VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO D395/2010**

CATCHWORDS

CONTRACT – Repudiation – when termination takes effect – ineffective notice of termination – Mutual abandonment – implied from conduct objectively determined - Quantum meruit claim.

LIQUIDATED DAMAGES – whether available where owner in breach of contract – whether available where building work suspended –dispositive remedial code for damages – whether available after contract ended – accrued rights.

EQUITABLE FRAUD – whether fraud committed against non party entitles another party to relief – whether fraud constitutes repudiation of contract – deceit.

COLLATERAL AGREEMENT – uncertainty – whether contrary to s.16, s.33 and s.132 of the *Domestic Building Contracts Act* 1995.

APPLICANT	Peter Arapoglou
RESPONDENT	Aron Shkolyar
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	26 and 27 September 2011 (written submissions filed 24 October 2011)
DATE OF ORDER	29 November 2011
CITATION	Arapoglou v Shkolyar (Domestic Building) [2011] VCAT 2213

Order

1. The Respondent must pay the Applicant $96,730.44.

2. **The proceeding is listed for a directions hearing on 15 December 2011 at 9.30 am at 55 King Street, Melbourne, Vic, 3000, at which time the Tribunal will hear any application for costs.**

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr T Alexander of counsel
For the Respondent	Ms Moorhouse Perks solicitor

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Reasons

Background

1. The Applicant is a builder who trades under the business name of Tech-Line Homes (**'the Builder'**). The Respondent is, or was at the relevant time, the owner of property located in Caulfield (**'the Owner'**).

2. On 29 March 2008, the Owner and the Builder entered into two building contracts in the standard form published by the Housing Industry Association. Under the first contract, the Builder agreed to construct two residential units on the Owner's property, known as Unit 1 and Unit 2, for a price of $600,000 inclusive of GST (**'the Unit 1 & 2 Contract'**). Under the second contract, the Builder agreed to construct a third residential unit on the Owner's property, known as Unit 3, for a contract price of $220,000 inclusive of GST (**'the Unit 3 Contract'**).

3. According to the Builder, at the time when the two contracts were executed, a collateral agreement was entered into between the parties which provided that the Builder was to paid a fee of $100,000, known as a *project management fee*, if the specification for the works under the two contracts was upgraded to a higher and more expensive level (**'the Project Management Fee'**). The Project Management Fee was payable in addition to the $820,000 payable under the two contracts executed by the parties. To that end, the parties signed a separate one-page document entitled *AGREEMENT*, reflecting what the Builder contends constitutes the agreement to pay the Project Management Fee.

4. The building work under both contracts commenced on 3 July 2008 (**'the Works'**). Progress claims were submitted during the course of undertaking the Works. In that regard, both contracts adopted the progress payment regime described under s.40 of the *Domestic Building Contracts Act* 1995 (**'the Act'**), which was duplicated in Schedule 3 of the contracts. In addition, both contracts contained a special condition, which purported to allow the Builder to issue interim progress claims at his discretion representing a part of the Schedule 3 stages of work completed. For example, progress claims were submitted by the Builder for part of *Lock-up Stage* and part of *Fixing Stage*.

5. By April 2009, some of the progress claims submitted by the Builder had not been paid or had been short paid, with the result that $120,000 was unpaid. This prompted the Builder to convene a meeting with the Owner to discuss, amongst other things, why progress payments had fallen into arrears.

6. At that April meeting, the Owner disclosed to the Builder that he had fabricated two *false* progress claims on the Builder's letterhead and submitted those claims to his lender to enable funds to be drawn from the loan or loans taken out by the Owner to finance the Works. He said this was done so that he was able to meet interest payments under the loans procured by him and that if he had not taken that action, the lender would have "called up" the loans and he would not have been able to pay future progress claims submitted by the Builder.

7. That April meeting ended with an assurance from the Owner that there were sufficient funds available to meet future progress claims and that he would seek further funding from his lender as the Works progressed to ensure that there was no shortfall of funds as the Works neared completion. On the face of that assurance, the Builder continued with the Works. As matters progressed, three further progress claims were submitted by the Builder, all of which were paid in full. However, the outstanding progress claims totalling $120,000 remained unpaid.

