



## Civil and Administrative Tribunal New South Wales

Case Name: Cooper v JFW Constructions Pty Ltd

Medium Neutral Citation: 2019 NSWCAT

Hearing Date(s): 13 June 2019, Written Submissions on 8 July, 15, 16 and 19 August 2019.

Date of Orders: 26 November 2019

Date of Decision: 26 November 2019

Jurisdiction: Consumer and Commercial Division

Before: Ian Bailey AM SC

Decision:

1. Pursuant to section 48O(1)(c)(i) of the *Home Building 1989* the Builder is to carry out and complete all of the building work identified in Annexure A to this decision in accordance with the procedure identified in paragraphs [xx] to [xx] of the decision in these proceedings.
2. The Homeowner is to allow the Builder exclusive access to the whole of the premises during the performance of the works under the Work Order.
3. The work is to commence within 21 days of the date of these Orders and be completed by a date agreed or determined by the parties' experts.
4. Upon completion the Builder is to submit a Final Claim in accordance with Clause 7 of the Contract.
5. The Homeowner is to pay the amount of the Final Claim within 7 days of delivery of the claim.
6. If either party wishes to make an application for costs of these proceedings they are to file in the Registry such application along with any evidence on which they rely and submissions in support of the application within 28 days of the date of delivery of this decision.
7. If the application for costs is opposed the other party shall within a further 28 days file in the Registry any evidence on which they rely and submissions in support of the opposition to the application for costs.
8. The submissions as to costs are to include submissions on the issue of whether the hearing of the application for may be dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act, 2013*.
9. Pursuant to Schedule 4 Clause 8 of the *Civil and Administrative Tribunal Act 2013* either party has leave to



## REASONS FOR DECISION

- 1 These proceedings involve an application by Craig Cooper (the Homeowner) in HB 18/42409, filed on 2 October 2018, seeking orders for the payment of \$208,9803.97 by JFW Constructions Pty Ltd (the Builder), and a cross/application by the Builder in HB 19/14928, filed on 25 March 2019 seeking payment by the Homeowner of an amount of \$52,938. Both applications arise from a contract for alterations and additions to an existing cottage in Newtown.
  
- 2 The hearing was conducted on 13 June 2019 and directions were made:
  1. Both proceedings Adjourned - PART HEARD.
  2. The Tribunal notes the agreement by the parties as to the timetable for submissions.
  3. The Homeowner to file written submissions on or before 1 July 2019.
  3. The Builder to file written submissions on or before 22 July 2019.
  4. The Homeowner to file written submissions in reply on or before 29 July 2019.
  5. The submissions are to address all issues relating to a possible work order pursuant to section 48O(1)(c)(i) of the Home Building Act and the terms of such Order.
  6. The Tribunal will deliver the decisions in both matters including the terms of any work order and will include orders for the execution of the works, compliance certification and joint expert agreement upon completion.
  7. The Decisions by the Tribunal will include directions as to the conclusion of both matters.
  
- 3 The timetable for submissions was extended by consent.

### Evidence and Pleadings

- 4 The evidence of the parties and their pleadings comprised:  
Exhibit TE/1 Homeowner's Bundle of Documents comprising:  
  
In HB 18/2409
  - (1) Application Dated 7 June 2018
  - (2) Points of Claim dated 12 December 2018
  - (3) Points of Defence to Points of Claim dated 8 April 2019

(4) Statement of Craig Steven Cooper dated 29 April 2019

In HB 19/14928

(5) Application dated 25 March 2019

(6) Points of Claim dated 25 March 2019

(7) Points of Defence to Points of Claim dated 7 May 2019

(8) Statement of James Wilkinson dated 8 April 2019

(9) Statement of Craig Steven Cooper dated 29 April 019

Expert Evidence

(10) Report of Mario Bournelis with Scott Schedule dated 11 Dec 2018

(11) Report of Craig Nisbett with Scott Schedule dated 29 March 2019

(12) Joint Report Scott Schedule dated 20 May 2019

5 During the hearing the parties' experts, at the direction of the Tribunal, inspected invoices produced by the Builder relating to expenditure against Provisional Sums. The experts prepared a handwritten summary of their joint conclusions which became Exhibit TE/2.

6 At, and following the hearing on 13 June 2019, the parties filed submissions which addressed both applications.

(1) Builder's Opening Submissions dated 12 June 2019 with summary of agreements

(2) Homeowner's Submissions dated 5 July 2019

(3) Builder's Closing Submissions dated 14 August 2019 Annexures A Consolidated Table; B Agreed items; C items requiring resolution; D Items covered by provisional Sum Issue and E. Extracts of Transcript.

(4) Homeowner's Reply Submissions dated 16 August 2019

## The Issues

- 7 There are many issues which have been raised by the parties. The solicitor for the Homeowner prepared a list of issues which the Tribunal has adopted as the initial basis for the process of identifying the issues to be addressed:
- (1) What are the plans/drawings which were included in the Contract?
  - (2) Which works were included in the Contract under a provisional sum?
  - (3) Whether the proffering by the Builder of a price and a break-up including amounts for provisional sums, for which the Contract made provision for adjustment for actual costs, involves some actionable warranty on the part of the Builder, or alternatively, whether the process involves a breach of an implied obligation of good faith?
  - (4) Has there been an effective termination of the Contract?
  - (5) Even if the Contract has been terminated, is the Tribunal able to make a Work Order pursuant to section 48O(1)(c)(i) of the *Home Building Act 1989*.
  - (6) What expenditure has been made against Provisional Sums?
  - (7) What defective work remains in the residence?
  - (8) What work is incomplete?
  - (9) Were there variations to the work required under the Contract?
  - (10) What is the adjusted Contract Sum?
  - (11) Should the Tribunal make a Work Order?
  - (12) If a Work Order is made what should the terms of the Order cover?
- 8 The Tribunal understands that nothing in these proceedings turns on the question as to which plans/drawings were included in the Contract. There was uncertainty as to the numbers and dates on various drawings, however this issue does not need to be considered.
- 9 Likewise there does not seem to be any real dispute as to which works were included under provisional sums. Ultimately the questions which arise involve an exercise of interpretation of the Contract documents and the evidence as to the work required.

