

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO D700/2013

**CATCHWORDS**

DOMESTIC BUILDING DISPUTE –. Fabrication of contract documents; Weight to be given to differing evidence; corroborating documents; inconsistencies in evidence.

<b>APPLICANT</b>	Advaland Pty Ltd (ACN 144 477 994)
<b>FIRST RESPONDENT</b>	Spencer John Bitcon
<b>SECOND RESPONDENT</b>	Alan Richard Gaskell
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E. Riegler
<b>HEARING TYPE</b>	Preliminary Hearing
<b>DATE OF HEARING</b>	13, 14, 15, 16 and 17 January 2014.
<b>DATE OF ORDER</b>	4 February 2014
<b>CITATION</b>	Advaland Pty Ltd v Bitcon (Domestic Building) [2014] VCAT 99

**ORDER**

1. I find and declare that the Applicant is not the original contracting party of the building works, the subject of this proceeding and that the actual original contracting party is Kitchener Crespin.
2. I find and declare that the version of the contract documents exhibited to the affidavit of Spencer John Bitcon dated 6 December 2013 as Exhibit “SJB-1” constitutes the written contract between the Spencer John Bitcon and Kitchener Crespin.
3. **This proceeding is listed for a directions hearing before Senior Member E Riegler at 9.30 am on 6 March 2013 at 55 King Street, Melbourne, at which time further orders will be made as to the future conduct of the proceeding.**
4. Costs reserved.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicant	Mr M Lanza, solicitor
For the First Respondent	Mr A Kirby of counsel
For the Second Respondent	No appearance <sup>1</sup>

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<sup>1</sup> There was no requirement for the Second Respondent to appear at the Preliminary Hearing.

## REASONS

### INTRODUCTION

1. On 1 October 2013, the Tribunal ordered that a preliminary hearing be listed to determine the following separate questions:
  - (a) Is the Applicant the contracting party, as builder, of the building works the subject of this proceeding?
  - (b) What document constitutes the written contract between the parties?
2. By way of background, the First Respondent (**‘the Owner’**) is the owner of a residential property located in Glen Iris (**‘the Property’**). On or about 4 August 2010, he contracted with either the Applicant or its director, Kitchener Crespin in his personal capacity, for the construction of a residential dwelling on the Property.
3. The parties fell into dispute during the course of the building works, which culminated in the building contract being terminated. The Applicant (**‘Advaland’**) issued proceedings against the Owner for recovery of money allegedly owing under a building contract between Advaland and the Owner. The Owner defends the claim made by Advaland on the ground that no contract exists between him and that entity. The Owner alleges that the building contract is between him and Kitchener Crespin in his personal capacity. In that respect, the Owner contends that the version of the written contract in his possession constitutes the true written contract made between the parties. That document, which is in the form of a *Master Builders Association Home Improvements Building Contract* (**‘the MBA contract’**), has white ‘Dymo’ type labels affixed to the front cover and first page which name *KITCH CRESPIN* as the builder. By contrast, Advaland contends that the Owner’s version of the written contract is a fabrication and that the MBA contract held by it is the true written contract between the parties. That version of the MBA contract does not have any printed labels affixed to it and has the name *Advaland P/L* handwritten on the cover page and first page of the document.
4. Both versions of the MBA contract, together with associated documentation, were tendered in evidence. The differences between the two versions of the MBA contract are as follows:
  - (a) Advaland’s version has, in handwriting on the cover page of the contract, the name *Advaland P/L* as the builder. It also names, in handwriting, *Spencer John Bitcon* as the owner and further states, in handwriting, *20 Staunton Lane* next to the printed words *Builder’s Job No.* The cover page is detached from the body of the contract.