8. At that April meeting (or at a subsequent meeting) the parties also sought to reconcile other financial dealings between them. In particular, on one hand the Owner had paid for some of the items of work or materials that formed part of the scope of the Works, while on the other hand, the Builder had loaned money to the Owner. In that respect, the parties have now agreed that the reconciliation of those dealings results in a net amount of $28,213 owed to the Builder.

9. In late September 2009, the parties met again for the purpose of discussing what funding arrangements had been undertaken by the Owner. The Builder was again assured that the Owner was in the process of refinancing and that additional funds would become available in the near future.

10. On 14 October 2009, a further meeting was convened between the parties to discuss why outstanding progress claims had not been paid. With the consent of the Owner, the Builder’s wife, Sue Arapoglou, rang the Owner’s bank and enquired as to how much money was left to be drawn down from the construction loan given by that bank. According to Ms Arapoglou, the bank advised that only $17,000 was left to be drawn from the construction loan. However, at that stage, $260,000 still remained to be paid under the contracts.

11. Consequently, the Builder assumed that funding for the Works, which he believed was wholly derived from that construction loan, had been depleted with the effect that there were insufficient funds available to pay the balance of the contract price. The Builder further believed that this occurred principally because the Owner was drawing from the construction loan to service interest payments

accruing thereunder, rather than allocating all of the available funds solely for the payment of the Works.

12. At that time, a total of $680,000 had been claimed by the Builder under the two building contracts. However, only $560,000 had been paid. No money had been claimed or paid under the collateral agreement relating to the Project Management Fee. Consequently, the Builder ceased work under both contracts.

13. Shortly before or on 1 November, the Builder telephoned the Owner and told him that unless he paid the outstanding progress claims and put sufficient money into an account to complete the building project, he would not undertake any further work for him. The Builder requested that the Owner provide a letter from his lender that there were sufficient funds to complete the project. The Owner responded with a statement to the effect that he would not make any further payments, including payment of outstanding progress claims, until such time as the Builder completed Unit 3, which at that time was considerably late in completion, given that the contractual date for completion was 20 March 2009.

14. On or shortly after 1 November 2009, the Owner moved into Unit 3. At that time, the stage of work for Unit 3 was past *Fixing Stage*. In other words, some work that comprised *Completion* stage had been undertaken by the Builder. The stage of work for Units 1 and 2 was part way into *Fixing Stage*. That stage had not yet been completed.

15. After November 2009, no further work was undertaken by the Builder, nor did the Owner make any further payments under the contracts. No communication occurred between the parties until 10 April 2010, when the Builder gave formal notice that both building contracts had come to an end. At that stage, the unpaid progress claims amounted to $120,000.

The claims

16. The Builder submits that the conduct of the Owner in failing to make payment of progress claims, raising false progress claims and failing to provide satisfactory evidence of his capacity to pay the balance of the contract price constitutes a repudiation of the contracts. The Builder contends that he verbally accepted that repudiation on 1 November 2009; and then formally by letter dated 10 April 2010. He seeks damages comprising:

    (a) the unpaid progress claims in the amount of $120,000 or alternatively, that amount on a quantum meruit basis;

    (b) $28,210 being the agreed *loan amount*; and

    (c) payment of the Project Management Fee of $100,000.

17. The Owner counterclaims against the Builder for loss and damage resulting from the Works not being completed by 20 March 2009, being the date for completion, in the amount of $63,773.62. The Owner further counterclaims for the cost of repairing defects in the Works, which are estimated to be $8,091.

18. The Builder disputes that the Owner has any entitlement to damages for delay. He contends that the owner's conduct in fabricating false progress claims constitutes an equitable fraud, in that he deceived the Builder by representing that the whole of the construction loan was to be applied for the benefit of the Builder and towards the building costs. Consequently, he submits that the Owner is therefore deprived of claiming any relief for delay.

The issues

19. This proceeding raises a number of issues for determination:

    (a) Did the Owner commit an equitable fraud on the Builder?

    (b) How did the contract end?

    (c) Is the Builder entitled to the Project Management Fee?

    (d) Is the Builder entitled to be paid the value of the outstanding progress claims?

    (e) Is the Builder entitled to be paid the *loan amount*?

    (f) Are the works defective and if so, is the Owner to be awarded damages for the cost of repairing defects?

    (g) Is the Owner entitled to an award of damages in respect of any delay in completing the Works?

Did the Owner commit an equitable fraud?