- 10 Before dealing with the remaining issues individually the Tribunal is of the view that that some consideration should first be given to some aspects of the contractual documentation, and the manner in which the work proceeded which, it seems to the Tribunal, have substantially contributed to the problems which have arisen between the parties. These factors are at the core of determining why the dispute arose and whether the contract remains on foot.

### **The Contract and Performance**

- 11 The documents included in the Contract, particularly as to the architectural scope and detail of work, contained minimal information. It seems to the Tribunal that the paucity of detail included in the documents meant that there were many aspects which were uncertain and were, in the Tribunal's opinion, correctly addressed by the Builder under Provisional Sums. It is also clear that there were many decisions which the Homeowner had to make and to provide the Builder with information as to what was required, which was absent from the documents.
- 12 There was no specification or schedule of finishes, and the drawings included merely general requirements such as compliance "with the Building Code of Australia and relevant Australian Standards".
- 13 The engineering drawings were more detailed, however the evidence discloses that they contained errors and deficiencies which created problems for the Builder and the Homeowner. The Homeowner acknowledged this difficulty, see [19].
- 14 One significant problem was caused because the 'design' of the stairs on the drawings did not comply with relevant standards and would, if built, have produced a wholly impractical headroom clearance. The Tribunal understands that the design of a compliant stair will be more difficult, and thus more expensive, than that envisaged by the draftsman who prepared the plans.
- 15 Apart from the uncertainties associated with the limited detail in the documents as to what was required, there were a number of unusual aspects associated with the performance of the work. The first was that the

Homeowner kept a dog in a room of the existing small cottage which restricted the workspace available to the Builder. The work under the Contract included work in this room. The Builder described the dog as being vicious, and at one stage the dog attacked a workman. The Homeowner also stored personal possessions in various rooms which the Builder had to relocate, protect and clean during the performance of the work. The Homeowner actually occupied the incomplete building site in the early months of 2018 when the problems which the parties faced became very difficult. Clearly these involved matters which caused delay and additional cost to the Builder.

16 The most significant unusual aspect of the performance of the work under the Contract was the approach taken by the Homeowner to the finalisation of details and the introduction of changes to the work performed, particularly changes which altered the work which had been already performed. The sequence of these events was set out in the Builder's evidence by way of emails. At paragraph 15 to 19 of the Builder's Statement (pages 164-165) in Ex TE/1 the Builder explained the problem:

15. The trouble I had with Craig was that the construction certificate plans had errors. And to exacerbate the situation Craig would request changes on the run verbally or by way of email. At pages 12 to 26 are a number of emails detailing Craig requesting changes, there being issues with plans, and Craig complementing my building work.
16. On 24 January 2018 Craig sent an email stating the following:  
Hey Mate  
You'll find attached the plans with notes re:
  - Ligts (sic)
  - Plaster mouldings
  - Light tubes
  - Gas bayonet
  - Data cabling
17. The plans sent by Craig had extensive handwritten notes regarding changes that Craig wanted. In relation to the plans, the following rooms have been built different to the construction certificate plans because Craig changed his mind; en-suite, bathroom downstairs, kitchen, both bedrooms downstairs. Also Craig wanted non-complying light tubes in the kitchen and stairs without approval.
18. I tried my best to accommodate the changes that he wanted but after a while it got to the point that the construction certificate plans in no way reflected what Craig wanted from the renovation and it was difficult to make the renovation work.
19. A lot of the changes that Craig requested were after the works were completed. Craig saw what was built in accordance with the construction certificate plans and changed his mind. I could not follow

the clause in the contract regarding variations and give him a variation slip because the tradies were already on site and ready to work in accordance with the construction certificate plans. It was normal for Craig to give less than 24 hours notice when he changed his mind.

- 17 The Homeowner in his evidence does not dispute the substance of the above evidence of the Builder in [16].
- 18 The Tribunal notes that as late as 17 and 18 May 2018 emails to and from the Homeowner disclose that changes were being made to the location of power points in the bathrooms on the ground floor and upstairs.
- 19 It is also of note that as at mid June 2018, the Homeowner expressed satisfaction with the work of the Builder. At this stage the parties were discussing the additional costs which had been incurred as a result of, amongst other things, the extensive variations which had been introduced. In an email to the Builder on 12 June 2018, see page 187 in Ex TE/1 the Homeowner stated:

I am impressed with the work you have done thus far, and the problems you have found solutions for. I appreciate your capacity to manage the problems with the stairs, engineers drawings and upstairs plumbing which resulted in the bulkheads.
- 20 The Tribunal concludes that whilst the parties had not resolved the issues as to the value, or amount to be paid for the additional work undertaken by the Builder in dealing with “the problems”, and the numerous changes, the relationship was far from having “collapsed”.
- 21 The Tribunal further does not accept that the Builder could be regarded as being in breach of the Contract. The work was unquestionably later than envisaged. However, in the light of the evidence as to the actions of the Homeowner in delaying giving directions to the Builder and making extensive changes to the work required, see [16] to [18], it is entirely realistic to conclude that the Builder was not the source, or cause, of the delay and accordingly was not in breach.
- 22 Of particular concern for the Builder was the fact that the works as contemplated by the numerous changes would not comply with the Construction Certificate documentation. The Builder was concerned that

unless the Construction Certificate documents were not amended to reflect the extensive changes made by the Homeowner, it would be difficult for the Homeowner to obtain an Occupation Certificate. The Builder requested the Homeowner to arrange for amended plans to be prepared which reflected the work as it was performed.

### **Disagreement about costs and Provisional Sums**

23 The parties were unable to reach agreement as to the amounts payable under the contract, and obviously remain so. It seems that the Homeowner did not accept that the amount to be paid for work covered by Provisional Sums was the actual cost incurred along with an allowance for margin of 15% on the excess over the allowance. In these proceedings the Homeowner alleges that the Builder was under some legal obligation as to the 'accuracy' of the amount included in the Provisional Sum allowances. The Tribunal concludes that the Homeowner's resistance to making payment for costs exceeding the provisional allowances was at least one of the causes of the failure to agree, and that this approach of the Homeowner has continued during these proceedings.