- (b) Advaland's version has, in handwriting on the second page, the name *Advaland P/L* as the builder and *Spencer John Bitcon* as the Owner.
  - (c) The Owner's version has on the cover page two printed adhesive 'Dymo' type labels, one naming *KITCH CRESPI*N as the builder and the other naming *SPENCER BITCON* as the owner. The *Builder's Job No.* has not been engrossed. Similarly, the Owner's version has, on the second page, two printed 'Dymo' type labels, one naming *KITCH CRESPI*N as the builder and the other naming *SPENCER BITCON* as the owner.
  - (d) On page 45 of the Owner's version, the words *Spencer Bitcon* are handwritten, under which a signature appears. The signature panel for the Builder is unmarked and unsigned. The contract is undated.
  - (e) On page 45 of Advaland's version of the contract, *Kitchener Crespin* is handwritten within the builder's signature panel and his signature appears under that name. The hand written words *Spencer Bitcon* also appear within the Owner's signature panel and a signature appears under that name, although the signatures appear slightly different between the two forms of the written document. The document is dated in handwriting: *6 August 2010*.
  - (f) Both contracts have initials appearing in the spaces provided for *Owner(s) Initials* and *Builder's Initials* on each page of the documents, although the builder's initials appear slightly different between the two forms of the written document.
5. In all other respects, the two forms of written document are identical. Both documents have been signed by the Owner in all panels where the Owner's signature is required. Both documents also contain a printed stamp stating: *PLEASE REFER TO CONTRACT ADDENDA* in the sections of the document which would otherwise have required engrossing.
6. As is the case with the MBA contracts, the parties have produced their own versions of the *Contract Addenda*. Like the MBA contracts, there are differences between the two versions of the *Contract Addenda*. Those differences are as follows:
- (a) Page one of Advaland's version has a printed date of *25/01/11* appearing at the bottom of the page. Whereas, the Owner's version of the document has a printed date of *3/07/2010* printed at the bottom of that page and all pages that follow.
  - (b) Page two of Advaland's version has a printed date of *3/09/13* appearing at the bottom of the page. Whereas, the Owners version of the document has a printed date of *3/07/2010* printed at the bottom of that page and all pages that follow.

- (c) The remaining pages of Advaland's version all contain the printed date of *25/01/11* at the bottom of each page, consistent with page one of the document.
- (d) The initials of each of the Owner and the builder, which appear in handwriting at the bottom of each page, appear slightly different between the two documents.
- (e) Page two of Advaland's version prints the builder as:

*Advaland*  
*ABN 14 144 477 994*
- (f) Page two of the Owner's version prints the builder as:

*Kitchener Crespin*  
*ABN 65 859 519 926. HIA 965581*  
*RBP K Crespin DB-L 30966 DB-M 30965*

### **Owner's version of events**

- 7. The Owner and his partner, Ms Annabelle Molan, both gave evidence of the surrounding circumstances leading to the signing and exchange of the written contract documents comprising the MBA contract, *Contract Addenda* and *Project Specifications*. According to the Owner, he had arranged to meet Mr Crespin at Mr Crespin's home/office on the weekend of 30 July - 1 August 2010 for the purpose of signing and exchanging contract documents. He said that he and Ms Molan, drove to Mr Crespin's residence on one of those two dates. When they arrived, the Owner telephoned Mr Crespin but was told that he was not at home. According to the Owner, Mr Crespin told him that the contract documents were under a tarpaulin, which covered either a trailer or a car in his driveway.
- 8. The Owner said that he then picked up a bundle of documents from under the tarpaulin, which comprised two sets of the same contract documents. None of the documents were signed or initialled but had stickers on them indicating where to sign. The Owner recounted that he again rang Mr Crespin and asked what should happen about signing the documents. According to the Owner, Mr Crespin told him to sign the documents where indicated. The Owner then asked about the spaces left at the bottom of each page of the contracts for initialling. He was told: *put my initials in*. In his affidavit affirmed on 6 December 2013, the Owner states:
  - 16. I then sat in the car with Annabelle and put both his initials and my initials on the bottom of each page where initials had to be entered. I also signed both copies of the documents on page 45 together with some other locations in the contract that required my signature, such as on pages 20, 31 and 43. Each of these pages had a sticker on them indicating where I should sign. I then got out of the car and took one copy of the Contract, Addenda and Specifications back to the place where I had originally got them underneath the tarpaulin near his apartment.