20. The Owner concedes that he created two false progress claims on the Builder's letterhead in order to draw money from the construction loan or loans in order to service interest payments under those loans.

21. Mr Alexander of counsel appeared on behalf of the Builder. He submitted that the Owner committed a fraud against the Builder. He referred me to a number of authorities in support of that proposition.

22. I do not accept that a fraud was committed against the Builder. In my view, if a fraud had been committed, it was committed against the lender, rather than the Builder. The funds that were available to be drawn down from the construction loans were monies to be borrowed by the Owner from the

Owner's lender. They were not monies drawn from a fund established exclusively for the Builder. Accordingly to the Owner, they were monies borrowed for the purchase of the land and to pay for the construction of the Works - irrespective of whether those Works were undertaken by the Builder or someone else. In my view, how the monies drawn from those loan accounts were used was a matter between the Owner and his lender. However, I do not believe that by re-directing funds from loans taken out by the Owner constitutes a fraud on the Builder. The money available to be drawn from those loans was not the Builder's money. It only became the Builder's money after the Builder was paid. This was not a situation where monies were redirected or misappropriated from funds in respect of which the Builder had an interest. For example, the situation would be different if the funds were drawn from a retention fund established as security for the performance of a builder's obligations under a building contract. In those circumstances, the money held in the retention fund constitutes part of the progress payments made to the relevant builder, albeit that they are held by the principal pending completion of the building works. That is not the situation in the present case.

23. The Builder had no interest in the loans taken out by the Owner, save and except that those loans provided the means by which the Owner would perform his obligations under the contracts. However, whether a progress payment was made through the construction loans, by cash or by some other means was irrelevant in terms of the Owner performing his obligations under the contracts. The Builder's contractual rights, insofar as they related to the Owner's funding arrangements, were limited to allowing him to request that satisfactory evidence of the owner's capacity to pay the contract price was provided. Therefore, I find that the redirection of funds from the construction loans does not constitute a fraud on the Builder.

24. Further, I do not accept the contention made by the Builder that the Owner had promised that the construction loans were procured solely for the benefit of the Builder. In essence, Mr Alexander's submission was couched in terms of the Owner having deceived the Builder by re-directing loan funds for a purpose other than paying for the Works.

25. Having heard both the Builder and the Owner during cross-examination, I accept the evidence of the Owner that the issue of drawing funds from the construction loans to service interest payments was discussed with the Builder prior to entering into the contracts. In particular, the Owner gave evidence that it was a *key condition* that the construction loans would be serviced out of the loan amount. When asked by counsel whether he had conveyed that

information to the Builder, he answered: *not just told but it was condition number one that the contract would be signed based on that condition.*

26. Ms Moorhouse Perks, solicitor, appeared on behalf of the Owner. She drew my attention to a recent decision of the Supreme Court of Victoria in *Horesh v The Shepardi Association of Victoria & Ors*,[1] where Almond J, citing *Maghill v Maghill*,[2] stated:

> In *Maghill v Maghill* the High Court set out the elements of the tort of deceit as follows [22]:
>
> > The modern tort of deceit will be established where the plaintiff can show five elements: first that the defendant has made a false representation; secondly that the defendant made the representation with the knowledge that it was false or that the defendant was reckless or careless as to whether the representation was false or not; thirdly that the defendant made the representation with the intention that it be relied upon by the plaintiff; fourthly that the plaintiff acted in reliance upon a false representation; fifthly, that the plaintiff suffered damage which was caused by reliance on a false representation.
>
> In an action of deceit the plaintiff must establish actual fraud [23] and because fraud is a serious allegation the need to satisfy each element has always been strictly enforced [24].[3]

27. As I have already found, I do not find on the evidence before me that any representation was made that the construction loans were dedicated solely for the benefit of the Builder. Therefore, I do not find that the tort of deceit is made out.

28. Further, I do not consider that the conduct of the Owner goes so far to constitute a breach of the contracts, given that the contracts did not require that progress claims were to be paid out of the construction loan or loans.

Did the Owner repudiate the contracts?

29. The issue of how the contract came to an end is critical to each of the parties' claims. It impacts on whether the Builder is able to pursue a quantum meruit claim for work completed up to November 2009 and equally, it impacts on the Owner's damages claim for delay.

