

AUSTRALIA / JUDGMENT

# Kapeller v BH Australia Pty Ltd

**[2020] NSWCATCD 20****COURT**

Civil and Administrative Tribunal

**DECIDED**

08 January 2020

**BEFORE**

D Goldstein, Senior Member

**CASE / FILE NUMBER**

HB 19/0928 &amp; HB 19/09300

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## Source record

### Civil and Administrative Tribunal New South Wales

**Medium Neutral Citation:** Kapeller v BH Australia Pty Ltd [2020] NSWCATCD 20**Hearing dates:** On the papers**Date of orders:** 8 January 2020**Decision date:** 08 January 2020**Jurisdiction:** Consumer and Commercial Division**Before:** D Goldstein, Senior Member

**Decision:** The Notice of Order issued on 8 January 2020 is amended under Section 63 of the Civil and Administrative Tribunal Act 2013, and should read as follows:

1. A hearing in respect of Applications HB 19/0928 & HB 19/09300 is dispensed with under section 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).
2. BH Australia Constructions Pty Ltd must pay Phillip Kapeller and Rachael Cesnik the sum of \$191,336.00 immediately.
3. In the event that a party wishes to bring a costs application, the costs application must be lodged in the Tribunal and served on the costs respondent within 14 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application.
4. The costs respondent will have 14 days after the date they or it receives the application to lodge in the Tribunal and serve on the costs applicant their or its submissions, if any, in response to the cost applicant's costs application, such submissions either attaching or referring to the documents relied upon.
5. The cost applicant will have 14 days after the date they or it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent their or its submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.
6. The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing.

7. Subject to the parties' submissions, the Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

|                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|---------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Catchwords:</b>              | BUILDING AND CONSTRUCTION — Home Building — Repudiation — Failing to proceed with due diligence                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>Legislation Cited:</b>       | Civil and Administrative Tribunal Act 2013 (NSW)<br>Home Building Act 1989 (NSW)                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>Cases Cited:</b>             | BH Australia Constructions Pty Ltd v Kapeller [2019] NSWSC 1086<br>DB Homes Australia Pty Limited v Kes [2019] NSWCATAP 221<br>eMove Pty Ltd v Dickinson [2015] NSWCATAP 94<br>Hometeam Constructions Pty Ltd v McCauley [2005] NSWCA 303<br>Kapeller v BH Australia Constructions Pty Ltd [2019] NSWCATAP 40<br>Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd [2007] HCA 61; (2007) 233 CLR 115<br>Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632 |
| <b>Texts Cited:</b>             | Nil                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Category:</b>                | Principal judgment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>Parties:</b>                 | Phillip Kapeller (First Applicant)<br>Rachael Cesnik (Second Applicant)<br>Respondent: BH Australia Pty Ltd (Respondent)                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Representation:</b>          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>Counsel:</b>                 | P Williams (Respondent)                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <b>Solicitors:</b>              | DWF (Australia) (Respondent)                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <b>File Number(s):</b>          | HB 19/0928 & HB 19/09300                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Publication restriction:</b> | Nil                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

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## REASONS FOR DECISION

These proceedings have a complicated history to which I will briefly refer.

On 19 September 2018 the Tribunal dismissed HB 17/39359 and HB 17/46098 brought by the applicants.

In *Kapeller v BH Australia Constructions Pty Ltd* [2019] NSWCATAP 40 an Appeal Panel allowed an appeal against the Tribunal decision at first instance and made an order that both applications were to be remitted to the Consumer and Commercial Division to a Tribunal differently constituted for re-determination.

BH Australia Constructions Pty Ltd sought leave to appeal against the decision of the Appeal Panel. That application was dismissed on 22 August 2019 by Leeming JA in *BH Australia Constructions Pty Ltd v Kapeller* [2019] NSWSC 1086.

