



## Civil and Administrative Tribunal New South Wales

Case Name: Bruen v Clientel Developments

Medium Neutral Citation: [2019] NSWCAT

Hearing Date(s): 21 January 2020

Date of Orders: 13 March 2020

Date of Decision: 13 March 2020

Jurisdiction: Consumer and Commercial Division

Before: Alder, J

Decision:

1. The application is dismissed because having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established.
2. The applicant is to pay the respondent the sum of \$1000.55 within 7 days.

Legislation Cited: *Home Building Act* NSW 1989  
*Fair Trading Act* NSW 1987  
*Civil and Administrative Tribunal Act* NSW 2013

Category: Principal judgment

Parties: Beverley Bruen (applicant)  
Clientel Developments Pty Ltd (respondent)

Representation: Applicant in person  
Respondent by its solicitor, Michael Birch

File Number(s): HB 19/40088

Publication Restriction: Nil

## JUDGMENT

### REASONS FOR DECISION

#### Background

1. Beverley Bruen is a home owner (**owner**) and Clientel Developments Pty Ltd (**builder**) is a registered company that holds a current builder's licence no.234880C. Mr Tony Younan is the builder's sole director.
2. On or about 16 November 2018, the owner and the builder entered into a written contract (**Contract**) for the builder to design and build a new bathroom (and demolish the old bathroom) (**Works**) at a single story semi-detached dwelling at Five Dock (**Premises**) being "residential building work" as that term is defined under the *Home Building Act 1989* (**HBA**). In return the owner was to pay the builder \$24,000 (incl GST).
3. Before the Tribunal is an application filed by the owner on 4 September 2019 for compensation of \$29,805.49 and an order seeking relief from payment of the builder's outstanding invoice of \$1,650.00.
4. The owner contends the Works contained defects and there are some incomplete items. The main complaints are that the fall of the floors in the shower area and bathroom area are inadequate and water is not directed into the drains, which results in ponding; the waterproofing on the shower walls is non-compliant, the width of the bathroom is smaller than the design and a heated towel rail has not been installed.
5. The Contract included floor plans dated 20 October 2018 (page 117), 3D side view prepared by the builder (pp 260-261) and a list of PC items (pp 121-125).
6. Work commenced on or around 16 November 2018. The Works were carried out by various contractors (tiler, plumber, water proofer, electrician) under the supervision of Mr James Khoury, Project Manager.

7. The completion date was eight calendar weeks after the Works were due to commence, namely 25 January 2019.
8. An agreed variation to the Works involving removal of asbestos was carried out for \$800 (incl GST). The variation (stage 1 sign off) was signed by both parties on or about 16 November 2018 (page 272). This increased the contract sum to \$24,800.
9. It is not disputed the owner has paid \$22,636.80. The builder claims an amount of \$2,163.20 is owed.
10. Prior to completion, on 9 January 2019, the owner emailed the builder with a list of items requiring rectification (page 119). There is no mention of inadequate falls, waterproofing or ponding.
11. Work were completed in early March 2019.
12. On 9 May 2019, Mr David Gardiner, Senior Building Inspector of Department of Fair Trading inspected the Works.
13. On 10 May 2019, Mr Gardiner issued a rectification order for various minor work to be rectified by 6 June 2019. The rectification order did not make mention of inadequate falls, waterproofing or ponding.
14. During 23 to 27 May 2019, the builder re-attended the Premises to carry out the works in the rectification order.
15. On 4 June 2019, the owner wrote to Mr Gardiner contending the rectification order was not complied with.
16. On 11 June 2019, Mr Gardiner re-inspected the Works.
17. On 18 June 2019, the builder issued a credit of \$655 to the owner and after deducting this amount from \$2,163.20, issued invoice no. 1904 dated 18 June 2018 for \$1,508.20 (**Invoice**).