30. Mr Alexander contended that the contracts were lawfully determined by the Builder as a consequence of the Owner's repudiation of those contracts. He

[1] [2011] VSC 26
[2] (2006) 226 CLR 551 at [37] – [38]
[3] Ibid at [100] – [101]

referred me to the judgement of Warren CJ in *Kane Constructions Pty Ltd v Sopov*,[4] wherein her Honour described repudiatory conduct as:

> Gibbs CJ in *Sheville & Anor v The Builders Licensing Board* likewise observed that a contract may be repudiated where one party renounces their liabilities under it, evincing an intention to no longer be bound by the contract. His Honour further observed that repudiation may also occur where one party demonstrates an intention to fulfil the contract, but in a manner "substantially inconsistent with his [or her] obligations and not in any other way…" The conduct of the allegedly repudiatory party must be "such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it" [footnotes omitted]

31. Mr Alexander contends that the Owner repudiated both contracts prior to 20 March 2009, being the *Completion Date* under both contracts. He submitted that the following conduct amounted to a repudiation of the contracts:

    (a) the non-payment of a progress claim for $45,000 on 18 November 2008.

    (b) The misappropriation of $30,000 from the construction loan on 19 February 2009, by the creation of a false progress claim.

    (c) The underpayment of the progress claim by $30,000 on 19 February 2009.

    (d) The misappropriation of $45,000 from the construction loan on 17 March 2009 by the creation of a false progress payment claim.

    (e) The failure to have future funds available in order to make payment of future progress claims

32. It is not in dispute that the parties continued to perform the contracts after 20 March 2009. The Builder continued to construct the Works and the Owner continued to make payments under both contracts. Both parties continued to affirm the contracts. Nevertheless, Mr Alexander contended that it was open for the Builder to 'retrospectively' accept the repudiatory conduct referred to above, such that the contracts are determined as from when the repudiatory conduct occurred. He submitted that such a finding is material to the Owner's claim for delay damages because it would deprive the Owner from claiming liquidated damages under the contracts by reason of the Works not being completed by the completion date of 20 March 2009.

[4] [2005] VSC 237 at [795]

33. It cannot be said that electing to exercise a right to terminate operates retrospectively to render a contract at an end as from the date of the repudiatory act, in circumstances where the parties have continued to affirm the contract for some time after the repudiatory act occurred.[5] That proposition is entirely inconsistent with the parties continuing to perform the contract after the alleged act of repudiation. It is inconsistent with the authorities cited to me and I know of no authority that supports such a proposition.

34. In my view, termination of a contract resulting from an election to accept a defaulting party's act of repudiation takes effect when the election is made and not when the repudiatory act occurred.[6] In that respect, termination for breach is to be distinguished from rescission *ab initio*. The question remains, however, whether by the conduct alleged, the Owner repudiated the contracts.

35. There a number of factors highlighted by Mr Alexander and disclosed by the evidence which require consideration in determining whether the Owner has repudiated the contracts:

    (a) misappropriation of funds

    (b) not having sufficient funds available to pay the contract price;

    (c) failure to provide evidence of the Owner's capacity to pay the contract price;

    (d) a failure to make full payment progress claims; and

    (e) taking possession of Unit 3 without consent.

Misappropriation of funds

36. As I have already discussed, I do not consider that the fabrication of the false progress claims, resulting in funds being drawn from the construction loans for purposes other than paying the Builder, constitutes a breach of the contracts. As such, such conduct cannot be said to evince an intention not to be bound by the terms of the contracts. In fact the evidence of the Owner is that this was done so that he could honour his obligations under the contracts.[7]

Insufficient capacity to pay

37. I am not satisfied on the evidence before me that the Builder has proved on the balance of probabilities that there were insufficient funds available to pay

[5] *Larratt v Bankers and Traders Insurance Co Ltd (*1941) 41 SR (NSW) 215 at 226
[6] Ibid
[7] See paragraphs 20 to 26 above.

for the balance of the contract price. In particular, the contention that only $17,000 was left in the construction loan was disputed by the Owner. He gave evidence that he took out three separate loans to pay for the land and finance the Works. There was no evidence that the other loans did not have sufficient remaining funds available to enable the Owner to pay for the Works. The mere fact that some progress claims were not paid or fully paid does not lead to an irrefutable inference that insufficient funds were available to pay for the Works, especially when weighed against the fact that subsequent progress claims were paid in full.