18. When I collected the Contracts from Crespin's residence I noticed that the front page of each copy of the Contracts had white stickers with my name and Crespin's name in capital letters. Crespin's name was labelled as "KITCH CRESPIN".
  19. Exhibited hereto and marked with the letters "SJB-1" is a copy of the Contract, Addenda and Specifications that I collected from Crespin's residence on 29 July or 1 August 2010 & initialled at that time. These are the documents that I say comprise the only contractual documents relating to the building works at the Property. They have not been altered in any way by me or anyone acting on my behalf or at all.
9. Consequently, the Owner left Mr Crespin's residence with the counterpart MBA contract, which had not been signed by Mr Crespin but with his initials engrossed onto each page of the contract by the Owner, together with the *Contract Addenda* and *Project Specifications*. In his affidavit affirmed on 6 December 2013, the Owner states that a few days after signing the contract documents, he took them to Aris Petratos, a mortgage broker who was arranging finance on his behalf. Sometime later, he received a telephone call from Prue Morse, a property valuer engaged by the lender providing finance for the building works. Evidence was given by Prue Morse confirming that she was in receipt of the Owner's version of the *Contract Addenda* prior to completing her valuation report on 5 August 2010. Ms Morse produced a copy of the *Contract Addenda* which she had scanned into her computer. It appears to be the same document as the document produced by the Owner, and which he contends forms part of the contract documents.<sup>2</sup>
10. Ms Molan's evidence in chief is comprised in her affidavit affirmed on 9 December 2013. Her evidence corroborates the account given by the Owner of the events leading up to the signing, initialling and exchange of the contract documents. She states in her affidavit that the construction loan for the building works was in both the Owners and her name and further that:
12. The following week after the Contract documents were signed, I received a call from Aris who told me that in order for the loan application to progress he needed me to sign a document that Spencer had already signed. I asked him to fax it to me at my work at Pitcher Partners.
  13. On 6 August 2010, I received a fax from Aris at my work in the form of an email. Fax documents received at my work are converted to an email and then forwarded to the relevant person or persons. My work emails record that the fax was sent from Aris on 5 August 2010 at 10.06pm but I did not receive it until the following morning. The fax comprised a fax cover sheet dated 21 July 2010, attached to which was the execution page (being page

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<sup>2</sup> Exhibit R-8.

45) of the Contract (“the Signing Page”) signed by Spencer. At the time, I thought this was something to do with the building contract and I thought that I had to sign it in order to obtain the construction finance. I have subsequently been informed by the Respondent’s solicitor, and believe, that Aris has informed my solicitor that the fax cover sheet used by Aris dated 21 July 2010 was in fact a previous fax cover sheet to me, that Aris reused, and in fact the fax was actually sent on 5 August 2010. I note that it has a date stamp of 5 August 2010. Exhibited hereto and marked with the letters “ALM-1” is a copy of the fax cover sheet and attachment I received from Aris on 6 August 2010.

...

15. I signed the signing page next to Spenser’s name and dated it 6 August 2010, because in the box where the date is written in was handwritten “Pls Date,” and then I emailed it back to Aris, and cc’d it to Spencer, at 11.15 am on 6 August 2010.
11. The Owner’s evidence is that a copy of page 45 of the MBA contract, signed by both him and Ms Molan and dated 6 August 2010, was also emailed to Mr Crespin on 6 August 2010. A copy of that email was tendered in evidence. It bears the fax imprint of 6 August 2010.
12. In late August, the Owner flew to America to undergo heart surgery. He returned in early September 2010. Upon his return, he finalised construction finance with another lender, being the National Australia Bank. This was procured through a different mortgage broker by the name of Claude Rotstein.
13. Mr Rotstein’s evidence in chief is set out in an affidavit affirmed on 4 December 2013. He states:
  11. Prior to the loan from the NAB be approved [sic], I noted from the Contract that Spencer provided to me, that it was unsigned by the builder and the execution page on page 45 of the contract (“signing page”). I told him that the NAB would require a fully signed copy of the Contract. Spencer told me that he had signed both counterpart copies of the Contract and had left one copy with the builder and taken one copy, and because the builder had not been there at the time, his (Spencer's) copy of the Contract was not signed by the builder.
14. The Owner’s evidence is that he then contacted Mr Crespin to arrange for a signed copy of page 45 to be returned to him. His evidence is that on 24 January 2011, he re-sent a copy of the page 45, signed by both him and Ms Molan and dated 6 August 2010, to Mr Crespin. A copy of that email correspondence was tendered in evidence. The attachment to that email appears to be the same document as the document attached to the Owner’s email to Mr Crespin dated 6 August 2010.
15. Mr Rotstein’s evidence is consistent with the Owner’s version of events. He said that:

12. To the best of my recollection, Spencer gave me the details of the builder referred to in the Contract (Mr Kitchener Crespin) (“Mr Crespin”) and I telephoned Mr Crespin and asked him to provide me with a copy of the signing page from his copy of the Contract, that had been signed by both him and Spencer, so that this could be forwarded to the NAB. He said he would email it to me.
16. Mr Rotstein said that on 25 January 2011, Mr Crespin sent him an email with a PDF attachment, being a signed copy of page 45 of the MBA contract. A copy of that email was tendered in evidence. It appears to be a copy of the the same document as the document attached to the Owners email to Mr Crespin dated 6 August 2010 and 24 January 2011, being page 45 of the MBA signed by both the Owner and Ms Molan and dated 6 August 2010.
17. However, the PDF image attached to Mr Crespin's email was faint and as a consequence, Mr Rotstein forwarded another email to Mr Crespin dated 27 January 2011 requesting that Mr Crespin re-send a more legible copy to him. He then states:
  15. The following day, 28 January 2011 at 1:28 am in the morning, I received an email from Mr Crespin in reply to my email to him of 27 January 2011. The email did not contain any text except for the words “Kitch Crespin” in the body of the email. Attached to the email was the signing page from the Contract. The resolution and clarity of the page was much better than the previous version page forwarded to me on 25 January 2011.
18. The email dated 28 January 2011 was also tendered in evidence. It is clearly more legible but only contains the signatures of Mr Crespin and the Owner. Ms Molan’s signature does not appear on that document. Moreover, the date of the document appears to be in a different handwriting to the handwritten date in the scanned image attached to the email dated 25 January 2011, albeit that both documents bear the same date of 6 August 2010. This indicates that the page 45 of the MBA contract that Mr Crespin signed and forwarded to Mr Rotstein on 28 January 2011 came from a different document to the source document bearing the signature of Ms Molan.
19. Mr Rotstein gave further evidence that he also arranged for the contract documents to be certified as being a true copy of the original. He said this was necessary in order to make an application for a *First Home Owners Grant*. To that end, he sent the contract documents to Mr Gaskell, a chartered accountant and the father of Ms Molan, for certification. He stated:
  19. On 27 January 2011, prior to receiving the signing page from Mr Crespin on the following day, 28 January 2011 (the Exhibit CAR-4), I sent an email to Mr Gaskell attaching a copy of the Contract, Addenda and Specifications (being Exhibit CAR-1). In the email, I



asked Mr Gaskell to certify the attached document as being a true copy of the original and I gave him the specific wording to use. Because I scanned the original documents into my computer, then if Mr Gaskell printed the documents I believe it constituted a true copy of the original ... The signature page on the copy of the Contract emailed to Mr Gaskell was the version given to me by Spencer in September 2010 that did not have Mr Crespin's signature. Therefore, in the email, I told Mr Gaskell that in relation to the signing page I had emailed the builder and asked him to rescan a clear copy of this, and was awaiting his response.