18. On 28 June 2019, Mr Gardiner prepared a building report.
19. In August 2019, the owner engaged an expert who prepared a report listing 10 defects. The costings to rectify are \$29,805.49 and will require the bathroom tiles and waterproofing to be pulled out and redone. The builder's expert disputes all defects with the exception of three minor defects, which he says will cost \$507.65 to rectify.
20. The builder thus concedes \$507.65 to the owner (\$210, plus \$55 plus \$90 for the three items, plus 30% builder's margin of \$106.50, totalling \$461.50 plus GST of \$46.15). After deducting \$507.65 from \$1,508.20, the builder contends that a balance of \$1000.55 is due under the Invoice.
21. Whilst the builder has not filed a cross application for payment of \$1,000.55, the Tribunal can make orders in a respondent's favour under s 48O of the HBA.
22. The owner has been using the bathroom on a daily basis since March 2019.

### **Jurisdiction, cause of action and legislation**

23. Section 48K of the HBA gives the Tribunal jurisdiction to hear and determine any building claim brought before it in accordance with Part 3A. Section 48A defines "building claim" widely to include claims for money (not exceeding \$500,000) or relief from payment of a specified sum of money, arising out of the supply of building goods or services whether under a contract or not.
24. S 48A(1) defines "building goods or services" as supplied for residential building work or specialist work, being goods or services supplied by the person who contracts to do, or otherwise does the work.
25. The owner's claim is brought against the builder on the basis that the builder has breached the warranties implied into the Contract to perform

residential building work under Part 2C of the HBA, specifically s 18B(1)(a) that work is to be performed with “due care and skill”.

26. Section 48A(2) states that a building claim includes a claim for compensation for loss arising from a breach of a statutory warranty implied under Part 2C.

27. Section 48K(7) states that the Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim is lodged is after the end of the period within which proceedings for a breach of the statutory warranty must be commenced (as provided by section 18E).

28. Section 18E provides that the applicable statutory warranty period in respect of contracts for residential building work entered into after 1 February 2012 is six years for major defects and otherwise two years. The warranty period generally commences on completion of the work: s 18E1(c). Whether the defects are characterised as major or not, the owner’s application is brought within time.

29. In the circumstances, the Tribunal finds that it has jurisdiction to hear and determine the building claim.

30. S 48O of the HBA sets out the powers of the Tribunal in determining a building claim. Specifically it can make 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: s48O(1)(a). It can also 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: s 48O(1)(b). The Tribunal can make an order even if it is not the order that an applicant asked for: s 48O(2).

31. Section 48O(3) provides that ss 79R and 79T-79V of the *Fair Trading Act 1987* (FTA) apply, with any necessary modifications, to and in respect of the determination of a building claim. This includes s 79U of the FTA which provides that when making any orders, the Tribunal must be satisfied that the orders will be fair and equitable to all the parties to the claim.

### **Legal representation**

32. The matter was first listed before the Tribunal on 4 October 2019 for a Group List Hearing.

33. Ms Kelsey Boyd, a representative from the builder attended, together with counsel, who sought leave to appear. The Tribunal granted the builder leave to be legally represented on 4 October only and ordered that any further application for legal representation would need to be made in writing and if such an application was made before the next hearing, the applicant would be given an opportunity to respond.

34. On 31 October, Mr Younan wrote a letter to the Tribunal requesting leave for the builder to be legally represented on grounds that the dispute was only marginally under the \$30,000 threshold as per the Tribunal's Guidelines for representation. No other supporting submissions were made. Mr Younan did not provide the name of his solicitor and address for service.

35. On 1 November 2019, the matter was listed for a further Group List Hearing. The orders included that if either party wished to be legally represented at the hearing, they were to make applications by 8 November 2019.