In connection with the remission of HB 17/39359 and HB 17/46098 orders were made on 11 September 2019, the relevant parts of which are as follows:

‘4. The issues to be re-determined will therefore be:

- (a) Whether the owners properly terminated the contract or whether they repudiated the contract and the builder accepted the repudiation;
- (b) If the owners properly terminated the contract, the value of the claim for incomplete works;
- (c) The value of the claim for defective works;
- (d) How much (if any) is the builder owed under the contract;
- (e) How much (if any) can the builder prove by way of quantum meruit.
- (f) Whether the builder should be ordered to rectify defective work or complete incomplete work. (Note: The builder is currently unlicensed).

5. By 9 October 2019, the parties are to:

- (a) File an indexed, tabbed and paginated joint bundle containing all evidence and submissions relevant to the above issues (and any other issues the parties deem to be relevant), together with a transcript of the original hearing and the amount to be awarded in respect of damages for defective and incomplete work (assuming that a money order is appropriate) and the appropriate scope of work (in the event that a work order is made)
- (b) Notify the Tribunal by the same date whether they seek to have the matters re-determined without a hearing, on the basis of the material provided, including the transcript.’

On 28 November 2019 further orders were made the relevant parts of which are as follows:

‘The builder has leave to file and serve a written submission not exceeding three pages length dealing with the issue of termination / repudiation only, by close of business on 2 December 2019.

- 2. Any submission not provided in accordance with order 1 above will not be considered at the hearing.
- 3. The owner may file and serve any submission in response to the builder's submission by 20 December 2019.’

The parties have agreed that they do not require a hearing and the questions for re-determination may be decided on the basis of their submissions and documents filed in support of their submissions. I will make an order that a hearing in respect of Applications HB 19/0928 & HB 19/09300 is dispensed with under section 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).

In these Reasons I will refer to the applicants as the ‘owners’ and to the respondent as the ‘builder’.

The owners filed their submissions on 9 October 2019. Thereafter in accordance with the 28 November 2019 orders, the builder filed its submissions on 2 December 2019. The owners replied on 19 December 2019.

The parties filed a two (2) Folder Joint Bundle made up of 19 parts.

In these proceedings the owners submit that the builder repudiated the contract. The builder submits that the owners have failed to substantiate the repudiation asserted.

In *DB Homes Australia Pty Limited v Kes* [2019] NSWCATAP 221 an Appeal Panel stated at [47]:

‘It is axiomatic that to terminate a contract based on repudiatory conduct, the first step is to identify the specific purported repudiatory conduct of the other party. The letter sent by the builder’s solicitor’s letter on 2 December 2016 identifies the purported repudiatory conduct.’

As stated in the passage referred to above, the purported repudiatory conduct must be identified. In these proceedings it must be identified by reference to the page number in the Joint Bundle. In addition the evidence to which the builder relies in support of its submission that the owners’ claim must fail should also be identified by reference to the relevant page number in the Joint Bundle. The owners have complied with this requirement. The builder has not.

## **The contract**

The parties entered into an undated HIA Contract. Item 6 of Schedule 1 provided that the builder was obliged to bring the building works to practical completion no later than 36 weeks after the building period commenced.

Clause 19 of the contract dealt with delays and extensions of time. Clause 25 dealt with suspension of the works. Clauses 27 – 30 dealt with ending the contract.

The owners’ evidence is that the contract was signed on 9 September 2015 and that work commenced on site in January 2016.

I find that the 36 week building period expired in approximately October 2016.

## **The owners’ submissions**

The owners’ submissions refer to a broad range of evidence. It seems that the matters that the owners rely upon to establish that the builder repudiated the contract are that the builder:

abandoned the site on or about 15 March 2017 some 237 days after the date for completion;

removed prime costs items from the site that had been paid for by them and have not returned them;

did not serve notices to extend the contract period; and

did not suspend the performance of the works.