20. After receiving the email from Mr Crespin on 28 January 2010 [sic] at 1:28 AM, I then forwarded Mr Crespin's email to Mr Gaskell a short time later. The body of my email stated:

*Hi Allan, the final page for certification attached.*

20. According to Mr Gaskell, after he received the contract documents from Mr Rotstein on 27 January 2011, he certified the documents as being copies of the original by affixing a printed label to the front page of each of the contract documents bearing the certification wording, which he then signed and dated 27 January 2011. However, consistent with Mr Rotstein's evidence, as at 27 January 2011, Mr Gaskell's version of the MBA contract had not been signed by or on behalf of the builder. He only received the signed page 45 of the MBA contract on the following day, being 28 January 2011. According to Mr Gaskell, after receiving the signed page 45 of the MBA contract on 28 January 2011, he affixed his certification label to that page, which he then pre-dated 27 January 2011, before inserting that page into the body of the document. During cross-examination, he conceded that, with the benefit of hindsight, the process he adopted was not entirely appropriate.
21. Following the certification of the contract documents, the documents were returned to Mr Rotstein, who then forwarded the documents to the National Australia Bank in order to secure finance for the building works.
22. It is interesting to note that of the contract documents certified by Mr Gaskell on 27 January 2011, which comprise the MBA Contract, *Project Specifications*, *Contract Addenda* and architectural drawings, the *Contract Addenda* appears to be the same copy as the Owner's version of that document. In particular, it names the builder as *Kitchener Crespin* and the date *3/07/2010* appears at the bottom of each page.

### **Advaland's version of events**

23. Advaland's version of the background facts differs significantly from the Owners evidence. Mr Crespin and his fiancée, Ms Scholtes gave evidence of the surrounding events leading up to the signing of the MBA contract. According to Mr Crespin, a meeting was arranged with the Owner at Mr Crespin's residence on 6 August 2010 for the specific purpose of executing and exchanging the contract documents.

24. Mr Crespin said that he denied ever entering into a building contract with the Owner, in his personal capacity. He said that since Advaland Pty Ltd had become incorporated, he never executed building contracts in his personal name. He gave evidence during the course of the hearing that he specifically recalls meeting the Owner and Ms Molan at his residence on 6 August 2010, at which time he explained the various terms of the contract documents to the Owner. He said that both the original MBA contract and its counterpart were signed by both parties on that day and dated 6 August 2010. According to Mr Crespin, the version of the MBA contract signed on that day was the version bearing the handwritten words on the front cover and first page *Advaland P/L*. He denied that he or anyone acting on behalf of Advaland had prepared a contract with white labels naming *KITCH CRESPIN* being affixed to the front cover and first page. According to Mr Crespin, the version of the MBA contract bearing those white labels was a forgery.
25. Ms Scholtes prepared a witness statement, which she adopted as her evidence in chief. She stated:
1. In January 2010 to October 2010 I was employed by Advaland as the Office Manager & Personal Assistant to Kitchener Crespin, as Director of Advaland P/L ...
  2. I prepared the contract consultation with Kitchener Crespin between Advaland and Spencer John Bitcon on 6 August 2010 for the contract signing meeting scheduled at that evening ...
  3. While working for Advaland I prepared all of Advaland's contracts in consultation with Crespin under Advaland P/L.
  4. ...
  5. The evening Spencer Bitcon and Annabelle Molan came to our address at ... to sign the contract it was the first time I met Molan. I had spoken to and emailed Bitcon several times over the past year because he developed the Advaland website, hosted our site and provided us with some technical support but I'm not certain if this was the first time I had met him. I recall a conversation Molan and I had as we met, we laughed about the name of our street because she and myself are both affectionately called Belle. We chatted generally to get to know each other and I learned that her and Bitcon were engaged and that she was a Forensic Accountant...
  6. ...
  7. On the evening the contract was signed I was present with Crespin, Bitcon and Molan while Crespin took Bitcon through the details of the contract, page by page. Each page was signed by Bitcon and Crespin and full signatures were signed where I had stuck down coloured arrows. Molan was not required to sign the contract as she was not named on the contract...