36. On 6 November 2019, The Tribunal emailed Mr Younan and requested that he provide the name of his solicitor and address for service of notices, stating: "*Once we have the information from you, we can then send a copy of your request to the applicant seeking their comments if they agree or*

*disagree with the request and then refer it to a Tribunal Member to consider.”*

37. On 8 November (and 20 November 2019), Mr Younan emailed the Tribunal and the owner with the name and address of the builder's solicitor.
38. On 14 January 2019, the Tribunal asked the owner for submissions in response to the builder's application for legal representation.
39. On 15 January 2019, the owner sent submissions opposing legal representation on grounds that it was not a complex matter, the dispute was less than the threshold of \$30,000 for representation and that it would not be in the interests of justice as it would complicate matters and thus defeat the Tribunal's guiding principle of "quick, just and cheap" hearings.
40. The application for legal representation was heard at the commencement of the hearing.
41. Mr Birch undertook not to apply for costs for the hearing if legal representation was granted, but reserved his client's rights in relation to the costs of the two previous Group List Hearings. He said his client had made the application in October last year and had not prepared to run the matter himself.
42. After hearing oral submissions, the Tribunal allowed the builder to be legally represented subject to costs of the hearing not being pressed. The reasons being that there was no real prejudice to the owner as she had been on notice that a solicitor may be given leave to appear for the builder, given the builder was legally represented on at least one previous occasion and she was aware of the current application and she had been given liberty to make such an application herself. I offered the owner an adjournment so that she could obtain her own legal advice. She did not take up this offer as she said she could not afford a solicitor.

## Procedural issues

43. Pursuant to Tribunal orders made on 4 October, the owner had filed her evidence on 25 October 2019. At a further Group List on 1 November 2019, the builder was directed to file its evidence by 22 November 2019.

44. On 19 November 2019, Mr Younan requested a two week extension of time to 6 December to file and serve his evidence on the grounds that his expert had only just provided him with his report and he needed extra time to complete his evidence. The owner opposed the extension request. On 25 November the Tribunal granted the extension. The builder's documents were ultimately filed on 6 December 2019.

## Documents

45. The owner's bundle of documents includes:

- Expert report of Mr Paul O'Donnell of Canberra Sydney Inspections (**CSI**) Building Consultants dated 12 August 2019 (pp 304-373)
- Building inspection report of Mr David Gardiner from NSW Fair Trading dated 14 June 2019 (pp186-200)
- Scott Schedule (pp 367-373)

46. The builder's bundle includes:

- Expert report of Mario Bournelis of City Wide Building Consultants dated 15 November 2019 (pp 374- 387)
- Reply to scott schedule (pp 416-423)
- Statement of Tony Younan dated 5 December 2019 (pp 204-215).
- Rectification order dated (pp 182-185)

47. The builder prepared a joint bundle for the hearing, which includes copies of the owner's documents. For ease of reference, where I refer to a document in these reasons, I have referred to its page number in the joint bundle.
48. The owner relies on the expert report of Mr Paul O'Donnell. Mr O'Donnell has a bachelor of building (honours) and holds an unlimited builder's licence (153601C) and has 35 years' experience in the building and construction industry. Mr O'Donnell undertook a visual inspection of the property on 6 August 2019. He has identified 10 items requiring rectification. Each item is listed and costed in a scott schedule he has prepared. The owner did not tender quotes from contractors to rectify the defects identified.
49. The builder relies on the expert report of Mr Bournelis. Mr Bournelis holds a builder's licence and is a building consultant and building mediator and has in excess of 34 years' experience in the building industry. Mr Bournelis undertook a visual inspection of the premises on 14 November 2019. He has prepared a reply to the scott schedule.

## **Hearing**

50. At the start of the hearing, Mr Birch handed up written submissions and provided a copy to the owner. This was not opposed.
51. The owner wished to give oral evidence. Mr Birch opposed this on the grounds it would be unfair and prejudicial as she had not filed a statement. He submitted that her evidence be confined to what was in her bundle. The Tribunal allowed the owner to give oral evidence. During her testimony, no objections were made. She was cross examined. Her expert witness was also cross examined.
52. Mr Tony Younan's statement was read. He was cross examined by the owner.