Failure to provide satisfactory evidence of the Owner's capacity to pay

38. The admission made by the Owner that he fabricated two false progress claims prompted the Builder to demand that the Owner provide evidence of his capacity to pay the contract price. In fact, the Builder stated that it would not continue with the Works until such evidence was provided. It would appear that this was one factor which led to the cessation of the Works and the creation of an impasse between the parties, ultimately leading to the Builder giving notice that the contracts were at an end. The question arises whether the Owner was contractually obligated to provide evidence of his capacity to pay the balance of the contract price?

39. Clause 13.0 of the contracts describes what information needs to be provided by an owner to a builder (**'the Essential Information'**). It states:

> The Owner must give the Builder written evidence of the following within 30 Days of the date of this Contract to enable Building Works to commence:
>
> - satisfactory evidence of the Owners title to the Land;
> - full details of any easements, restrictions or covenants which affect the Land;
> - satisfactory evidence of the Owners capacity to pay the sum of the Contract Price and where monies are to be borrowed, satisfactory written evidence that any loan has been approved by the Lending Body and that the mortgage documents have been signed;
> - details of any inspections required by the lending Body;
> - copies of any town planning approval and proof of payment of the relevant fees, where the Owner is responsible for obtaining the approval; and
> - where there are existing structures on the Land to be removed by the Owner, evidence that such structures have been demolished and all debris has been removed.

40. Although it might be argued that Clause 13.0 only operates prior to the Works commencing, I am of the view that the conduct of the Owner may have imposed an ongoing obligation on him to provide or update the Essential Information as the Works progressed.

41. In particular, information given to the Builder prior to the Works commencing as to the Owner's capacity to pay for the Works was, in effect, nullified by his subsequent action in depleting funds that would otherwise be used to pay for the Works. In that sense, the Owner's subsequent conduct rendered whatever information was given prior to the Works commencing inaccurate and in those circumstances, the precondition imposed under Clause 13.0 cannot said to have been fulfilled, with the result that he was in breach of the contracts until updated information was provided.

42. Consequently, I find that the Owner was contractually obligated to provide or update the Builder with satisfactory evidence of his capacity to pay the balance of the contract price following the demand made by the Builder in or about November 2009. The failure to provide that information constituted a breach of the contracts. However, I do not consider that that act, in itself, constitutes a repudiation of the contracts. It is not what I consider to be a breach of a fundamental term of the contracts.

Non payment of progress claims

43. It is not in dispute that a number progress claims submitted by the Builder remained unpaid as at the date when work ceased in late October 2009. However, Ms Moorhouse Perks submitted that the Owner was not obligated to make payment of those progress claims because they were not issued in accordance with the terms of the contracts.

44. It is uncontested that the Builder issued progress claims totalling $680,000 of an aggregate contract price of $820,000. Further, it is uncontested that the Owner has paid $560,000 in respect of those progress claims. The short payment of progress claims of $120,000 is made up as follows:

Date	No	Description	Amount claimed	Amount paid	Date paid
18/11/08	3	Frame-part payment for Unit 3	$45,000	Nil	–
12/02/09	5B	Lock-up balance for Unit 2	$90,000	$60,000	19/02/09
17/03/09	5A	Lock-up balance for Unit 1	$90,000	$45,000	24/03/09

45. Ms Moorhouse Perks submitted that the progress claims submitted by the Builder were not in accordance with Schedule 3 of the contracts and as a result, there was no obligation to pay them.

46. Schedule 3 of the contracts mirrors the statutory regime specified under s.40 of the *Domestic Building Contracts Act* 1995 (**'the Act'**) as follows:

Unit 3 Contract		**Unit 1 & 2 Contract**	
Deposit (5%)	$11,000	Deposit (5%)	$30,000
Base Stage (10%)	$22,000	Base Stage (10%)	$60,000
Frame Stage (15%)	$33,000	Frame Stage (15%)	$90,000
Lock-Up Stage (35%)	$77,000	Lock-Up Stage (35%)	$210,000
Fixing Stage (25%)	$55,000	Fixing Stage (25%)	$150,000
Completion (10%)	$22,000	Completion (10%)	$60,000

47. As I have already stated, the progress claims submitted by the Builder were not in accordance with the stages set out in the above table. However, both contracts contained a special condition which stated:

> Stage payments to be broken up if required.