24 The inability to reach agreement, however, caused the cessation of work. The Tribunal concludes that it is not strictly necessary to make a finding as to which party was responsible for the absence of agreement. The Tribunal will however make findings as to the adjustments which should be made to the amount payable under the Contract. The Builder explained the situation at [24]:

24. Around 20 July 2018 I left the site. I could not do more building work unless the plans were properly drafted, variations were approved, or I went over the allowed provisional sum cost.

25 The Tribunal also considers that the matters addressed above at [11] to [22] should be taken into consideration when addressing the issue as to whether a Work Order under s 48O(1)(c)(i) of the *Home Building Act 1989* (Work Order), should be made and the terms of such an Order to address the existing circumstances.

## The purported termination

26 The Contract makes provision in clause 13 as to how Default by the Builder is to be addressed. Clause 13 provides:

13. Default by the Builder
  - (a) If the Builder is in default by:
    - (i) wrongfully stopping work for an unreasonable period;
    - (ii) failing to proceed with due expedition to enable completion by the due date after allowing for changes to the construction period; or
    - (iii) failing to comply reasonably with a **written** notice to replace defective work or improper materials.

THEN the **Owner** by **written** notice is to advise the Builder of the matter or matters constituting the default and require the Builder to rectify the default within **twenty (20) days**. If the Builder fails to rectify the default within the period allowed, the **Owner** may by further **written** notice determine the **Builder's** engagement.
  - (b) The **Owner** may terminate this Contract in the circumstances provided by the general law however this does not prevent the **Owner** and the **Builder** from agreeing to additional circumstances in which the contract may be terminated.

27 In these proceedings the Homeowner claims to have exercised the option under subclause 13 (b) and purported to terminate the contract by a letter dated 13 November 2018, from his solicitor which stated:

I advise I act for Mr Cooper.

I am instructed to advise you that my client hereby terminates the Small Residential Renovations & Additions Contract dated 22 September 2017.

My client reserves all of his rights at law and common law.

28 The Homeowner's Points of Claim in paragraphs 13 to 15, apparently for the purpose of identifying, or specifying, the breach by the Builder upon which the termination by the Homeowner was based stated:

13. Pursuant to Schedule 3 of the Contract construction was to be completed within 75 days from the date the work is due to commence, namely, on or before 1 February 2018.
14. The Builder has never pursuant to the Contract, applied for extension of time to complete the works.
15. On 13 November 2018 the Homeowner terminated the Contract.

29 As to the matter referred to in [14] the Contract relevantly provides in Subclause 6(b):

- (b) the construction period is to be adjusted as set out below:

- (i) An extension of time for delays due to variations and other events or matters reasonably beyond the **Builder's** control must be allowed.
- 30 Accordingly there is an automatic entitlement to an extension of time for variations and other events beyond the control of the Builder. Whilst subclause 6(b)(ii) refers to notification by the Builder of "such matters", there is no condition precedent involved in the process. The fact that the Builder has not "applied for" extensions of time does not diminish the entitlement of the Builder to extensions of time which "must be allowed".
- 31 The Tribunal at [16] to [18] addressed the extensive delays occasioned by the prolonged determination by the Homeowner of necessary details of the work required, and the introduction of variations, even to work which had been fully, or partly, completed.
- 32 The Tribunal also considers that the cessation of work occasioned by the inability of the parties to reach agreement as to monetary adjustments was a cause of delay "beyond the control of the Builder". The Tribunal concludes that the Builder was entitled to extensions of time which would have resulted in the completion date being adjusted to the extent that the Builder could not be said to be in default under the Contract.
- 33 Further the Tribunal concludes that there is no legally sustainable basis for concluding that the Builder was in breach in a manner which could amount to a repudiation of the Contract. The Homeowner has not explained what the breach was which provided a legal an entitlement by the Homeowner to terminate the contract at common law.
- 34 The Builder's evidence about why work ceased at paragraphs 49, 51 and 53 of the statement dated 8 April 2019 was:
- 49. I disagree with paragraph 15 (no return by builder). I left the site because Craig would not pay any more for the building works.
  - 51. I disagree with paragraph 27 (no work since April). All provisional sums were reached, and Craig would not pay any more.
  - 53. I disagree with paragraph 28. I abandoned the site when Craig said he was not going to pay any more money.

- 35 The Tribunal notes that, although the Homeowner in a Statement in response to the Builder’s statement dated 8 April 2019 stated that a non-response to evidence was not an admission, the Homeowner has not responded to the above critical evidence, noted in [34] as to why there was a cessation of work. The Tribunal also notes the Homeowner’s approach to the provisional sums issue in these proceedings at [23].
- 36 The Tribunal concludes that there was a cessation of work was caused by the inability of the parties to agree about the amount payable under the Contract, particularly as to the adjustment of provisional sums.
- 37 The Tribunal concludes that the purported termination was ineffective as a termination at common law. The bald assertion that the contract is hereby “terminated” without any reference to the legal basis upon which the termination was made was, in the opinion of the Tribunal, insufficient. To the extent that the Homeowner seems to have relied in the Points of Claim upon the delay to completion being due to default by the Builder was incorrect for the reasons at [28] to [34], as was the reliance upon a lack of an “application” for an extension of time as explained at [29] to [30].
- 38 The purported, but ineffective, termination by the Homeowner, could have been treated at law by the Builder as a repudiation which, if accepted by the Builder could, have justified a termination by the Builder. The Builder has not done so and the legal consequence is that the Contract remains on foot.

### **Provisional Sums**

- 39 Clause 5 of the Contract addresses ‘PC Items or provisional sums’, which are defined as:

These allowances are for items where the **Owner** still has to make a choice or a decision or where the amount of work is not specifically known. Due to this situation an allowance has been made for each item or work. The choice made or the work required will impact on the cost to be paid.