53. Mr Bournelis was not present at the hearing and I did not have the benefit of cross examination so that he could be tested on his evidence. This reduced the weight of his expert evidence. Mr Birch submitted that no adverse inference should be drawn given that Mr Bournelis was not asked to attend by the owner for the purposes of cross examination. The Tribunal had made no orders stipulating that a party should give written notice should they require a witness to attend. Mr Birch advised the Tribunal that the witness was on a pre-booked boat trip to Hamilton Island. The Notice of Hearing issued by the Tribunal to both parties is dated 7 November 2019. No evidence was given as to when the holiday was booked.
54. Mr O'Donnell's conclusion (page 307) is that the defects are major as they comprise waterproofing issues which have detrimentally affected a major element of the building, resulting in water ponding and water not being directed to the drains. He recommends (page 308) "*the waterproofing and tiles and fittings to be removed and replaced with new.*"
55. Mr O'Donnell also contends there have been contractual alterations. He contends the width of the bathroom is 1350mm whereas the floorplan indicates the width to be 1500mm. There is no heated towel rail installed, as per the PC items and the floor waste has been placed under the vanity instead of the middle of the floor.
56. Mr Bournelis' conclusion is that any defects are minor.
57. There is no mention of inadequate falls, defective waterproofing or ponding in the rectification order of 10 May.
58. On 27 May 2019, Mr Younan wrote to Mr Gardiner (copying in the owner) stating: "*I was able to contact Ms Bruen moments ago. She has confirmed the following: 1. The works are now completed and she is satisfied. 2. She will make payment of her final invoice by the due date...*" (page 302).

59. The owner's letter to Mr Gardiner dated 4 June 2019 does not mention inadequate falls, defective waterproofing or ponding.

60. Mr Gardiner's report of 14 June 2019 does not mention inadequate falls, defective waterproofing or ponding.

61. The owner bears the onus of proving her case on the balance of probabilities. The test is the civil standard of proof.

62. I have made individual findings as follows.

### **Defective work - evidence and findings**

#### *Item 2.1 - damaged floor and door entry to bathroom*

63. Mr O'Donnell says that the owner has spent \$160 in repairing the edge flooring to the bathroom that was damaged during construction.

64. Mr Bournelis disputes the defect, however he says that the builder has provided the owner with a credit for \$160. No evidence of the credit was provided to me, which I assume has separately occurred as, or was part of the agreed \$655 credit included in the Invoice, as it does not appear as an allowance in the builder's costing on the scott schedule.

#### *Item 2.2 Bathroom door (\$1,080)*

65. Mr O'Donnell says the door is closer than 1200mm to the toilet pan and requires "lift-off" hinges as it does not comply with F2.5 of National Construction Code (**NCC**), formerly Building Code of Australia (**BCA**) Volume One, and 3.8.3.3 of NCC Volume Two, which each require the door to a fully enclosed sanitary compartment to open outwards or slide or be readily removable from the outside of the compartment (e.g., via "lift-off hinges"), unless there is a clear space of at least 1.2 m between the pan and the doorway.

66. He estimates the cost to rectify is \$1,080, which involves a carpenter for 8 hours @ \$90 per hour to evaluate and adjust, and a painter for 4 hours @ \$90 per hour.

67. Mr Bournelis disputes the defect. Whilst he agrees the required distance is 1200mm, he says that the door complies with the NCC as the distance between the door entry and the toilet pan is actually 1700mm, which is well over the minimum distance of 1200mm. He has taken his measurements from the doorway entry and not the edge of the door. This is clear from his photo no. 2 (p 404). He says that this measuring point is in accordance with the NCC guidelines (Figure 3.8.3.3). It is not entirely clear from Mr O'Donnell's photos (page 353) from which point he has taken his measurement as his photos are not as clear as Mr Bournelis' photos; it looks like it is from the edge of the door.

68. In light of the fact that I have no reason to prefer Mr O'Donnell's interpretation of the NCC as to what is the correct measuring point over that of Mr Bournelis; and bearing in mind that the owner bears the burden of proof, on balance, I disallow this part of the homeowner's claim.

