



New South Wales
Civil and Administrative Tribunal

Case Title: Aubrey Cornwall and Robert Cornwall v
Stylemaster Patios Kellyville Pty Ltd

Medium Neutral Citation: [2014] NSWCAT

Hearing Date(s): 17 July 2014

Submissions closed: 16 August 2014

Decision Date: 4 December 2014

Division: Consumer and Commercial Division

Before: P. Boyce, Senior Member

Decision: 1 The respondent is to pay the
applicants the amount of \$1,650.49
on or before 16 December 2014.

2 Costs Reserved

Catchwords: Contract term, money claim, defective
building works

Legislation Cited: *Civil and Administrative Tribunals Act 2013*
Civil and Administrative Tribunal Rules 2014
Consumer Trader and Tenancy Act 2001
Home Building Act 1989

Cases Cited: *Agricultural and Rural Finance Pty Ltd v*
Gardiner (2008) 238 CLR 570,
Wake v Harrop 1 H & C 202 as quoted by
Isaacs J in *Gordon v McGregor* (1909) 8
CLR 316

Texts Cited: None

Category: Principal Judgement

Parties: Aubrey Cornwall and Robert Cornwall
(applicants)
Stylemaster Patios Kellyville Pty Ltd
(respondent)

Representation

- Counsel: Applicants : Mr Nicholas Allan
Respondent: Mr Jeremy Gruzman

- Solicitors: Applicants: Drayton Sher, Lawyers
Respondent: Karl Balian & Co Pty Ltd

File number(s): HB 13/53373

Publication Restriction: Unrestricted

REASONS FOR DECISION

Application

- 1 This is the rehearing of an application by applicant home owners against a respondent builder for breach of the statutory warranty in the *Home Building Act 1989* seeking damages being the cost of rectification of building work and relief from payment of the balance of the cost of carrying out the building work.

- 2 The applicants brought their first application to the Consumer Trader and Tenancy Tribunal ("CTTT") (file number HB 13/05767) by application dated 31 January 2013 seeking an order against the respondent:
 - (a) for relief from payment of \$8,570.00 being the amount claimed by the respondents as owing to it under a contract between the applicants and the respondent; and,
 - (b) Compensation in the amount of \$29,150.00 for loss because of a breach of the statutory warranty *Home Building Act 1989*.

- 3 By consent on 18 March 2013 the CTTT ordered, inter alia, that:
- (a) Within 14 days [of 25 March 2014] the Respondents to provide Applicants with a detailed amended building plan, proposal and contract meeting covenants [building restrictions contained in Community Management Statement in DP270109] requirements and for the Applicants to consider same and, if accepting, to seek the approval of the Owners Corporation to implement the revised building works.
 - (b) If the Applicants do not approve the amended plan etc the parties to seek an independent report from the Dept of Fair Trading or Master Building Association on the current works and plan particularly in reference to the covenant and current complaints of the current works.
- 4 On 17 June 2013 the applicants renewed their application in the CTTT (file number HB 13/33042 against the respondent seeking orders:
- (a) for relief from payment of \$8,570.00 being the amount claimed by the respondents as owing to it under a contract between the applicants and the respondent; and,
 - (b) Compensation in the amount of \$37,950.00 for loss because of a breach of the statutory warranty *Home Building Act 1989*.
- 5 On 24 September 2013 the CTTT made procedural directions and in particular made direction (3): *"The parties are on notice that the threshold issue for the Tribunal to consider is whether the orders made in HB 13/05767 on 18 March 2013 have been complied with"*.
- 6 On 11 October 2013 the CTTT dismissed the application because there was no jurisdiction to determine the application. Member Meadows gave his reasons for dismissing the application:

The result is that orders made on 18 March 2013 were complied with, and pursuant to s 43(1) of the Consumer Trader and Tenancy Tribunal Act 2001, the Tribunal could not accept this application. For those reasons the application is dismissed.