- 40 In Schedule 6 to the Contract the following Provisional Sums were listed:

Cabinetry / Kitchen / Bench Top	\$25,300.00
Brickwork	\$4,840.00
Plumber	\$11,000.00
Electrician	\$7,700.00

Render	\$3,000.00
PC Items	\$6,000.00
Rubbish Removal 10 x \$550	\$5,500.00

- 41 The descriptions of the works under these Provisional Sums was included in the Job Break Up in the Contract in the following terms:

Cabinetry

Timber kitchen, timber bench top and two wardrobes

Brickwork

Allowance 1500 bricks supplied and laid plu patching downstairs total of a weeks labour

Plumber

Includes disconnections, rough in and fitoff, also includes relocating existing hot water heater, sewer and stormwater to be tapped into existing mains.

Electrician

Please not I'll try to leave the existing electrical as is if possible, Allowance includes to disconnect electrical before demo, rough in and fit off, will need exact layout to firm price in.

Render

Allowance includes new external work plus patching and making good to downstairs walls

PC Items

Estimate includes toilets, taps, tiles, bath, sinks, vanities, mirrors, drains, screens, and fans.

Rubbish removal

Allow for 10 collections throughout the job

- 42 Although not expressed in the Homeowner's Points of Claim, the basis of the dispute about the Provisional Sums is explained in the Homeowner's Submissions dated 5 July 2019 as involving either an enforceable warranty or a breach of an implied duty of good faith on the part of the Builder.
- 43 It is alleged that statements in the Quote/Job Break Up as to the amounts of the Provisional Sums have the character of an enforceable warranty by the Builder as to the amounts which the actual cost of the work associated with each allowance would be. Further, it seems that the Homeowner contends that if the actual cost of performing the work involved exceeds the amount of the allowance then the Builder will be in breach of the warranty.
- 44 The Tribunal does not accept that the provisional allowances, having regard to the definition of the allowances in Clause 5, could be treated as warranties. The words used in Clause 5 of the Contract, in effect, exclude the interpretation contended for by the Homeowner.

- 45 The alternative basis of dispute as to the Provisional Sums issue involves an alleged breach by the Builder of an implied obligation of good faith. The proposition is that the Builder made the estimates for the provisional sums and that when the actual cost of the work required became certain, and was found to be more than the estimates, then there was a breach of a duty of good faith. Even if such a proposition was legally sustainable, which it is not, there would need to be evidence as to what the allowances should, or could, have been. The obvious reason why it was necessary to include provisional allowances is that the architectural drawings were aspirational rather than definitive.
- 46 The Homeowner's contentions seem to completely misunderstand the objective of including provisional allowances. The allowances, amongst other things, provide some protection for the owner from estimates prepared by builders with an objective of risk avoidance when the nature and extent of work is uncertain. As the Builder stated in his evidence, "it is the fair way to deal with the problem".
- 47 As to the allowance for "Cabinetry / Kitchen / Bench Top" it is obvious that there is no design in the Contract drawings which could provide a basis for an estimate. There is a reference to a "suppliers design" on the plans but no such document is identified.
- 48 As to the allowance for "Brickwork", it is likewise impossible to identify with any precision from the Contract drawings the actual extent of brickwork required.
- 49 As to the allowance for "Plumber", there is no evidence from the Homeowner as to what could realistically be the basis for estimating the actual work required and the probable cost.
- 50 The allowance for Electrician was necessary because there was nothing in the Contract documents identifying electrical works. It was only in late January 2018, close to the originally contemplated completion date that the Homeowner turned his mind to what was required by way of electrical work,

even then without any specificity as to the required location of GPOs and light fittings.

- 51 The “claim” insofar as the Homeowner asserts an entitlement to damages arising from the amounts included for provisional sums is rejected.

### **Adjustment of Provisional Sums**

- 52 The Builder tendered evidence of actual expenditure by way of invoices from subcontractors and suppliers of work and materials which were included within the work covered by provisional allowances. The Builder submits, in the Tribunal’s view correctly, that the documents are business records and admissible as such. The experts for the parties were asked by the Tribunal to examine the invoices and draw conclusions as to whether the invoices were for work included in the provisional allowances. They prepared a hand-written document which annexed copies of the invoices which was marked Ex TE/2. The Tribunal relies upon the conclusions made by the experts in this Exhibit. On this basis it is however clear that estimates by the Builder in the Quote/Job Break Up were reasonable.

- 53 Exhibit TE/2 quantifies the amount overspent as proved by the invoices including and an allowance for excess on one item calculated at 10% rather than the contractual excess allowance of 15%, as being \$2,763.31.

- 54 The Homeowner in the Submissions dated 5 July 2019 submits that the correct figure for the overspending of Provisional Sums is **\$3,039.99**. The Builder in his Closing Submissions accepts the Homeowner’s calculation.

- 55 The Tribunal will include the agreed amount in the assessment of amounts payable.

- 56 The issue as to the correct adjustment for over-expenditure of the Provisional Sums has been resolved by consensus. The Homeowners submissions as to the procedure adopted by the Tribunal which lead to the production by the experts of Ex TE/2 assert, but do not identify, a material disadvantage. The invoices annexed to the Exhibit are business records recording the amounts

charged by subcontractors and the amounts paid by the Builder and provide a proper basis for the exercise undertaken by the experts.

## Appropriate Remedy

57 A central consideration for the Tribunal is the issue as to whether it is appropriate to exercise the applicable discretion and make a Work Order pursuant to s 48O(1)(c)(i) of the *Home Building Act 1989* (Work Order) having due regard to the 'preferred outcome' under s 48MA of that Act.

58 The Tribunal also understands that the Issues in the proceedings which need to be addressed by the Tribunal, if a work Order is made, will be reduced and accordingly this question should be addressed with priority.