*Item 3.1 inadequate shower fall*

69. Mr O'Donnell says the fall to the shower floor waste is inadequate to prevent water running outside the tiled wet area. Shower area floor falls need to be a minimum of 1:80, in accordance with AS 3740 (Waterproofing of Wet Areas within Residential Buildings). The shower area therefore needs a 12.5mm fall over 1000mm. Mr O'Donnell conducted a level measurement using a "MD Smart Tool" levelling device and concluded that the fall is only 5mm over 1000mm, which is less than half of the minimum required. He says that the inadequate fall results in water travelling outside the shower and waterproofed areas when in use and the water ponding and not flowing down the drain as required.

70. He recommends the removal and replacement of the tiles and bed to achieve a proper fall.

71. He estimates the cost to rectify this item (and items 3.2 and 3.7 below) is approximately \$13,000.

72. Mr Bournelis concedes that the falls are not in accordance with AS 3740, however he agrees with Mr O'Donnell's level measurements that there is a fall to the floor waste of 5mm over 1000mm within the shower recess. He ran the shower head constantly at full strength for five minutes and observed the water running towards the floor waste with no seepage into the main bathroom area during the process. After the water was turned off, he observed the water on the surface tiles slowly trickle into the floor waste with some minor overspray to the floor tiles outside the shower recess. After 10 minutes, he observed minor ponding on the shower floor recess, which he said could also be attributed to "surface tension" and did not warrant the complete removal of the floor tiles.

73. Further, he says that "ponding" is not defined in the NCC and AS 3740

74. I accept that the fall in the shower area is not in accordance with AS 3740. However, I cannot find that Mr O'Donnell has proven from his testing that the fall results in the water not draining without ponding. I accept the results of Mr Bournelis' water testing that there was no seepage into the main bathroom area during the process. I do not consider there is a defect in the fall in the shower area and I disallow this part of the owner's claim.

*Item 3.2 Tiles – no hob*

75. Mr O'Donnell says that the shower is unenclosed and as such, requires a 15mm minimum set-down. It has no set down.

76. He recommends removal of tiles and inclusion of the set down and re-tiling.

77. The owner claims approximately \$3,856 for removal of all tiles and \$3,936 for reinstalling tiles.

78. Mr Bournelis agrees that a 15mm minimum set-down in these circumstances is required. However, Mr Younan says that the owner requested a continuous floor finish with no step down. He relies upon a copy of the owner's Stage 4 Sign-Off for a level floor with no step down (page 519). The sign off has purportedly been signed by the owner and Mr Khoury on Mr Khoury's iPad on 21 November 2018. The owner denied it was her signature and refuted that she had ever signed anything on an iPad during the build. Mr Younan under cross examination said that all his foreman used iPads on site that could be signed, but that he didn't know how long they had used iPads. In re-examination he said iPads had been used by his staff prior to 2017 for stage sign-offs on long jobs.

79. I accept Mr Younan's evidence that the owner agreed to a continuous floor finish which meant no step down was required to be built. I disallow this part of the owner's claim.

80. Mr O'Donnell also says the shower it is out of alignment by 10mm and out of square at the doorway.

81. Mr Bournelis says that there is a minor 8mm misalignment at the door entry, but it has been measured by reference to the existing walls and door and cannot be classified as a defect and no damage has arisen.

82. Mr O'Donnell also says that a tile at the entry is damaged and needs replacing. This work presumably falls within the overall tiling cost above. Mr Bournelis concedes damage to one tile and has allowed for a tradesman @ \$65 per hour for 2 hours to remove the damaged floor tile and reinstate (\$130), plus materials \$80, totalling \$210.

83. I allow \$210 for this part of the claim.

*Item 3.3 unenclosed shower - waterproofing*

84. Where a shower area is unenclosed it is required to have waterproofing in a radius of 1.5m horizontally and 1.8m vertically. Mr O'Donnell says the

wall is not compliant as it does not reach 1.8m high. The waterproofing membrane as installed will result in water travelling outside the shower and waterproofed areas when in use, causing water to pond and not flow down the drain.