- 7 On 11 October 2013 the applicants brought this application against the respondent in the CTTT (HB 13/53373) seeking orders:
- (a) for relief from payment of \$8,570.00 being the amount claimed by the respondents as owing to it under a contract between the applicants and the respondent; and,
 - (b) Compensation in the amount of \$40,000.00 for loss because of a breach of the statutory warranty Home Building Act 1989.
 - (c) Restoration of credit rating with proof of same.
- 8 On 15 November 2013 the CTTT made procedural directions including directions to address the issue of res judicata and issue estoppel.
- 9 By consent on 4 December 2013 the CTTT set aside the directions orders made on 15 November 2013 pursuant to s 32 of the *Consumer Trader and Tenancy Act*.
- 10 The application was heard on 17 July 2014. At the conclusion of the hearing the Tribunal directed the parties to file written concluding submissions.

Jurisdiction and legislation

- 11 S 48A of the *Home Building Act* defines:

“building claim” means a claim for:

- (a) The payment of a specified sum of money, or
- (b) The supply of specified services, or
- (c) Relief from payment of a specified sum of money, or
- (d) The delivery, return or replacement of specified goods or goods of a specified description, or
- (e) A combination of 2 or more of the remedies referred to in paragraphs (a)-(d)

that arises from a supply of building goods or services whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of building goods and services, but not include a claim that the regulations not to be a building claim”.

“building goods and services” means goods or services supplied for or in connection with the carrying out of residential building work or specialist work, being goods or services:

- (a) Supplied by the person who contracts to do, otherwise does, that work, or
- (b) Supplied in any circumstances prescribed by the regulations to the person who contracts to do that work.

12 S 3 of the *Home Building Act* defines:

“residential building work” means any work involved in, involved in co-ordinating or supervising any work in:

- (a) The construction of a dwelling, or
- (b) The making of alterations or additions to a dwelling, or
- (c) The repairing, renovation, decoration or protective treatment of a dwelling”.

13 S 48K(1) of the Act provides:

Jurisdiction of Tribunal in relation to building claims

(1) The Tribunal has jurisdiction to hear and determine any building claim brought before it in accordance with this Part in which the amount claimed does not exceed \$500,000 (or any other higher or lower figure prescribed by the regulations).

14 The Tribunal is satisfied that it has jurisdiction to hear and determine the application before it.

Statutory warranties

15 S 18B of the Act provides:

Warranties as to residential building work

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 performed in a proper and workmanlike manner 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.

Facts

- 16 After negotiations with the applicants, the respondent presented to the applicants a "Tax Invoice" numbered KV-5069.
- 17 The Tax Invoice refers to a hand drawn sketch of a proposed structure.
- 18 The Tax Invoice and the sketch were signed by the applicants and the respondent on 17 November 2011.
- 19 The respondent relies on the Tax Invoice and the sketch to be read together as the building contract (referred to in these reasons for decision as the "Contract").
- 20 The applicants entered into the Contract dated 17 November 2011 for the respondent to build a structure at the rear of their property.
- 21 The Contract was for the supply of a powder coated steel framed Insulated metal Roof patio cover to be connected with the applicants existing

dwelling by means of a flat roof for a price of \$21,425.00. The price was payable by instalments of and at:

(a)	Preliminary payment	\$2,142.50
(b)	Check measurement	\$4,285.00
(c)	Before start of job	\$6,427.00
(d)	Completion of floor/frame	\$6,427.00
(e)	Completion	\$2,142.50

22 The respondent carried out building works.

23 The applicants have paid to the respondent \$12,424.50 for the building works.

24 The parties agree that pursuant to the Contract an amount of \$8,570.00 remains due to the respondent.

What were the terms of Contract

25 The first issue to be determined by the Tribunal is what were the terms of the contract? In particular:

- (a) Were the roof height and its visibility from the street terms of the Contract; and,
- (b) Whether the colour of the metal sheeting was the colour chosen by the applicants?

Roof height and visibility

26 The evidence of the applicants is that during the negotiations with the respondent's representative, Mr Orehek, before entering into the Contract, they stipulated that they wanted a *"gable patio roof for the rear of [their] house (the "pergola")*.

27 The applicants evidence is that in response to the applicants further stipulation that the *"they did not want the pitch of the roof of the pergola to be visible from the front"*, Mr Orehek said that *"we'll make sure that the*

pitch of the roof cannot be seen from the front of the house” and that he then proceeded to demonstrate with a tape measure where the maximum height of the roof would be, about 1 metre above the existing gutter.