On 24 April 2017 the owners' solicitors wrote to the builder stating that it had abandoned the works while they were incomplete and had not brought the works to practical completion within the 36 week period referred to in the contract. The letter stated that the abandonment of the works was a repudiation which the owners accepted.

#### The builder's submissions

The builder's submissions contain helpful references to the relevant law regarding repudiation of contracts.

Unfortunately, the builder's submissions when addressing the evidence do not refer to the pages in the two (2) Folder Joint Bundle.

For example at [7(a)] of its submissions the builder refers to a 'statement of claim' the builder sent to the owners on 16 March 2017. It refers to pages 109 and 110 of the affidavit of Mr Kapeller, which I have taken to be pages 109 and 110 of the Joint Bundle. Those pages refer an email dated 22 September 2016 and a 'Final Variation Agreement'. At [7(b)] of its submissions the builder refers to a communication dated 20 March 2017 cross referenced to page 113 of the affidavit of Mr Kapeller, which I have taken to be page 113 of the Joint Bundle. Page 113 of the Joint Bundle is a diagram.

Fortunately, the owners' documents have a page reference used in the first instance proceedings which serve as an identification. When referring to Mr Shankar's evidence, the builder's submissions do not refer to the Joint Bundle pages.

The builder's submissions are that it was of the view that the parties were still bound by the contract and that it was willing to complete the works and to engage in discussions for that purpose. It states that it did not evince an intention not to be bound by the contract.

The builder does not submit that it was the owners who repudiated the contract. As stated above, the builder's position is that the owners have failed to substantiate the repudiation asserted.

#### Determination of the remitted proceedings

I find that the owners did not follow the contractual procedure in clause 27 of the contract to bring the contract to an end.

I find that despite not following clause 27, the owners had a common law right to terminate the contract. I find that they exercised that right when on 24 April 2017 their solicitors wrote to the builder stating that it had abandoned the works and that the abandonment of the works was a repudiation which the owners accepted.

I find that the principles to be applied to the termination of a contract according to common law principles are those set out in *Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd* [2007] HCA 61; (2007) 233 CLR 115 ('Koompahtoo') and as also discussed in *DB Homes Australia Pty Limited v Kes*.

The owners' written notification dated 24 April 2017 stated that the builder had abandoned the works while they were incomplete and had not brought the works to practical completion within the 36 week period referred to in the contract and that this was a repudiation of the contract.

The owners' solicitors use of the word 'repudiation' should in my view be seen in light of what the plurality stated at [44] in *Koompahtoo* footnotes excluded:

'The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligation. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. (In this case, we are not concerned with the issues that arise where the alleged repudiation takes the form of asserting an erroneous interpretation of the contract. Nor are we concerned with questions of inability as distinct from unwillingness.) Secondly, it may refer to any breach of contract which justifies termination by the other party. It will be necessary to return to the matter of classifying such breaches. Campbell J said this was the sense in which he would use the word "repudiation" in his reasons. There may be cases where a failure to perform, even if not a breach of an essential term (as to which more will be said), manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.'

I will refer to the sense in which the owners' solicitor used the term repudiation later in these reasons.

Did the builder abandon the works ?

The owners must persuade me that as a fact, the builder did abandon the works. If that fact is established, I will then consider whether that amounts to a repudiation of the contract.

Mr Kapeller's evidence is that:

in February 2017 he was working in Western Australia. He states that In February he returned to New South Wales and inspected the works;

In February 2017 he agreed with the builder's representative that he would pay the progress payment for the 'Painting complete' stage. He makes no assertion that the works were abandoned in February 2017;

on 13 March 2017 his wife told him that she had attended site and that there was 'nobody working there' and the painting was still incomplete;

he contacted the kitchen supplier who informed him that the builder had cancelled the order for the kitchen.

