled area

- 102 The Nakhla Report states in relation to the ground floor main tiled area “No expansion joints. These are required”. No explanation is provided as to why expansion joints are required.
- 103 The Coombes Report concurs that no expansion joints have been installed and states “I noted that the timber skirting boards have been positioned above the tiles. As there is no evidence of disturbance to the floor tiles it can be assumed that sufficient gaps for expansion are available under the skirting boards”.
- 104 Having considered the experts’ respective evidence, and particularly in light of the absence of any explanation in the Nakhla Report regarding the need for expansion joints, I am not satisfied that the lack of expansion joints renders the tiling defective.

Item 5(21) – Shower screen in upstairs bathroom

- 105 The Nakhla Report states “excessive movement to shower screen fixed panel. Adjust”
- 106 The Coombes Report states “I observed the frameless glass shower screen ... and in my view the fixed panel is fit for the purpose intended”. During cross-examination Mr Coombes confirmed that when examining the screen he pressed against it with his hands and was satisfied that it was sufficiently sturdy.
- 107 In the absence of any further explanation regarding the shower screen, including for example what tests or investigations, if any, were done to establish that it is insufficiently sturdy, or what code or standard has been breached, I cannot be satisfied that the shower screen installation is defective.

Item 5(26) – Inbuilt wall cistern half flush

- 108 The Nakhla Report states that the half flush button on the in-built wall cistern is not working.
- 109 Mr Coombes states in his report that whilst he was carrying out his inspection he observed that the half flush button was not working but that the issue was rectified by the builder whilst he was onsite.
- 110 In the absence of any further information I cannot be satisfied that there continues to be an issue with the half flush button or indeed that any past issue with the button was due to defective workmanship.

Timing of work order

- 111 The experts agree that the rectification works should be able to be completed within approximately twelve weeks, allowing an two additional weeks for the Christmas shut down period.

Orders

112 For these reasons I make the following orders:

- (1) Within 14 weeks of the date of these orders the respondent is to carry out the works specified in the Schedule attached to these orders, in a proper and workmanlike manner.
- (2) The application is otherwise dismissed.
- (3) If there is a costs application, the costs applicant is to file and serve submissions and documents on the costs application by 14 days from the date of these orders.
- (4) The costs respondent is to file and serve submissions and documents on the costs application by 28 days from the date of these orders.
- (5) The costs applicant is to file and serve costs submissions in reply by 35 days from the date of these orders.
- (6) The costs submissions of the parties are to state whether the parties seek an oral hearing on the issue of costs, or consent to the costs application being determined on the papers in accordance with s 50 (2) of the Civil and Administrative Tribunal Act 2013 (NSW).
- (7) The Tribunal may determine it appropriate to deal with any costs application 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

SCHEDULE

Item 2 (Water ingress to garage):

The works set out in section 2.2.3 of the Coombes Report.

Item 4 (Roof and stormwater drainage):

The works set out in section 2.4.3 of the Coombes Report except that in relation to the alfresco ceiling the works shall be in accordance with section 6 of part 8.4.6 of the Nakhla Report and in relation to the rainwater tanks the works shall be as set out in section 4 of the Joint Report under the heading "Rainwater tank".

Item 5(4) (External Window frames):

Clean and apply touch-up paint as required to external window frames.

Item 5(5) (Rear bi-fold doors):

Install aluminium storm-mould above bi-fold doors, expose weepholes, repair render and repaint.

Item 5(8) (Garage floor):

Clean and paint with non-slip paint.

Item 5(9) (Entry door lock):

Replace lock.

Items 5(11), (13), (15), (20), (22), (23) (Internal doors):

Replace and paint internal laundry door, door to ground floor WC, ground floor bedroom door, upstairs bathroom door, door to bedroom 4 (balcony bedroom) and doors to upstairs master bedroom and ensuite. Note: new doors to be brand new.

Item 5(18) (Double doors to media room):

Repair paint to T-piece and patch repair around hinges.

Item 5(19) (Cupboards under sink in media room):

Remove existing door which is missing shark tooth detail and replace with door that has shark tooth detail along the top edge.

Item 5(25) (Rear hinged door latch):

Carry out adjustment to the latch mechanism and/or to the striker plate to achieve effective latching of the hinged door of the multi bi-fold unit.