85. He says that a flexible and continuous membrane is required under the tiles.

86. In coming to his conclusion, Mr O'Donnell relies on the owner's photos taken during the waterproofing process (pp 359-360), which he says clearly show the waterproofing does not meet the 1.8m requirements. He says that given the photos show the tiling process has begun, with tiles laid in part, the Tribunal should infer that the waterproofing (being an earlier process) has been completed.

87. He recommends "*removing the existing failed system, installing a compliant and approved membrane turned up at the door angle and edges, and turned down into the drain and reinstalling the tiles.*" (page 48). He says that it is not possible to comply with AS 3740 by "*just silicon applied to edges and sealing tile surfaces.*" (page 320).

88. Under cross examination, Mr O'Donnell conceded there was no indication of leaking in the shower.

89. Mr Bournelis disputes that waterproofing has not been properly done. He says that a waterproofing certificate has been issued from a certified water proofer, although the certificate was not in evidence. He says that the photos from which Mr O'Donnell has based his opinion show incomplete waterproofing and in any event, Mr McDonnell has found no evidence of a failure in the waterproofing.

90. No evidence has been tendered to demonstrate that the waterproofing itself is defective. There is no evidence of a failure in the waterproofing, such as leaking - a failure of waterproofing would be a potential cause for

leaking. It is not raised in Mr Gardiner's report. The owner has been using the shower for nearly a year with no leaks. Under cross examination, the owner conceded that she had never raised with the builder problems with waterproofing in the bathroom. It would be unreasonable to require the waterproofing and tiles and fittings to be removed and replaced with new in the absence of any defect. I disallow this part of the owner's claim.

#### *Heated towel rail*

91. Mr O'Donnell in his executive summary (p 307) claims that a heated towel rail was not installed as per the PC items specified in the Contract (p 124).

92. However, the PC Items refer to a non-heated towel rail, not a heated one. Mr Bournelis says that the towel rail could only be non-heated as there was no power outlet for it. The schedule to the rectification order under "incomplete work" includes an order to "*install the towel rail to the bathroom wall in accordance with the plan and contract documents.*" There is no mention of the towel rail being heated in the rectification order.

93. In any event, the builder relies on instructions from the owner not to install the towel rail at all: in her email dated 25 May 2019 to Mr Khoury, she states: "*As discussed, please do not install the towel rail.*"

94. Under cross examination the owner said that she was left with no choice but to agree that the towel rail should not be installed as it would cause a hazard as it would be too close to the wet area. Her email of 25 May goes on to say: "*I believe that the design results in my having wet towels if installed.*" She contends that unauthorised changes were made to the plans which reduced the width of the room from 1.505m to 1.350m, which meant the space was too narrow to accommodate the towel rail and the length of the shower glass was insufficient to limit the spray of water from the shower.

95. In an email to Mr Gardiner dated 9 May 2019, Mr Younan says the design change was made at the owner's request (pp 289-90). A full height wall

was installed at the client's request so there would be no more dog legged glass in the shower area. He says a variation was not raised as the wall was built at no cost to the owner. It was not raised in the owner's letter of 9 January 2019, nor was it raised in the rectification order.

96. Mr Bournelis says (p 384) the reduction in width was due to the builder erecting this false wall to house the recessed niche in the wall of the shower area, WC concealed cistern and the recessed shaving cabinet above the vanity. The shaving cabinet with mirror doors and the niche were installed by the builder at no cost. He says that the slight reduction in width is not a defect and allows the bathroom to be used as intended, whilst giving the owner storage.

97. Further, Mr Younan offered to erect the rail in a different spot that suited the owner, which the owner rejected.

98. The owner claims \$345 for a towel rail holder and the cost of two carpenters/plasters @\$90 per hour for 8 hours (\$1,440) plus \$552 materials to remove the wall and extend the room to 1.505mm plus two painters @ \$90 an hour for 8 hours (\$1,440).