Between 13 and 15 March 2017 he attempted to communicate with the builder but received no response;

on 16 March he received a statement of claim from the builder in relation to claims for additional costs;

Between 16 and 20 March 2017 he unsuccessfully attempted to communicate with the builder's representative;

On 20 March 2017 he received a letter from the builder which suspended the works;

On 20 March 2017 he was informed by his wife that she had visited the site to find it unlocked and all owners PC items missing;

On 21 March 2017 after returning from Western Australia he attended site and could not find the owners PC items and observed that painting and tiling was incomplete.

On 21 March he sent an SMS to the builder's representative regarding his visit to the site and the fact that the front and garage doors were open with PC items missing.

I have had regard to the builder's 20 March 2017 letter purporting to suspend the works. I find that the letter does not comply with clause 25 of the contract. That clause allows the builder to suspend the carrying out of the building works if the owner is in breach of contract. The clause requires the builder to give the owners details of the breach. The builder's suspension letter does not refer to a breach of contract by the owners or give details of a breach. It seeks to suspend the works until a meeting is held to discuss the scope of works to completion. Clause 25 does not permit a suspension of the building works for that purpose. I find that the builder's 20 March 2017 letter did not have the effect of validly suspending the works in accordance with the contract.

The owners' evidence of abandonment of the works relies upon a hearsay assertion based on what Ms Cesnik said to Mr Kapeller and factual matters which may give rise to an inference that the builder abandoned the works. I am not bound by the rules of evidence and as a result have the discretion to take into account hearsay evidence.

The owners' repudiation letter to the builder was dated 24 April 2017. It asserts that the builder has abandoned the works. I infer from this letter that the owners assert that the works were abandoned at that time.

The builder's evidence is given by Mr Shankar who describes himself as an Administration manager. He does not describe the nature of his duties in that capacity.

Mr Shankar does not dispute or contradict the owners' assertion that the works were abandoned as from 13 March 2017. He was the author of a number of letters to the owners as referred to in his witness statement. His letter dated 10 April 2017 to the owners described, at point 1, the contract as ongoing 'and is only stopped whilst a commercial arrangement is attained regarding the outstanding payments and works'. At point 5, the builder stated:

'With regards to the "missing" items, we are happy to return once a clear mutually rewarding outcome is achieved between the parties.'

I accept Mr Kapeller's evidence including his evidence that his wife told him on 13 March 2017 that she had attended site and that there was 'nobody working there'. I also accept Mr Kapeller's evidence that he contacted the kitchen supplier who informed him that the builder had cancelled the order for the kitchen, that his wife told him on 20 March 2017 that she had visited the site to find it unlocked and all owners PC items missing. Finally, I accept his evidence that on 21 March 2017 after returning from Western Australia he attended site and could not find the owners PC items and observed that painting and tiling was incomplete.

I find that Mr Shankar's evidence as referred to does not contradict the owners' evidence regarding the builder's abandonment of the works. To the contrary it contains admissions that the works had been 'stopped' and that the builder was 'happy to return' to site. In addition Mr Shankar's evidence gives rise to an inference that the builder had ceased to carry out the works until such time the owners agreed to make a number of additional payments.

I find that the owners' evidence that I have referred to and accepted, coupled with the admissions from Mr Shankar is sufficient for me to find that as from 13 March 2017 the builder had ceased working on site, or as stated by the owners had abandoned the works while they were incomplete.

In ceasing to work on the site did the builder breach the contract and what was the nature of the breach

Clause 39.1(d) of the contract stated:

'The building works will be done with due diligence and within the time stipulated in this contract'

As previously stated, item 6 of Schedule 1 of the contract provided that the builder was obliged to bring the building works to practical completion no later than 36 weeks after the building period commenced. There was an extension of time clause. There is no evidence that the builder claimed an extension of time. The contract contained a suspension of work clause. I have found

that the builder did not suspend the works in accordance with the contract. I further find that the builder was obliged in accordance with clause 39.1(d) of the contract to proceed with the execution of the works with due diligence and, failing suspending the works in accordance with clause 25, the builder had no right to cease carrying out work on the site. The builder's obligation under clause 2.1 was to carry out and complete the building works in accordance with the contract, and that meant in accordance with clause 39.1(d).