48. In accordance with that special condition, some of the stages set out under Schedule 3 were broken up and claimed as part stage progress claims. Nevertheless and for the reasons that follow, Ms Moorhouse Perks submitted that the outstanding progress claims still did not reconcile with Schedule 3.

Unit 3 Contract progress claims

49. The following table sets out the payments made under the Unit 3 Contract:

Unit 3 Contract				
Date claimed	**Dated received**	**Claim**	**Amount claimed**	**Amount paid**
29/3/08	31/10/08	Deposit (PC-1)	$11,000	$11,000
23/9/08	3/10/08	Base Stage (PC-2)	$22,000	$22,000

Unit 3 Contract				
Date claimed	**Dated received**	**Claim**	**Amount claimed**	**Amount paid**
18/11/08	Not paid	Frame stage and part Lock-Up Stage (PC-3)	$45,000	0
2/12/08	5/12/08	Part Lock-Up Stage (PC-4)	$11,500	$11,500
22/12/08	29/12/08	Balance Lock-Up Stage (PC-5)	$65,500	$65,500
15/04/09	22/04/09	Fixing Stage (PC-5)	$55,000	$55,000
Total			$210,000	$165,000

50. Progress claim *PC-3*, claimed on 18 November 2008, comprised the full amount of the *Frame Stage* progress claim ($33,000) plus $12,000 in respect of *Lock-Up Stage*. Progress claim *PC-4* sought a further part payment of *Lock-Up Stage* in the amount of $11,500. Progress claim *PC-5* claimed $65,500 and was said to represent the balance of the *Lock-Up Stage*. Consequently, the total amount claimed in respect of *Lock-Up Stage* was $89,000, which was more than the amount stated in Schedule 3 ($77,000).[8]

51. Accordingly, it was submitted that the outstanding progress claim in respect of the Unit 3 Contract (*PC-3*) was contrary to what was permissible under that contract. Ms Moorhouse Perks therefore contended that the Owner was not in breach of the Unit 3 Contract in failing to make payment of *PC-3*. She contended that the Builder should have reissued *PC-3* in the amount of $33,000, which would be commensurate with the amount representing the *Frame Stage* progress payment under Schedule 3. Otherwise, a payment of $45,000 in respect of *PC-3* would result in the Builder being paid all of the *Frame Stage* progress claim plus an additional $12,000 for *Lock-Up Stage* over and above what was permitted under Schedule 3, given that the Builder had subsequently claimed and received $65,500 for what it described as the balance of *Lock-Up Stage*.

52. I accept that the obligation to make payment of *PC-3* was effectively extinguished after the Builder submitted *PC-5*. If that progress claim remained alive, the aggregate amount claimed in respect of *Lock-Up Stage*

[8] See paragraph 46 above.

would exceed what was permissible under Schedule 3. Consequently, either *PC-5* or *PC-3* had to be adjusted to make the aggregate amount claimed commensurate with what was permissible under Schedule 3. Given that *PC-5* was paid on 29 December 2008, it was incumbent upon the Builder to reissue *PC-3* so that the balance claimed in respect of *Lock-Up Stage* was commensurate with Schedule 3. It failed to do so and in those circumstances, it cannot be said that the Owner remained in breach of the Unit 3 Contract by failing to pay *PC-3*.

Unit 2 & 3 Contract progress claims

53. Similarly, there is a discrepancy between the amount claimed by the Builder for Units 1 and 2 compared with what the Builder was entitled to claim under Schedule 1 of the Unit 1 & 2 Contract. The progress claims submitted by the Builder in respect of Units 1 and 2 are set out in the table below:

Unit 1 & 2 Contract				
Date claimed	**Dated received**	**Claim**	**Amount claimed**	**Amount paid**
29/3/08	3/10/08	Deposit (PC-1)	$30,000	$30,000
23/9/08	3/10/08	Base Stage (PC-2)	$60,000	$60,000
2/12/08	8/12/08	Part Lock-Up Stage (PC-3)	$30,000	$30,000
9/12/08	16/12/08	Frame Stage Unit 1 (PC-4A)	$45,000	$45,000
9/12/08	16/12/08	Frame Stage Unit 2 (PC-4B)	$45,000	$45,000
12/02/09	19/02/09	Part Lock-Up stage Unit 1 (PC-5A)	$90,000	$60,000
17/03/09	24/03/09	Part Lock-Up Stage Unit 2 (PC-5B)	$90,000	$45,000
30/06/09	6/07/09	Part Fixing Stage	$30,000	$30,000
5/08/09	11/08/09	Part Fixing Stage	$50,000	$50,000
Total			$470,000	$395,000