- 28 In his statutory declaration dated 15 August 2013 tendered by the respondent, Mr Orehek declared that:

I was standing at rear of the property (possibly at the initial stages of meeting with Mr & Mrs Cornwall) and said, that due to part of the house roof being single storey that the new patio roof will definitely be seen from the front.

Secondly, at a later stage in a very short conversation I was trying to explain that part of the roof would not be seen that is obscured by the existing building, however at some point out the front the roof would be seen.

- 29 Under cross examination, Mrs Cornwall's evidence is that when she received the quotation from the respondent in response to a question *“Did you read the quotation carefully?”* was that *“As much as I could understand. We told [Mr Orehek] what we wanted and he gave us it [the quotation]. I don't understand measurement for pillars and blocks”*.

- 30 Mr Orehek's cross examination revealed that his recollection of the discussions was at best sketchy, given that the discussions took place during a *“busy week- a long time ago”*. On his evidence, the plan he produced was not drawn to scale, however he used scale paper and a ruler. The plan does not say it is not to scale. Mr Orehek says that the plan was merely a design sketch.

- 31 In such a situation where the recollections of the parties are in dispute, the Tribunal must make a determination on the evidence before it.

- 32 The respondent's evidence is that a quote was given by it dated 9 October 2011, but accompanied by an email dated 9 November 2011. As a result of issues raised about a proposed insulated walling by the applicants a revised quote was given dated 10 October 2013, but sent by email to the

applicants dated 11 November 2011. The date discrepancies explained by auto dating.

- 33 The evidence that Mr Orehek also had to amend the plan he had drawn because he had omitted at least a proposed down pipe from it favours the applicants' assertion that the proposed works did not reflect the applicants' requirements for the structure as to its height.
- 34 The applicants submit that the drawings could be viewed as a complete record of the parties bargain or that they can be viewed as a partial record and complemented by what was discussed and agreed on 17 November 2011. The applicants support this alternative contention with a "*a written contract, not under seal, is not the contract itself, but only evidence...[I]t is always open to the parties to show whether or not the written document is the binding record*". *Wake v Harrop* 1 H & C 202 as quoted by Isaacs J in *Gordon v McGregor* (1909) 8 CLR 316, 323.
- 35 The Tribunal is satisfied on the civil standard of proof that the applicants did make known to the respondent's representative that they required the roof to not be visible from the street. Although not stated with any precision in his statutory declaration, the Tribunal is satisfied that Mr Orehek recognised the difficulties of restriction of visibility of the structure from the street with the practicalities of designing the structure to accommodate the applicants' stipulation for the size of the structure to be achieved and the use of a gabled roof. The hand drawn plan that the respondent purports to form part of the Contract does not identify the height of the roof. However, the plan is in the nature of a design sketch. The width of the structure is shown as 8.1 metres and the proposed pitch of the roof of 22 degrees is identified albeit noting that the pitch is to be confirmed. It is reasonable to conclude that even drawn as a sketch plan to have a gabled roof, there needed to be a height at its pitch to enable the roof members to carry span of 8.1 metres as shown in the plan.

36 It is noted that in the respondent's evidence there is a plan drawn by the respondent dated 27 March 2013 which identifies the height of the gabled roof to be 1.696 metres above the fascia of the existing dwelling. It is assumed that this later drawn plan is of the structure as built.

37 It was not until the frame of the structure was erected that the applicants complained about the visibility of the roof from the street (and the colour of the roof sheeting).

38 The respondent supports its contention that the applicants' affirmed the alleged breach of contract in the cross examination of Mrs Cornwall where in response to questions about the roof height and colour she said:

Counsel: So you knew, didn't you, what colour the roof was and you could see that it was going to be visible from the street?

Mrs Cornwall: Yes, that is why we made a complaint with them [Stylemaster] at that time.

Counsel: So you knew that the roof would be visible and you could have said "stop" before the roof went up or things went any further but you didn't tell them to stop. You agreed to let them proceed.

Mrs Cornwall: We didn't have any choice.

Counsel: Well you did have a choice. You could have told them to stop.