59 Section 48O(1)(cc)(i) provides:

### **48O Powers of Tribunal**

- (1) In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate:
  - (a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
  - (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,
  - (c) an order that a party to the proceedings:
    - (i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or
    - (ii) do or perform, or refrain from doing or performing, any specified act, matter or thing.
- (2) The Tribunal can make an order even if it is not the order that the applicant asked for.
- (3) Sections 79R and 79T–79V of the [Fair Trading Act 1987](#) apply, with any necessary modifications, to and in respect of the determination of a building claim satisfy themselves that the invoices related to work under the Contract

60 Section 48MA provides:

### **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.

The operation of these provisions was considered by the Appeal Panel in *Leung v Alexakis* [2018] NSWCATAP 11. In that case, the Appeal Panel decided:

- (1) There was a discretion to be exercised under s 48O(1) which permits the Tribunal to make an order for compensation, an order in the nature of a work order or some other order of the type set out therein: at [139].
- (2) Section 48MA operated in the manner akin to a presumption, such that “unless the facts of a particular case make it inappropriate to order rectification of the defective work by the responsible party, an order should be made in terms that give effect to the principle”: at [140].

61 The facts in this case, in the opinion of the Tribunal, suggest that a Work Order should be made upon terms which address, amongst other things, the conduct of the parties in relation to the performance of the work during its performance, and the resolution of any issues which arise during the performance and at the completion of the work.

62 The Tribunal considers that the terms of the Order should also include a clear definition of the role of the parties’ experts. This is in recognition that the fact that joint **independent** expert opinion will assist both parties in avoiding the difficulties which arose under this Contract. There is no provision under the Contract for the independent acceptance that the work has been completed in accordance with the Contract. In circumstances where differences between the parties can arise the Tribunal may make directions for joint inspection on completion, or, if necessary, during the performance of the work.

63 The Tribunal notes that the Homeowner opposes the making of a Work Order, however the basis for that objection does not appear to identify any justified doubt as to the capacity of the Builder to perform the work required to complete.

64 As explained at [20] the Tribunal does not accept that there has been a collapse in the relationship, beyond what would reasonably be expected when parties to contracts fall into dispute. There is one factor which needs to be

recognised. The Homeowner retained partial occupation of the residence during the performance of the building work, and actually occupied the dwelling whilst work was continuing. It is undesirable for an owner of a residential building to remain in occupation of premises all of which, to differing degrees, has some construction work being undertaken. Clause 6(a)(i) requires that the Builder have possession of “such parts for the work site as is reasonably required to allow work to proceed”.

- 65 The Tribunal considers that one advantage of the remaining work being undertaken under a Work Order is that the Tribunal may give directions as to access by the Builder to perform the building works, which the evidence in this matter illustrates can cause difficulties.
- 66 The work required for completion includes rectification of defective items of work agreed between the experts and, to the extent necessary as found by the Tribunal, as requiring rectification. There has also been some agreement as to the work which has not been completed.
- 67 The Tribunal concludes that a Work Order should be made based upon the agreements reached between the experts for the parties. The terms or directions for the performance of the work involved will be determined by the Tribunal.

### **Incomplete and Defective Work**

- 68 There has been some agreement between the experts particularly as to the work required to be performed, either by way of rectification of work performed, or for the completion of the work under the Contract. There are number of issues about which there is no agreement. The respective positions of the parties' experts are set out in the Joint Scott Schedule at pages 372 to 398 of Ex TE/1.
- 69 For the purpose of identifying the work to be performed under a Work Order the Tribunal relies in part upon the summary of the agreements contained in the annexures to the Builder's Closing Submissions. There are some items included in those submissions which do not seem to reflect the actual extent

of agreement. These will be addressed by the Tribunal in the following analysis. The Tribunal has adopted the format of the Schedules, and in Annexure A has included the decisions which the Tribunal was left to determine, in the form of a Work Order.

- 70 It is necessary for the Tribunal to give some consideration to the items which the Joint Scott Schedule discloses are not agreed. The issues to be addressed involve first whether the item of work is covered by a Provisional Sum, and second whether the item of work involves a variation for which the Builder is entitled to be paid. These issues are not so much a matter for expert opinion, but involve an exercise in interpretation of the Contract and consideration of the evidence.
- 71 To the extent that the experts have agreed a value for an item of work, the Tribunal adopts that valuation for the relevant allocation of entitlement.
- 72 The following sections address the matters which require a decision by the Tribunal. These conclusions are included in Annexure A which lists the work to be performed done under the Work Order and the Tribunal's findings as to entitlement.
- 73 The task for the experts and for the Tribunal was very difficult as a consequence of the absence of detail within the documents referred to at [11] to [14].

*Item (1)(i) Plasterboard Ceilings Beds 1 & 2 and Hallway*

- 74 There is nothing shown on the Contract drawings as to new ceilings in these areas of the residence. The Builder did include in the Job Break Up for the downstairs ceilings a description of the work as "square set also roses all set and sanded". This does not refer to new ceilings, but to the treatment at the wall / ceiling junction and the installation of plaster roses.
- 75 The experts agreed that the work involved was incomplete work. The Builder's expert considered that all the work involved a variation. The Homeowner's expert relied upon a note about the ceiling in the Living Room (former Bathroom/Kitchen) that a new Gyrock ceiling at the same level as other

ceilings. Although the plans are very difficult to read, the Tribunal considers that if the work covered by this Item involves the installation of new ceilings, then it was not part of the work under the Contract and a variation should be allowed.

- 76 For the purpose of these proceedings, the Tribunal will include the work as incomplete under the Work Order and it will be identified in the terms from the Job Break Up.

*Item (1)(ii) Beds 1 & 2 and Hallway Render to walls at wall-ceiling junction*

- 77 The experts agree that this is incomplete work. The Builder's expert considers that the work is covered under the Provisional Sum for Render. The Tribunal notes that there is nothing on the plans which suggests that work of this character was required in the location concerned.

- 78 The Tribunal concludes that the work involved is work under the Contract and also involves an adjustment of the Provisional Sum for Render. The amount of the adjustment will only be known when the actual costs are incurred during the completion of the work under the Work Order.

*Item (1)(iii) Beds 1 & 2 and Hallway Electrical fitout*

- 79 The experts agree that item involves incomplete work. The Builder's expert considers that the work is covered under the Provisional Sum for Electrician. As explained at [16] the electrical works required were only addressed by the Homeowner on 24 January 2018.

- 80 The Tribunal concludes that the work involved is work under the Contract and also involves an adjustment of the Provisional Sum for Electrician. The amount of the adjustment will only be known when the actual costs are incurred during the completion of the work under the Work Order.