While there may be room for discussion about what 'due diligence' means in context of a builder carrying out building work, I find that the obligation in clause 39.1(d) of the contract does not permit a builder to cease carrying out building work unless there has been a valid suspension of work. In *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303 the Court of Appeal considered, among other things, failing to proceed with building works with due diligence. The cases considered by McColl JA concerned the progress of contractors on site proceeding with building works, the efficiency and progress of the building work and the factors that might impede progress. There was no consideration of a situation in which a builder had ceased carrying out work on site, or had abandoned building work without a valid suspension of building works, and whether the builder in that factual position was proceeding with due diligence. I find that the builder in ceasing to carry out building work without contractual justification when the works had not achieved practical completion within the time agreed for practical completion (in this case such time not having been extended under clause 19) was in breach of clause 39.1(d) and clause 2.1 of the contract.

I find that the builder breached both clause 2.1 and clause 39.1(d) of the contract by ceasing to continue working on the site and on the evidence, that breach commenced on 13 March 2017 and continued to 24 April 2017.

I find that clause 2.1 imposed a mandatory obligation on the builder, but was not in the nature of an essential condition of the contract in the sense that any breach of clause 2.1 however slight, would justify termination of the contract:

'he may in general treat himself as discharged upon any breach of the promise, however slight'

The above reference is an extract from Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632 at 641-642 as referred to at [47] in *Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd* concerning the elements of an essential term of the contract.

Clause 2.1 casts a general obligation on the builder. There are numerous obligations imposed on the builder by the various provisions of the contract. It is my view that the parties could not have and did not contract on the basis that if there was a breach of a requirement imposed on the builder by the contract, even if minor or trivial, that would entitle the owners to terminate the contract.

At [48] in *Koompahtoo* the High Court discussed a second category of relevant circumstances in which a breach of contract by one party may entitle the other to terminate. The plurality stated:

‘The second relevant circumstance is where there has been a sufficiently serious breach of a non-essential term. In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, the English Court of Appeal was concerned with a stipulation as to seaworthiness in a charterparty. Breaches of such a stipulation could vary widely in importance. They could be trivial or serious. The Court of Appeal held that to the accepted distinction between "conditions" and "warranties", that is, between stipulations that were in their nature essential and others, there must be added a distinction, operative within the class of non-essential obligations, between breaches that are significantly serious to justify termination and other breaches. This was a recognition that, although as a matter of construction of a contract it may not be the case that any breach of a given term will entitle the other party to terminate, some breaches of such a term may do so. Diplock LJ said that the question whether a breach by one party relieves the other of further performance of his obligations cannot always be answered by treating a contractual undertaking as either a "condition" or a "warranty". Of some stipulations "all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise".

I find that clauses 2.1 and 39.1(d) of the contract were in the nature of intermediate terms as referred to above. I must consider whether there has been a sufficiently serious breach of them to have justified the owners’ termination of the contract on 24 April 2017.

As at 24 April 2017 the builder was in breach of clause 39.1(d) of the contract, and it had been since 13 March 2017, because it had ceased had ceased working on site when it was obliged to carry out the works with due diligence. I find that this was a serious breach of contract that went to the root of the contract, in the sense discussed in *Koompahtoo* at [54] since the owners were entitled to the builder carrying out the building work with due diligence in order to bring the building works to practical completion, which I have found does not allow for the builder to cease carrying out building work without a valid suspension of work.

I find that as at 24 April 2017 the builder was in breach of clause 2.1 as it had not brought the building works to practical completion within 36 weeks from commencement as required by item 6 of Schedule 1. I note that item 11 of Schedule 1 to the contract had not been completed with the result that liquidated damages for delay in bringing the building works to practical completion by the end of the 36 week period was limited to \$1.00 per day. However I do not regard that as a factor which diminishes the consequences of the builder’s breach of clause 2.1 or clause 39.1(d). If anything this state of affairs reflects adversely on the HIA form of contract which allows as a possible outcome, the serious nature of a builder’s delay in bringing the building works to practical completion to result in the owner’s financial position to be treated as a trivial matter. I.E. a delay of one (1) calendar year to result in damages of less than \$365.00.