26. Despite extensive cross-examination, both Mr Crespin and Ms Scholtes were adamant that the meeting took place on 6 August 2010, at which time the original MBA contract and its counterpart were executed by all parties. In addition, both confirmed that at the conclusion of that meeting, the Owner took the counterpart MBA contract, *Contract Addenda* and *Project Specifications* away with him.
27. Mr Joyce, forensic document examiner with HD Forensic Experts Pty Ltd, was called to give evidence on behalf of Advaland. He prepared an expert report in relation to the MBA contract held by Advaland, which set his evidence in chief. Mr Joyce concluded:
- 5.1.4 Examination of page 47 of Q1 for writing indentations using electrostatic methods has revealed that the handwritten date, Kitchener CRESPIAN and Spencer BITCON signatures written on page 45 and the Spencer BITCON signature on page 43 were indented into this page. This establishes that pages 43 and 45 were above the page 47 when these entries were made...
28. Mr Joyce compared the version of the MBA contract held by Advaland with the certified copy of the MBA contract held by the Owner. He opined, consistent with Mr Rotstein and Mr Gaskells' evidence, that the certified copy of the MBA contract had the signature page 45 inserted into the document, rather than the signature having been made into the document itself. He concluded:
- 6.1.3 Whilst purporting to be a certified copy of an original, the document Q2 is a fabricated document consisting of a copy of page 45 of Q1 and another unidentified document.

## FINDINGS

29. It is not usual for witnesses to recall historical events differently, especially where a long period of time has elapsed. It is human nature for persons, over a period of time, to unwittingly or subconsciously reconstruct events and as a consequence, honestly hold a particular view as to what may have occurred in the past, even if that view is erroneous. However, in the present case the divergence between the two versions of events is so diametrically different, notwithstanding that each version was presented as a plausible scenario. Ultimately, however, I am guided by the numerous documents that were tendered in evidence, which tend to give greater weight to one version over the other.
30. Mr Lanza, solicitor, appeared on behalf of Advaland. He relied heavily on the expert opinion evidence of Mr Joyce, in submitting that the expert opinion unequivocally identified Advaland's version of the MBA contract as being an original document. By contrast, he submitted that the expert opinion correctly identified the Owners certified copy of the MBA contract as being a *fabricated document*.

31. Mr Lanza submitted that the expert opinion evidence of Mr Joyce, coupled with the lay evidence of Mr Crespin and Ms Scholtes proved, on the balance of probabilities, that Advaland's version of the contract documents was the true contract document.
32. In my view, the expert opinion evidence of Mr Joyce does not greatly assist me in determining the questions before me. In particular, the lay evidence of Mr Rotstein and Mr Gaskell explain how it is that the signed page 45 was inserted into one version of the MBA contract. Mr Lanza argued that the evidence of Mr Rotstein and Mr Gaskell was belatedly fabricated in order to rebut the expert opinion evidence of Mr Joyce. I do not accept that submission. In particular, there is ample documentary evidence which corroborates the evidence given by Mr Rotstein and Mr Gaskell. I accept their evidence that the signed page 45 was inserted into the Owner's version of the MBA contract and that this was done for no other purpose other than to expedite matters and with no other ulterior motive in mind.
33. During Mr Joyce's evidence, I asked whether he was able to determine whether Advaland's version of the MBA contract had, at some earlier point in time, been affixed with labels similar to those appearing on the Owner's version of the MBA contract. I asked whether those types of labels could be removed without there being some marks left on the document. Mr Joyce said that it was possible to remove the labels without there being any apparent destruction of the paper upon which they were affixed. In other words, it is possible that they could be removed without it being noticeable to the naked eye. He said that he could ascertain whether such labels had previously been affixed to the paper by using electrostatic imaging. He conceded, however, that he had not been asked to undertake that exercise. Therefore, he was not willing to proffer an opinion as to whether labels had previously been affixed to Advaland's version of the MBA contract.
34. It is regrettable that Mr Joyce did not examine the document to ascertain whether labels had previously been affixed to it. It seems to me that this question really lies at the heart of the dispute. In particular, what are before me are two versions of the same pro-form type contract. The Owner's version has white labels affixed to the cover and to the first page, naming Mr Crespin as the builder. Advaland's version does not have any white labels and the name Advaland P/L is handwritten on the cover and first page. It goes without saying that electrostatic imaging of Advaland's version of the contract may have provided material evidence as to whether the document had been altered. Without such evidence, I am left with largely circumstantial evidence from which I am asked to draw an inference one way or the other.
35. Mr Lanza further submitted that the Owner's evidence was that he initialled both sets of the MBA contracts with his own initials "SB" and also the initials of Kitchener Crespin "KC" and then left one set under the