Mrs Cornwall: *They wanted us to pay more money* [to change the roof colour].

39 The respondent submits that even if the Tribunal finds that it was a term of the Contract that the roof not be seen from the street, by the applicants affirmation to build the roof as the respondent planned to do, the applicants are stopped from denying that the plans were to build the patio in accordance with the instruction to proceed to build it.

40 The applicants submit that the assertion in the respondents submission that the applicants are estopped from denying instructions to proceed cannot be sustained. The applicants rely on the fact that a contract is either varied or it is not. To be varied, consideration must move from both parties: *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 601 [95]–[96]. The doctrine of election where one party abandons

one right in the course of exercising another inconsistent right is irrelevant in this matter. In this matter the applicants imply chose whether to terminate immediately over the height issue or hold the respondent to the bargain and claim damages later, that was their choice.

- 41 Additionally the applicants' submit that there is no notion of waiver in Australian law and no estoppel in the absence of any detrimental reliance by the respondent on what the applicants said. An instruction from one party to another will not, without more, alter the rights and obligations that attached when the parties first contracted: *Australian* at 593 [71]; 597 [84]; 601 [95] and [96].
- 42 The respondent contends that the applicants need for the roof not to be visible from the street was to satisfy the bylaws of the Community Plan for the land on which the applicants dwelling was erected.
- 43 This contention is supported by the applicants belatedly obtaining consent from the Community Association after the structure was completed.
- 44 However, the Tribunal is satisfied on the evidence before it that it was a stipulation of the applicants that the roof not be visible from the street and that stipulation forms part of the contract. The negotiations and recording of the agreement between the parties shows errors made by the respondent and it is reasonable to assume that the stipulation for height while discussed was not adequately recorded by Mr Orehek and as a result the structure supplied was not in accordance with the agreement that the applicants understood as having been entered into. The respondent has failed to complete the building works in accordance with that agreement to prevent the roof from being seen from the street.

Colour of roof sheeting

- 45 The applicants claim that during the pre-contractual negotiations they stipulated that they required a preferred a dark coloured roof. Mrs

Cornwall's evidence is that during those negotiations she had a discussion with Mr Orehek and that he recommended a light grey colour as it would be cooler. He did not have a sample colour with him when he discussed colours with the applicants; however, had a coloured brochure from Versiclad with him, which he gave to the applicants. A brochure from Versiclad was tendered to the Tribunal at the hearing. The image of the profile for "Spacemaker" structural roofing has been circled by pen and the words "light grey" written within the circle.

- 46 Mr Cornwall's evidence is consistent with Mrs Cornwall's evidence. In his statement Mr Cornwall confirms that Mr Orehek gave the applicants a Versiclad brochure and said "*The colour will be light grey as in this brochure*".
- 47 The issue of the roof sheeting colour was raised by the applicants with the respondent when the sheeting was delivered for installation. In an email exchange starting with an email from Mr Stevens of Spacemaster at 8:53pm on 22 February 2012 to Mr Cornwall, reference is made to two colour options being available for the roofing, that is "*'birch grey [light grey]' or 'slate grey [dark grey]', as per the contract we have ordered 'light grey' to change this now would mean ordering all new sheets in 'dark grey' (slate grey) at an approximate additional cost of @ [sic] \$8000.00*".
- 48 Mr Cornwall responded to the Mr Stevens email at 9:43 pm on 22 February 2012:

In the first instance, the sheets are the wrong colour.
These roofing sheets are not grey, as per contract we have ordered "light grey" as per the website colour [here the website address is set out]
They are beige (light brown).
If we stay with our contracted colour of "light grey" then, that's okay with us.
We do not want the beige colour supplied, which is not the contracted colour.

- 49 The Tribunal finds on the evidence before it that the applicants had identified to them by the respondent by reference to the Versiclad brochure the colour referred to as "light grey". The Tribunal is satisfied that the colour referred to in the invoice that forms part of the Contract for the roof is "light grey". The Tribunal is satisfied that the respondents supplied the roofing sheets in the colour that both parties had agreed upon. The applicants have failed to satisfy the Tribunal that the "light grey" colour they agreed upon with the respondent is other than as supplied by the respondents.
- 50 That part of the applicants claim in relation to the colour of the roof sheeting therefore fails.