*Item(1)(iv) Architraves to relocated Bedroom 2 door*

- 81 The plans required that the Builder “Move bedroom door to accommodate robes and rehang”. The work required a relocation and reuse of an existing door. This would necessarily, or sensibly, involve the reuse of the door frame
- 82 In any event the work which is required in incomplete work under the Contract which be included as such under the Work Order.

*Item(1)(v) Bedroom 2 Repairs to existing timber floor if necessary*

- 83 The experts have agreed the scope of work as “Re-sand and polish timber floor”.
- 84 This would appear to be rectification work and will be included in the Work Order as such.

*Item(1)(vi) Bedroom 2 Wardrobe*

- 85 This is agreed as incomplete work and will be included in the Work Order as such. The work was included in the Job Break Up as a part of the Cabinetry Provisional Sum. The Actual costs when incurred will need to be adjusted against the Provisional Sum.

*Item(1)(vii) Manhole / access hatch*

- 86 There is nothing in the Contract documents which referred to this item. The fact that it is a good idea is no basis for it being required.
- 87 The Tribunal concludes that this Item should be included as incomplete work under a variation for the agreed amount of \$390.00 (plus GST).

*Item(1)(viii) Mechanical Exhaust*

- 88 This item involves the supply and installation of a mechanical exhaust fan for sub-floor ventilation. It is not included under the contractual documents and the suggestion that the Builder damaged the original is not supported by evidence.

89 The Tribunal will include the work in the Work Order as incomplete work under a variation for the amount agreed of \$480.00 (plus GST).

*Item(2)(i) Flooring in Main Bedroom Incomplete*

90 This involves incomplete work which will need to link with the staircase, after installation. It will be included in the Work Order as such.

*Item(2)(ii) Architraves not installed*

91 This item is agreed as being incomplete work and will be included in the Work Order as such.

*Item(2)(iii) Window at Southern Elevation adjacent to stairwell not installed*

92 This item is agreed as being incomplete work and will be included in the Work Order as such.

*Item (2)(iv) Finish plasterboard walling & ceiling*

93 This item is agreed as being incomplete work and will be included in the Work Order as such.

*Item(2)(v) Master Bedroom Electrical fit-out*

94 This work will involve a further adjustment against the Provisional Sum for Electrician. It is incomplete work.

*Item(2)(vi) External Works – Roofing*

95 This Item involves two separate items. The first is external rendering and painting of first floor addition. The second concerns the roofing and roof plumbing.

96 The Tribunal understands that painting was not part of the work under the Contract. To the extent that the work involves cement rendering then it will be addressed in the Work Order as an adjustment under the Provisional Sum for Render.

- 97 The render work will be included as incomplete work subject to a Provisional Sum.
- 98 The roofing and roof plumber work was included in the Job Break Up as an item. Accordingly the work will be included in the Work Order as incomplete work.

*Item(2)(vii) Master Bedroom Wardrobe*

- 99 This involves incomplete work under the Provisional Sum for Cabinetry.
- 100 The work will be included in the Work Order as incomplete work subject to adjustment under the Provisional Sum.

*Item(2)(vii) Incomplete Work in Master Bedroom Ensuite*

- 101 All of the different aspects of the fit-out of the ensuite involve incomplete work.
- 102 The plumbing, supply of plumbing fittings, electrical fit-out and supply of tiles are all subject to Provisional Sums. The adjustment for the actual cost can only be made after the actual costs are known. The installation of a skylight is not possible and will not be included in the Work Order.
- 103 The other separate PC items for supply will be included in the Work Order as incomplete work. The amount can be assessed when the costs are known.

*Item (3)(i)(ii) Ground Floor Main Bathroom*

- 104 There are a number of items of incomplete work to the entry door which will be separately listed in the Work Order.

*Item (3)(iii) Wall linings and Ceiling*

- 105 The internal wall lining and ceiling need preparation for painting by others.
- 106 The work will be included in the Work Order as incomplete work.

*Item(3)(iv) Shower Screen not installed*

107 This is incomplete work and involves an item the supply of which is under Provisional Sum.

108 The work will be included in the Work Order subject to a Provisional Sum adjustment.

*Item(3)(v) Electrical Fit-out GF Bathroom*

109 This incomplete work will be included in the Work Order as incomplete work subject to a Provisional Sum adjustment.

*Item(3)(vi) Vanity Mirror not installed*

110 This item will be included in the Work Order as incomplete work subject to Provisional Sum adjustment for supply

*Item(3)(vii) Access hatch to sub-floor.*

111 There is nothing required under the Contract for this work. The experts have agreed an amount of \$390.00 (plus GST).

112 The item will be included in the Work Order as incomplete work the subject of a variation for the amount of \$390.00 (plus GST).

*Item (4)(i) Kitchen Skirting Boards*

113 This is incomplete work the cost of which is in dispute. This will be included as incomplete work in the Work Order.

*Item (4)(ii) Kitchen Cupboard Incomplete*

114 No longer pressed.

*Item(4)(iii) Kitchen Electrical Fit-out*

115 This is incomplete work subject to an adjustment of a Provisional Sum.

*Item (4)(iv) Kitchen Splashback*

116 This item of incomplete work will be included in the Work Order as such.

*Item (4)(v) Kitchen Ceiling Work*

117 As with Item (1)(i), this concerns a claim concerning ceiling work in the Ground Floor rooms.

118 There is nothing shown on the Contract drawings as to provision of a new ceiling in this area of the residence. The Builder did include in the Job Break Up for the downstairs ceilings “to be square set also roses all set and sanded”. This does not refer to new ceilings but to the treatment at the wall ceiling junction and the installation of plaster roses.

119 The experts agreed that the work involved was incomplete work. The Builder’s expert considered that all the work involved a variation. The Homeowner’s expert relied upon a note about the ceiling in the Living Room (former Bathroom/Kitchen) that a new Gyrock ceiling at the same level as other ceilings was required in that room. Although the plans are difficult to read the Tribunal considers that if the work covered by this Item involved the installation of a new ceiling then it was not part of the work under the Contract and a variation should be allowed.