I find that in circumstances where the builder was obliged to bring the building works to practical completion by approximately October 2016, its abandonment of the works as from 13 March 2016, and its conduct in ceasing to continue working on the site in breach of clauses 2.1 and 39.1(d) of the contract was sufficiently serious to justify the owners in terminating the contract as they did on 24 April 2016.

As a result I find that the owners' termination on 24 April 2016 was justified.

At [31] I stated that I would I will refer to the sense in which the owners' solicitor used the term repudiation in the 24 April 2016 letter. As stated at [44] in *Koompahtoo* the term 'repudiation' is used in different senses. The owners' solicitor's letter does not state whether the owners were alleging repudiation in either the first or second sense as referred to in [44]. I have found that there was a repudiation in the second category, namely a sufficiently serious breach of intermediate terms of the contract. If I am wrong about that, I find that the builder's actions in ceasing work without contractual justification evinced an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with its obligations. In addition I find that the builder's letter of 10 April 2017 gives rise to an inference that the cessation of work by it was related to the builder's desire to work out a commercial arrangement regarding payments and work to be completed. The builder's admission that it was happy to return the owners property 'once a clear mutually rewarding outcome is achieved between the parties' reinforces the inference. In other words the builder was refusing to do any more work until some type of a commercial outcome was arrived at. I find that such action is a clear indication of an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with its obligations. The contract provided the framework for all claims for additional money and how they were to be made. The builder was going outside the contractual provisions to claim extra funds and was refusing to do any more work until it had achieved its objective and that including taking the owners property into its custody.

### **Answers to issues to be re-determined**

Whether the owners properly terminated the contract or whether they repudiated the contract and the builder accepted the repudiation. I find that the owners properly terminated the contract.

If the owners properly terminated the contract, the value of the claim for incomplete works. The agreed amount for incomplete works is \$117,931.00.

The value of the claim for defective works. The agreed amount for defective works is \$73,405.00.

How much (if any) is the builder owed under the contract. The builder's submissions do not address this issue or refer to any of the evidence that may be relevant to this question. I therefore make no order about the amount, if any, the builder is owed under the contract.

How much (if any) can the builder prove by way of quantum meruit. The builder's submissions do not address this issue or refer to any of the evidence that may be relevant to this question. I therefore make no order about the amount, if any, the builder can prove by way of quantum meruit.

Whether the builder should be ordered to rectify defective work or complete incomplete work. (Note: The builder is currently unlicensed). The builder's submissions do not address this issue. As a result I find that the builder should not be ordered to rectify defective work or complete incomplete work by reason of the fact that it is no longer licenced under the Home Building Act 1989.

## Costs

The owners have stated that they wish to apply for costs. As self-represented parties, they should take into account that their rights regarding costs are limited. Refer *eMove Pty Ltd v Dickinson* [2015] NSWCATAP 94.

In the event that a party wishes to bring a costs application, the costs application must be lodged in the Tribunal and served on the costs respondent within 14 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application.

The costs respondent will have 14 days after the date she or it receives the application to lodge in the Tribunal and serve on the costs applicant her or its submissions, if any, in response to the cost applicant's costs application, such submissions either attaching or referring to the documents relied upon.

The cost applicant will have 14 days after the date they or it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent their or its submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.

The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing.

Subject to the parties' submissions, the Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

The owners have also sought other costs orders. I have no jurisdiction to make costs orders as regards proceedings in the Supreme Court, the Appeal Panel or in the proceedings at first instance.

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

**Registrar**

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Decision last updated:

29 March 2022

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