Defects

- 51 The applicants' further claim is for damages arising out of defective building works pursuant to the statutory warranty contained in s 18B of the *Home Building Act*.
- 52 The applicants obtained a report from Hi-Craft Home Improvements ("Hi-Craft") on about 30 January 2013. The Hi-Craft produced a Scott Schedule setting out the works proposed to satisfy the applicants claim for alleged defective and remedial works in the sum of \$37,950.00 and a recommendation that a structural engineers report of the structure should be obtained.
- 53 Subsequently, the applicants engaged Robert Springett of Craig & Rhodes Structural Engineers and the respondent engaged Trevor Hall of Kneebone, Beretta & Hall Pty Ltd, Consulting Structural & Civil Engineers.
- 54 Mr Springett and Mr Hall produced a joint report dated 10 October 2013 ("Joint Report") to set out their agreement on the remedial measures to be taken to the structure to ensure structural adequacy of the patio cover. They recommend:

- (a) Install two new posts against the rear wall of the house directly below the end truss. These will ensure that the structure is not totally reliant on attachment to existing house to resist uplift load.
 - (b) Provide an M10 galvanised steel bolt at the base of the posts through the holding down bracket marked on the sketch attached. These may be concealed by a decorative pedestal.
 - (c) Install a new 150 x 50 "Firmlok" or a 100 x 50 x 4 Duragal :C" section beside and firmly attached to the existing 208 x 65 box section as shown on attached sketch. This should be fitted in a way that reduces or eliminates the existing dead load deflection in the existing beam.
- 55 The Joint Report provides that there was no disagreement between the engineers.
- 56 The applicants tendered to the Tribunal a building report of NSW Building Consultants Pty Limited dated 14 February 2014, prepared by John Hickey (referred to in these reasons for decision as the "Hickey Report"). The report has been prepared in compliance with the CTTT's Expert Witness Code of Conduct. The amount determined by the Hickey Report to remedy the defective building works totals \$22,263.67.
- 57 The respondents tendered to the Tribunal a building report of City Wide Building Consultants Pty Ltd dated 23 March 2014, prepared by Mario Bournelis (referred to in these reasons for decision as the "Bournelis Report"). The report has been prepared in compliance with the Expert Witness Code of Conduct-Chairpersons Directions CTTT CD2003-2. The amount determined by the Bournelis Report to remedy the claimed defects is \$2,619.10.
- 58 As there is such a variance in the expert opinions it is necessary to consider each item as set out in the applicants' Scott Schedule.

- 59 Mr Hickey uses *Cordell Housing Building Cost Guide* (December 2013) as guide to costs together with Mr Hickey's industry experience in his costing of the works.
- 60 Mr Bournelis uses industry standard procedures, reference to *Rawlinson's Construction Cost Guide* and his industry experience in his costing of the works.

Item 1-Inadequate Structural members

- 61 The Hickey Report allows \$3,833.70 to remedy the structural defects identified by the Joint Report including 2 days labour for 2 men. The Bournelis Report allows \$2,301.00 including 1 days labour for 2 men.
- 62 The Tribunal accepts the respective experts' expertise in this regard and in the absence of evidence to the contrary cannot resolve the difference in costing other than by averaging the respective costing opinions.
- 63 The average of the two amounts is \$3,067.35. The Tribunal allows that amount for Item 1.

Item 2- Too little fall on skillion roof

- 64 The Hickey Report allows \$1,430.00 to remedy the defect of the claimed non-compliance with the Building Code of Australia ("BCA") as its pitch is too little to prevent a build-up of water. The Bournelis report provides that no remedy is necessary as the respondent has remedied the leak and the stormwater flow freely.
- 65 Mr Hickey measured the angle of the skillion roof and was satisfied that its pitch varies from 0.5 to 0.7 of a degree on its western end through 0.2 degrees at the centre to almost dead flat and 0.5 degrees at the western end where leaking has occurred. Mr Hickey refers to Part 3.5 *Roof and*

Wall Cladding of the BCA and that a trapezoidal roof requires a minimum pitch of 3 degrees. In his opinion the roof does not comply.