120 For the purpose of these proceedings the Tribunal will include the work as an incomplete under the Work Order identified in the terms from the Job Break Up.

*Item (5)(i) Dining Room Skirtings Incomplete*

121 This is incomplete work and will be included in the Work Order as such.

*Item (5)(ii) Dining Room Ceiling Incomplete*

122 This incomplete work will be included in the terms in the Job Break Up for the Ground Floor ceilings.

*Item (5)(iii) Electrical Fit Out Dining Room*

123 This is incomplete work which will be included in the Work Order as being subject to an adjustment against the Provisional Sum.

*Item (5)(iv) Dining Room French Door*

124 This is another item of incomplete work the extent of which will be defined on the Work Order.

*Item (6)(i) Internal Stairs Incomplete*

125 The work involved with the design and construction of the internal stair has been a major difficulty for the parties. The design will need to be completed and an order placed for the supply of the stairs. The Tribunal is not able to identify in the evidence any indication of whether the stair required will be significantly different from the defective design included in the Contract drawings. The Builder included the cost as an item in the Job Break Up and there is no basis for categorising this work as being anything other than incomplete work.

126 The Work Order will include for the Builder to finalise the design with its supplier and for the Builder to complete the installation including detailing the interface between the stair and the building elements.

*Item (6)(ii) Demolition Damage to Brick Wall*

127 This item is said to have arisen in the course of demolition work. The Homeowner was required to undertake all of the demolition and maintains in his evidence that he did all of the demolition. The Tribunal does not accept the assertion underlying the Homeowner's claim that the Builder is responsible.

128 The Builder's expert referred to the "engineering report" which suggests that the existing structure failed under the additional load imposed by the upstairs extension. The report apparently indicated that the cause of the damage was the failure of an existing timber lintel within the brick wall. This seems to the Tribunal to be a more logical cause of the problem than an unexplained allegation of negligence on the part of the demolisher. The Tribunal accepts

the Builder's expert's conclusion as to the cause of the relevant damage to the brickwork and the necessity for remedial works.

129 The Tribunal also accepts the opinion of the Builder's expert that such brickwork repairs, as are necessary, should be regarded as being part of the brickwork required under the Contract and that the cost of brickwork repairs should be treated as an adjustment against the Provisional Sum for Brickwork.

130 The Work Order will include the works as incomplete work and subject to an adjustment of the Provisional Sum for the actual costs incurred.

*Item (7)(i) Rubbish Removal – Clean Up*

131 The cost of Rubbish Removal under the Contract was subject of a Provisional Sum or allowance under the Contract. The Tribunal considers that the allowance of \$5,500 (Inc GST) will need to be adjusted to account for the actual cost incurred in rubbish removal whilst completing the work under the Contract.

*Item (8)(i) Alleged Defective Work Ground Floor Bathroom*

132 The first issue involves a difference of opinion between the experts as to whether the floor tiling installation to the ground floor main bathroom is defective. The critical consideration is whether a floor waste, in addition to that which has been installed in the shower, is required.

133 The Builder's expert provided a detailed explanation as to the relevant regulations and explained why in his opinion there is no regulatory requirement for the suggested additional floor waste. The Tribunal accepts this position and concludes that the tiling in the Ground Floor bathroom is not defective.

134 A further issue concerns the channel grate and the floor waste in the shower of the bathroom. There is agreement that further work is required to rectify the work as completed.

135 The work Order will include the necessary work as rectification work.

### **Adjustments to the Contract Sum**

136 The Tribunal identifies that there are adjustments to the Contract Sum:

- (1) To be made on the basis of the part performance of the work under the Contract to date.
- (2) To be made during and at the completion of the works having regard to the findings of the Tribunal in these decisions.

#### *Adjustments to date*

137 The amount of the Contract Sum and the total amount paid to date are not controversial.

138 There have been two variations the amounts for which and work involved are also uncontroversial.

139 As a result of the finding by the Tribunal at [54-55] an additional amount for the adjustments of the actual cost for the performance of work which was the subject of Provisional Sums made to date, of \$3,039.99 should be added to the Contract Sum.

140 There may have been other costs incurred by the Builder which could, and should, have been made prior to close of these proceedings. The Tribunal considers that the Builder should not be given a further opportunity to recover such costs if they were incurred but not established in these proceedings.

#### *Adjustments during the completion of the work under the Work Order*

141 Annexure A identifies those items of work for which an adjustment will be made for the actual costs incurred in the performance of items of work under the Work Order which are subject to Provisional Sums. These are noted in the fourth column in Annexure A. Adjustments will need to be made when the actual costs are known.

- 142 There are also three items for which an actual amount has been determined for variations which are yet to be performed. These amounts will need to be added to the Contract Sum during the performance of the Work Order.

### **Work Order**

- 143 The Work Order is expressed in Order 1 to these decisions.
- 144 The performance of the Work Order will be in accordance with the following conditions and procedures.
1. The parties' experts are to be available to assist the parties by making joint independent decisions (in effect as Tribunal experts) when necessary in relation to:
    - (a) the time required for the performance of the work
    - (b) the work or method of work required
    - (c) the calculation of actual costs for Provisional Sum Adjustments
    - (d) the valuation of any variations which arise
    - (e) the satisfactory completion of the work required.
  2. Such decisions will have regard to the terms of these decisions.
  3. The parties will each pay the costs of their experts.
  4. The Homeowner will allow full and free access to the Builder to all parts of the property during the performance of the work.
  5. Upon completion of the work, the experts will undertake a joint inspection of the premises and advise the parties when the work is completed.
  6. Upon completion, the Builder shall submit a final claim including all adjustments.
  7. If necessary, on completion the experts are to consult and agree upon any aspects as to the calculation of the final adjusted Contract Sum.

### **Orders**

1. Pursuant to section 48O(1)(c)(i) of the *Home Building 1989* the Builder is to carry out and complete all of the building work identifies in Annexure A to this decision in accordance with the procedure identified in paragraph [74] to [134] of this decision.
2. The Homeowner is to allow the Builder full exclusive access to the whole of the premises during the performance of the works under the Work Order.
3. The work is to commence within 21 days of the date of these Orders and be completed by a date agreed or determined by the parties' experts.