99. I find that a non-heated towel rail was specified. I accept the evidence of Mr Younan that the design change was at the owner's request. I accept the evidence of Mr Bournelis that the reduction in width is not a defect. In light of the fact that the builder offered to install the towel rail in an alternative place and the owner stated she did not want the rail installed, I have no reason to prefer the owner's account of what was agreed to over that of the builder's; and bearing in mind that the homeowner bears the burden of proof, I disallow this part of the owner's claim.

*Item 3.4 vanity unit (\$521)*

100. The vanity drawer has marks to the poly edges and needs cleaning. The vanity is wall mounted and its drain pipe is visible and is PVC, but should be chrome. The pipe has not been placed in the rear wall cavity.

101. Mr Bournelis says that the PVC pipe is not a defect. Photo 10 depicts it is out of general view. Further, the request for a change in position to within the cavity is an aesthetic preference only and not a defect. The builder has cleaned the drawers as part of the rectification order.

102. I accept the evidence of Mr Bournelis that the vanity is operating as intended and the placement and finish of the connecting drain pipe are personal preferences, with PVC being a common finish in circumstances where the waste is concealed. I disallow this part of the claim.

*Item 3.5 – Toilet (\$222)*

103. The toilet seat is loose. This was raised in the rectification order.

104. The owner claims a plumber @ \$111 per hour for two hours to adjust and reinstall the toilet. Mr O'Donnell says that a plumber is required in case special tools are necessary.

105. The builder has conceded the seat needs securing within its brackets, but says a carpenter in lieu of a plumber can rectify the seat @ \$55 per hour for one hour.

106. On balance, I don't accept that it is necessary to have a plumber adjust the seat. I allow the sum of \$55.

*Item 3.6 – minor finishes (\$1,625)*

107. Mr O'Donnell claims the silicon edge joints are untidy, the paint work to the door and window surrounds is not acceptable and the cornices have defective plaster finishes.

108. The owner has claimed the cost of two carpenters/plasterers to rectify @ \$90 per hour for 8 hours (\$1,440), plus materials of \$185.

109. Mr Bournelis says that at the time of his inspection, all silicon joints, painting and cornice works had been rectified following the rectification

order. He relies on photos 13-15 (pp 410-411). He observed some paint runoff at the top of the bathroom door. He has made an allowance for a painter @ \$65 per hour to sand and paint the door for one hour, plus \$25 for materials.

110. I accept that the silicon joints, painting and cornice works have been completed and allow the sum of \$90 to sand and paint the door.

*Item 3.7 Bathroom area - wrong position of floor waste and inadequate floor fall*

111. The floor waste has been put under the vanity instead of the middle of the floor. The floor plan shows it is to be in the middle of the floor. In Mr O'Donnell's opinion, this location will make unblocking the drain (should that occur) difficult. He concedes the drain appears to be working.

112. Mr Bournelis says that access to the drain can be obtained via a plumber's eel, if need be. He says that in any event, the Australian Building Codes Board (ABCB) stipulates floor wastes may be installed in bathrooms in residential dwellings, but "*it is not a regulated requirement under the NCC*".

113. The main bathroom floor does not have the correct fall to the floor waste. AS3740 requires the bathroom area floor fall to be 1:100 (10mm fall over 1000mm). It is only 5mm over 1000mm. Mr O'Donnell says that as a result, water is ponding on the tiles.

114. Similar to item 3.1 above, Mr O'Donnell recommends the removal and replacement of the tiles and bed to achieve correct falls.

115. Mr O'Donnell did not conduct a flood test.

116. Mr Bournelis concedes that the fall in the main bathroom is not in accordance with AS 3740, but says there is a fall of 6mm over 1000mm away from the entry door towards the shower recess (photo 18). He says

he placed water on the bathroom floor and watched it slowly trickle towards the shower recess and there was no evidence of water escaping through the bathroom entry door. During the hearing, Mr O'Donnell conceded there is no seepage into other rooms.