- 66 Mr Bournelis disputes Mr Hickey's finding. He says that the correct profile is that in the specifications set out in the Versiclad Spacemaker roofing information sheet, being a minimum of 1 degree. He provides photographs of his spirit level showing between a 0.9 and 1 degree pitch. He makes an assumption that the measurement of the pitch of the beam that runs along the northern elevation parallel to the beam on the southern elevation would be consistent across the roof.
- 67 The Tribunal prefers the evidence of Mr Hickey in this regard and his measurements across the roof. Accordingly the Tribunal allows the applicants claim of \$1,430.00 to remedy this defect.

Item 3- New roof can be seen from front of house

- 68 Having made a finding that the visibility of the roof was a term of the Contract the Tribunal accepts Mr Hickey's costing of the cost to remedy the respondent's error and will allow the applicants the amount of \$4,342.00.

Item 4-Stormwater pipe and guttering

- 69 Mr Hickey recommends that to remedy the defects that he has identified the Scope of Works should be:
- (a) Remove completely the existing downpipe at the north east corner,
 - (b) When the gable roof structure is removed to change the pitch completely remove both gutter systems where the two structures adjoin.
 - (c) Supply and install a new box gutter system at the interface of the tiled roof and the western gable and the northern roof sheet ends properly over-flashed at the gable and the tiles.

- (d) Extend the new box gutter system onto the skillion roof at the southern end and to the outside of the tiled roof at the northern end.
- (e) Install a rain water head on the eastern wall of the existing house approximately 200-400mm from the corner and at the position which allows the new box gutter to flow into that as well as the existing gutter at the eastern end of the tiled roof.
- (f) Replace the current gutter at the north eastern side of the pergola so that it then falls to the new rainwater head but with the overflow at the eastern end (the high point).
- (g) Connect the downpipe from the new rainwater head into the old stormwater line using PVC pipe and glue fix all joints for a proper seal of all connections that would be "inside" if and when the sliding doors were installed.
- (h) Install an overflow spitter at the rainwater head.

70 Mr Hickey's estimate of cost is \$7,995.00.

71 Mr Bournelis disagrees with Mr Hickey. He says that at the time of his inspection of the existing guttering and the new guttering on the structure it operated as intended. His solution is that the applicants install gutter guards to prevent the build-up of vegetative material in the gutters and clogging the downpipes.

72 The Contract provides for the inclusion of a box gutter and that the downpipes to be connected to the existing stormwater system. The Contract provides for no more. The opinion of Mr Bournelis is preferred by the Tribunal as it reflects what the applicants bargained for. The Structure is an addition on Patio Cover, which the Tribunal notes did not have Council approval and at the time of construction did not have the Community Association consent. The applicants sought and obtained a structure to minimum specifications. On construction they were disappointed and now seek to upgrade the efficiency of the stormwater and guttering at the respondent's cost.

73 The Tribunal accepts Mr Bournelis recommendation that no further works are required.

74 The applicants claim for this element of their claim is not allowed.

Item 5-Maintenance of gutter at western end of Gable

75 This issue has been dealt with in the finding for Item 4 above.

Item 6-Craked Brickwork

76 The applicants claim that the load created by the new structure has cracked brickwork. Mr Hickey estimates that the cost of repair of the brickwork is \$390.00. On Mr Bournelis's evidence the crack was pre-existed the construction work carried out by the respondent. He relies on a photograph taken by the applicants during the course of construction.

77 The Tribunal is satisfied on the evidence of the applicants that the crack in the brick work occurred during the or after the commencement of the works. The photograph tendered in support of a pre-existing crack is not conclusive of when the crack occurred. It is reasonable for the Tribunal to find and on the evidence before it is satisfied that the crack occurred during or after commencement of the works by the respondent.

78 The Tribunal allows the applicants the amount claimed of \$390.00.

Item 7- Installation of electrical cable

79 The applicants claim that electrical cable installed by the respondent have been installed without protection and that Mr Hickey estimates that it will cost \$2,249.00 to remedy.

80 Mr Bournelis says that the electrical works did not form part of the scope of works. The respondent ran the cables along the underside of the ridge as a favour to the applicants and left it to be installed by others. He does

agree that the exposed portion of the cable should be concealed with the installation of flexible conduit at a cost of \$80.00.