4. Upon completion the Builder is to submit a Final Claim in accordance with Clause 7 of the Contract.
5. The Homeowner is to pay the amount of the Final Claim within 7 days of delivery of the claim.
6. If either party wishes to make an application for costs of these proceedings they are to file in the Registry such application along with any evidence on which they rely and submissions in support of the application within 28 days of the date of delivery of this decision.
7. If the application for costs is opposed the other party shall within a further 28 days file in the Registry any evidence on which they rely and submissions in support of the opposition to the application for costs.
8. The submissions as to costs are to include submissions on the issue of whether the hearing of the application for may be dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act, 2013*.

Pursuant to Schedule 4 Clause 8 of the *Civil and Administrative Tribunal Act 2013* either party has leave to renew the proceedings if any of these orders are not complied with..

\*\*\*\*\*

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 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem with a shield and a crown.



**Annexure A to the Decisions in**

**HB 18/42409 Cooper v JFW Constructions Pty Ltd and**

**HB 19/14928 JFW Constructions Pty Ltd V Cooper**

**ANNEXURE A to the Decision**

<b>Item No</b>	<b>Sub No</b>	<b>Location</b>	<b>Works</b>	<b>P Sum Adjustment or Variation</b>	<b>Complete or Rectify</b>	<b>Notes</b>
<b>1</b>		Bedrooms 1 & 2, Hall				
	<b>i</b>	“	Square set ceilings, install ceiling roses, and sand ready for painting by others.		Incomplete work	If the Builder has, or will have to, install new Gyprock ceilings then a variation should be allowed for that work.
	<b>ii</b>	“	Patch render walls at wall ceiling junctions in preparation for painting by others.	Prov Sum for Render	Incomplete work	
	<b>iii</b>	“	Electrical fit-out	Prov Sum for Electrician	Incomplete work	
	<b>iv</b>	“	Relocate doorframe and door in Bed 2 and install architraves		Incomplete work	
	<b>v</b>	“	Sand and polish timber floors on completion of works		Rectify	
	<b>vi</b>	“	Supply and install wardrobe with Poly doors to underside of new stairs	Prov Sum for Cabinetry	Incomplete work	
	<b>vii</b>	“	Install Manhole/Access Hatch in Hall	Variation \$390 plus GST		
	<b>viii</b>	“	Supply and install sub-floor mechanical ventilation	Variation \$480 plus GST		

<b>2</b>		<b>Master Bed Ensuite F1</b>				
	<b>i</b>	“	Complete the installation of timber floor boards around stairwell and skirtings		Incomplete work	
	<b>ii</b>	“	Install architraves and cavity sliding door to en-suite		Incomplete work	
	<b>iii</b>	“	Install window and architraves to south elevation		Incomplete work	
	<b>iv</b>	“	Set and sand walls and ceiling ready for painting by others.		Incomplete work	
	<b>v</b>	“	Electrical fit-out	Prov Sum for Electrician	Incomplete work	
	<b>vi</b>	“	Cement Render external walls to first floor ready for painting by others. Install roofing and roof plumbing	Prov Sum for Render	Incomplete work Incomplete	
	<b>vii</b>	“	Supply and install Polythene folding doors for wardrobe	Prov Sum for Cabinetry		
	<b>viii</b>	“	Complete wall and floor tiles  Complete Plumbing fitout  Electrical fit-out including exhaust fan WC floor wastes shower screen vanity	Prov Sum for Plumber Prov Sum for Electrician Prov Sum for PC Items	Incomplete work Incomplete work Incomplete work Incomplete work	
<b>3</b>		<b>Ground Fl Bathroom</b>				
	<b>ii</b>	“	Install door jambs, door and architraves		Incomplete work	
	<b>iii</b>	“	Walls and ceiling, complete setting and sanding ready for painting by others		Incomplete work	
	<b>iv</b>	“	Install shower screen	Prov Sum for PC Items	Incomplete work	

	v	“	Electrical fit-out	Prov Sum for Electrician	Incomplete work	
	vi	“	Vanity Mirror to be installed	Prov Sum for PC Items	Incomplete work	
	vii	“	Access hatch to sub-floor	Variation \$390 plus GST	Incomplete work	
<b>4</b>		<b>Kitchen</b>				
	i		Install skirting boards		Incomplete work	
	ii		Not pressed			
	iii		Electrical fit-out	Prov Sum for Electrician	Incomplete work	
	iv		Tiled splashback to be installed		Incomplete work	
	v		Square set and sand ceiling ready for painting by others.		Incomplete work	If the Builder has, or will have to, install a new Gyprock ceiling then a variation should be allowed for that work.
<b>5</b>		<b>Dining Room</b>				
	i		Install skirting boards		Incomplete work	
	ii		Square set and sand ceiling		Incomplete work	
	iii		Electrical fit-out	Prov Sum for Electrician	Incomplete work	
	iv		French Door to courtyard Complete demolition, install lintel to opening Cement render to opening and patch between ceiling and wall finish. Supply and install door and fanlight frame as shown on South elevation Supply and install French door		Incomplete work  Prov sum for Render  Incomplete work	

<b>6</b>		<b>Internal Stairs</b>				
	<b>i</b>		Builder to obtain a compliant design and costing for the stairs and place order. Install stairs Complete detailing and finishes at interface with the building elements		Incomplete work	
	<b>ii</b>		Carry out repairs to damaged existing brick wall	Prov Sum for Brickwork	Incomplete work	
<b>7</b>		<b>Rubbish Removal</b>				
			The removal of rubbish was the subject of a Provisional Sum. This did not include the work of the final clean.			
<b>8</b>		<b>Ground Fl Bathroom</b>				
	<b>i</b>		There is no need to remove and replace floor tiling to the bathroom.			
	<b>ii</b>		There is no need to supply and install a new floor waste to the bathroom.			
	<b>iii</b>		Rectify defects to shower floor; Remove tiles (1m x 1m) Install waterproofing and channel grate and floor waste Relay tiles to shower		Rectify	