tarpaulin and retained one set for himself. However, the initials “KC” appearing on Advaland’s version of the MBA contract appear to be in a different handwriting to the initials “KC” appearing on the Owner’s version of the MBA contract. Therefore, Mr Lanza submitted that this inconsistency puts a lie to the Owner’s evidence that he signed and initialled both contracts in the absence of Mr Crespin. This is because there is no dispute that the signature of the Owner appearing in Advaland’s version of the contract is authentic. Therefore, if the Owner’s version of events was correct, the initials “KC” should appear in similar handwriting in each version of the MBA contract. The fact that it does not creates an irresistible inference that the ‘tarpaulin incident’ simply did not occur.

36. I do not accept that the Owner’s evidence is that he initialled “KC” on both versions of the MBA contract. His affidavit filed in this proceeding is equivocal, given that it is expressed generally.<sup>3</sup> During cross-examination, the Owner conceded that he wrote the initials “KC” on one version of the MBA contract. However, he was never asked whether he also initialled “KC” on the Advaland version of the MBA contract. During re-examination he elaborated on this evidence. He said that he filled out one booklet and signed it. He then signed the other booklet and put one version back under the tarpaulin. In my view, his evidence points to the fact that he signed both versions of the MBA contract but only initialled “KC” on the version that he took away with him. That is a more logical scenario as there would be no point in initialling the builder’s version and then leaving the document with the builder to sign.
37. Moreover, during cross-examination, the Owner explained that he was comfortable placing the initials “KC” on the version of the MBA contract which he took away because Mr Crespin authorised him to do so. He added that by adopting that process, the signing page 45 could then be signed at a later stage and faxed to him, without having to fax every page of the builder’s version of the contract.
38. In determining the questions before me, I have carefully considered the evidence of all witnesses and in particular, any inconsistencies and concessions made. Of significance, were the concessions made by Ms Scholtes, that it was common practice for Advaland to use white labels which were similar to the labels seen on the Owner’s version of the MBA contract. According to Ms Scholtes, this was done to give the contracts a more professional look. A further concession made by both Ms Scholtes and Mr Crespin was that their recollection of the meeting on 6 August 2010 was, to a large extent, aided by the fact that the contract bore the same date, rather than from examining diary notes or other like material. In fact, Mr Kirby, counsel for the Owner, called for the production of all diary notes held by Mr Crespin. Although Mr Crespin explained that he

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<sup>3</sup> See paragraph 8 above.

had electronic versions of his diary, which would corroborate the meeting, nothing was produced to verify that a meeting took place on 6 August 2010.