- 81 Apart from a reference on the plan forming part of the contract that there be installed "white' lighting panels for lights" there is no reference to any electrical work being carried out as part of the Contract.
- 82 The Tribunal is not satisfied that electrical work was part of the Contract and therefore does not allow the amount claimed by the applicants. It will however, allow an amount of \$80.00 as recommended by Mr Bournelis.

Further amounts

- 83 The applicants also claim what they refer to as "Kneebone 4, 5 and 11" totalling between \$843.00 and \$1,440.00. This claim arises from the recommendations of the respondent's engineer. The applicants made that claim in a further statement by Mr Cornwall filed with the Tribunal on 16 July 2014, the day before the hearing day.
- 84 The respondent objected to the late filing and service of the further statement.
- 85 In their submissions, the respondent maintains that the claim should not be allowed as the respondent has been prejudiced by its late filing and service, having only one day in which to prepare its response. Notwithstanding that the claim arises out of the respondents engineers assessment the Tribunal will not allow the claim. The history of this and its preceding application is that the applicants have made varied claims against the respondent only to crystallise in the application now being determined. The applicants ran the risk of an order being made against them that the matter should be dismissed because of issue estoppel, however, that matter was not pressed by the respondent and, in any case, the evidence of earlier matters is not entirely the evidence in the extant matter.

86 The Tribunal is not satisfied that the respondent has had a proper opportunity to consider the further elements of the applicants claim particularised in the statement of Mr Cornwell filed and served only a day before hearing. Accordingly, the Tribunal does not allow that part of the applicants claim.

Conclusion

87 The Tribunal is satisfied that in carrying out the building works for the applicants, the respondent failed to comply with the statutory warranty in s 18B (a) in that the work that was carried out has been found to be defective and not in a proper and workmanlike manner in accordance with the plans and specifications.

88 As such, the applicants are entitled to damages in the amounts allowed to the applicants in their claim by the Tribunal as follows (using the numbering system adopted in the reasons for decision):

Item 1	\$ 3,067.35
Item 2	\$ 1,430.00
Item 3	\$ 4,324.00
Item 6	\$ 390.00
Item 7	\$ 80.00
Total	\$ 9,291.35
Plus GST	<u>\$ 929.14</u>
Total including GST	\$10,220.49

89 The Tribunal is satisfied that applicants failed to pay the balance of the contract price for the building works. The respondent submits that there is agreement between the parties that any amount ordered to be paid by the respondent should be set off against the amount outstanding pursuant to the contract. The amount outstanding is under the Contract is \$8,570.00. When set off against the claimed for defective works and damages allowed

by the Tribunal, the amount payable by the respondent to the applicants is \$1,650.49.

Costs

- 90 Normally each party to proceedings before the Tribunal is to pay that party's own costs: s 60 of the *Civil and Administrative Tribunals Act 2013*. However, where there are special circumstances as set out in s 60(3) the Tribunal may make an award of costs.
- 91 The Tribunal in the Consumer and Commercial Division pursuant to Reg 38 of the *Civil and Administrative Tribunal Rules 2014* also has a discretion to award costs even in the absence of special circumstances:
- (a) if the amount claimed or in dispute is more than \$10,000.00 but not more than \$30,000.00 and the Tribunal has made an order where a party has conducted the proceedings in such a way as to cause disadvantage to the other; or,
 - (b) The amount claimed or in dispute in the proceedings is more than \$30,000.00.
- 92 The Tribunal reserves its decision as to costs to allow both parties to make submissions on the issue of costs only and the Tribunal makes the following directions.
- (a) The applicant may make written submissions by filing those submissions as to costs with the Tribunal and serve a copy of those submissions on the respondent within 14 days of the publication of this decision;
 - (b) The respondent may make written submissions by filing those submissions as to costs with the Tribunal and serve a copy of those submissions on the applicant within 21 days of the publication of this decision.

- (c) The issue of costs will be determined by the Tribunal on the papers.

(signed)



P Boyce
Senior Member
Consumer and Commercial Division
Civil and Administrative Tribunal of New South Wales

4 December 2014