117. Mr Bournelis observed only minor ponding on the bathroom floor (photo 19), which he says is attributable to surface tension, which does not warrant the complete removal of floor tiles. Again he says that "ponding" is not defined in the NCC and AS 3740.

118. Mr O'Donnell challenges Mr Bournelis' method of testing on the basis that he does not state clearly how he placed the water on the floor (for instance, he does not say he turned the shower on).

119. Whilst I accept the fall was not in accordance with AS 3740, given he conducted a water test and Mr O'Donnell does not make reference to his own mode of water testing, I prefer the evidence of Mr Bournelis that there was only resultant minor ponding. I do not accept there was a defect in the fall in the bathroom area. I disallow this part of the owner's claim.

120. In relation to the drain's positioning, Mr O'Donnell concedes the drain is functioning as intending. I accept that floor wastes are not mandatory under the NCC. In light of that fact, there can be no contractual requirement as to where the waste was to be installed. Thus, I do not find a defect with the positioning of the floor waste under the vanity. I disallow this part of the owner's claim.

*Item 3.8 – ventilation electrical (\$487)*

121. Mr O'Donnell says that a waterproof power point is required adjacent to the basin as it is closer than 1200mm as per AS 3000 Wiring Rules 2018.

122. The owner claims the cost of an electrician @ \$111 an hour for two hours (\$222) to install a water proof power point and the water proof point item (\$265).

123. Mr Bournelis agrees that the power point is closer than 1200mm. He says that its actual distance is 295mm, which exceeds the minimum distance of 150mm required between the edge of the basin and the power point, as per clause 6.2.2.2 of the Wiring Rules and as such it cannot be classified as a defect.

124. In light of the fact that there is no contractual requirement as to where this power point was to be installed; that I have no reason to prefer Mr O'Donnell's account of what is a proper interpretation of the Wiring Rules over that of Mr Bournelis, particularly where Mr Bournelis has cited a clause of AS 3000 and Mr O'Donnell has not; and bearing in mind that the owner bears the burden of proof, I disallow this part of the owner's claim.

## **Findings**

125. For reasons already given, I have not found on the evidence before the Tribunal that any defects justify the homeowner's claims.

126. I am not persuaded by the independent expert report of Mr O'Donnell that the standard of workmanship was poor and did not comply with the relevant Australian Standards and the Building Code of Australia. I do not find that the evidence establishes breaches of the statutory warranties which apply to residential building work pursuant to section 18B of the HBA and in particular that the builder failed to perform the work in a proper and workmanlike manner and with due care and skill.

127. I accept Mr Younan's evidence that he rang the owner on 27 May 2019 after the rectification works had been completed and she informed him that she was satisfied with the bathroom.

128. I find that the amount of \$1,000.55 is owing by the owner to the builder under the Contract.

## **Costs**

129. The builder's solicitor seeks an order that costs be reserved. As mentioned above, he agreed at the start of the hearing to not press the costs of the hearing. Thus any reserved costs are limited to appearances at two Group List Hearings.
130. The starting point in the Tribunal is that each party is to represent itself. The fact of leave being granted for a party to be represented, it does not automatically follow that legal costs can be recovered if the legally represented party is successful.
131. Costs are governed by section 60 of the Civil and Administrative Tribunal Act NSW 2013 which provides that each party should pay its own costs. Section 60(2) provides that costs may be awarded if there are special circumstances (delay, frivolous claim, complex matter, matter over \$30,000).
132. I am satisfied that the proceedings were prosecuted diligently by the owner and not unduly delayed. There has been some slippage with respect to directions, but this was on the part of the builder. The matter was not unduly complex and not over \$30,000.
133. I am not of the view that this is an appropriate case in which to award costs to the builder, in the absence of special circumstances. The usual rule that each party pay its own costs should apply.

## **Orders**

134. I make the following orders:
1. The application is dismissed because having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established.

2. The applicant is to pay the respondent the sum of \$1000.55 within 7 days.

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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