39. Moreover, there are inconsistencies in the evidence of Mr Crespin and Ms Scholtes that remain unexplained or at least not satisfactorily explained. First, Advaland's version of the *Contract Addenda* has a date printed on the first page being 25/01/11. Further, the second page, which named the builder as *Advaland*, has a printed date of 3/09/13. By contrast, the Owner's version of the *Contract Addenda* has printed at the bottom of every page the date 3/09/10, being a date that precedes the exchange of the contract documents. According to Mr Crespin, the date of 3 September 2013 is a typographical error. I have difficulty accepting that evidence. In particular, that explanation does not explain why on one hand, the Owner's version has a consistent date of 3 August 2010 on every page, while the Advaland's version has different dates and coincidentally, on the critical page naming the builder, a date which postdates the filing and serving of the Owner's affidavit dated 20 August 2013, which first raises the allegation that the building contract was entered into with Mr Crespin personally, and further exhibits a copy of the Owner's version of the MBA contract.
40. Second, Ms Scholtes gave evidence that between January and October 2010, she was employed by Advaland to prepare contract documents on its behalf. She said that in all cases she named the builder as Advaland Pty Ltd. However, an extract from the ASIC database was produced during the course of the hearing which showed that Advaland was first registered on 7 June 2010. In those circumstances, how could it be that contracts were entered into by Advaland prior to June 2010? In my view, this statement undermines the credibility of her evidence.
41. From the Owner's perspective, there are also inconsistencies in the evidence given. In particular, the certification process adopted by Mr Rotstein and Mr Gaskell was, as I have already commented, inappropriate. Nevertheless, what took place is explicable and I do not consider that it was done for any ulterior motive, other than to expedite matters.
42. Balancing all of the evidence and in particular, the chain of emails tendered during the course of the hearing, coupled with the corroborating evidence of Ms Molan, Mr Rotstein and Mr Gaskell, I consider the Owner's version of events to be the more likely scenario. Moreover, there is evidence from un-interested witnesses, such as Prue Morse, the valuer appointed by the construction finance lender, verifying that the Owner's version of the contract documents were given to her in 2010, well before the parties had fallen into dispute. Similarly, evidence was given by Long Pham, a loan officer employed by the National Australia Bank, which also confirmed that the lender was in receipt of the Owner's version of the contract documents well before any disputation arose between the parties.

43. In my view, it is reasonable to draw an inference that these documents reflect the actual documents that were exchanged between the parties, given that it is unlikely that the Owner would have fabricated or altered a document in circumstances where there is no dispute or disagreement between the parties. Indeed, it defies logic that the Owner would alter the documents so that they reflected the name of Mr Crespin, rather than Advaland, given that both the building permit and certificate of warranty insurance both named Advaland as the relevant builder.
44. I note that both Mr Kirby and Mr Lanza argued that the other was burdened with the onus of proving that the version of the contract documents held up by the opposing party was a forgery. In my view, it is unnecessary to decide the preliminary questions on the basis of one party having to carry the burden of proof. Each party has maintained a particular position regarding the contract documents and it is for the Tribunal to decide, on the balance of probabilities, what facts transpired based on the evidence and documents presented to it. As I have indicated, in my opinion the evidence given by the witnesses called by the Owner and the documents tendered by him, persuade me that the Owner entered into a building contract naming Kitchener Crespin as the builder and that the contract documents comprise the Owner's version of the MBA contract ((Exhibit R-12) and the Owner's version of the *Contract Addenda* bearing the date 3 July 2010.
45. I further find that although the Owner's version of the MBA contract is unsigned by the builder, the forwarding by Mr Crespin of an executed page 45 to Mr Rotstein, has the same effect as if he had signed the actual document itself. I make this determination because I find that, in all likelihood, the document which constitutes the Owner's version of the MBA contract is the counterpart of the document that the Owner signed and left under the tarpaulin. Naturally, this means that I have concluded, from the evidence before me, that in all likelihood, Advaland's version of the MBA contract had, at one stage, labels affixed to it which bore the name *KITCH CRESPIN* as builder.
46. At the conclusion of the hearing of this preliminary proceeding, I asked the parties whether I was to also determine the identity of the party which undertook the building work, as opposed to simply identifying the true contract documents and the parties to those contract documents. Mr Kirby submitted that my task was limited to determining the two preliminary questions set out above and that further evidence would need to be adduced in order to determine who actually carried out the building work. Mr Lanza submitted that it was open for me to make findings as to the identity of the party that undertook the building work, given that the orders setting out the preliminary questions were expressed generally. I do not consider it appropriate that I make findings in relation to the identity of the entity that constructed the building work, given Mr Kirby's submission that further evidence would need to be adduced in order to

properly consider that question. Accordingly, I leave that question to be determined at final hearing.

**SENIOR MEMBER E. RIEGLER**