54. As can be seen in the above table, the Builder claimed payment for *Lock-Up Stage* before any claim was made for *Frame Stage*. Ms Moorhouse Perks submitted that the sequence of progress claims submitted by the Builder was,

again, not in accordance with Schedule 3 and as a result, it cannot be said that the Owner was in breach of the Unit 1 & 2 Contract in failing to make full payment of the progress claims. There is no evidence, however, that when the claim for *Part Lock-Up Stage* (*PC-3*) was made, the *Frame Stage* and the part *Lock-up Stage* work had not been completed. There is no explanation as to why *Part Lock-Up Stage* (*PC-3*) was claimed prior to the *Frame Stage* progress claims (*PC-4A* and *PC-4B*) being submitted. It may have been an oversight on the part of the Builder but in the absence of any evidence as to why this occurred, one can only speculate.

55. I do not accept that Schedule 3 requires the Builder to claim *Frame Stage* before making a claim in respect of *Lock-Up Stage*, provided all of the work comprising both of those stages has been completed. It is a matter for the Builder if he chooses not to submit a claim for *Frame Stage* when that stage of work is complete. I do not regard his failure to submit a progress claim when the relevant work was completed as a breach of contract.

56. What the contracts and s.40 of the Act require is at the Builder does not make a claim that is not directly related to the progress of the building work. As I have already indicated, there is no evidence that when the claim was made for *Part Lock-Up Stage*, the work was not directly related to that stage. Accordingly, I do not accept the proposition that there was no obligation on the Owner to make payment of *PC-5A* and *PC-5B*, simply because the Builder had sought payment of an initial part of its claim for *Lock-Up Stage* before seeking payment in respect of *Frame Stage*.

57. Therefore, I find that there was no justification for not making full payment in respect of *PC-5A* and *PC-5B*. There is no allegation that the work was not completed or that the claim was not directly related to the progress of the Works. Further, the Owner makes no claim or submission that the method by which the parties have departed from the payment regime set out in Schedule 3 is contrary to the contracts or the Act.

58. Therefore, I find that the Owner was in breach of the Unit 1 & 2 Contract in failing to pay *PC-5A* and *PC-5B.* However, I do not regard that breach as constituting a repudiation of the Unit 1 & 2 Contract. The term requiring payment of the relevant progress claims was not a fundamental term of the contract, especially where the contract provided other contractual remedies to enforce compliance.

Moving into Unit 3

59. It is not in dispute that the Owner moved into Unit 3 on or about 1 November 2009, without the consent of the Builder and in circumstances where the Unit 3 Contract had not been completed. In my view, that may, in some instances, constitute a fundamental breach of the Unit 3 Contract. For example, where access is also denied. However, in the present case there is no evidence that access was denied. In fact, the evidence indicates that the Owner still wanted the Builder to complete Unit 3, given his statement during cross examination that he was not willing to make any further payment until that unit was completed.

60. Although I accept that even if access is not denied, it is possible that moving into Unit 3 may have adversely impacted on the Builder's ability to undertake the Works as they related to that unit. However, apart from the Owner and Builder parting ways, no evidence was adduced as to what occurred after the Owner moved into that unit. There is no evidence that the act of moving into Unit 3 was the penultimate act that caused the Builder to cease work, a fact from which one might have been able to draw an inference that this act went to the root of that contract.

61. In those circumstances, I cannot conclude that the conduct of the Owner in moving into Unit 3 constituted a repudiation of the Unit 3 Contract, as opposed to a mere breach thereof. In other words, without more evidence I do not find that moving into Unit 3 constituted conduct that *went to the root of the contract.*

How did the contracts end?

62. As I have already found, the factors raised by Mr Alexander, taken individually, do not in my opinion constitute a repudiation of either of the contracts by the Owner. However, the question arises whether the breaches of contract I have found proved, if taken collectively, constitute a repudiation of either of the contracts by the Owner.

63. Before considering that question, one further fact which arose during the course of the proceeding needs to be examined. Importantly, the Owner conceded during cross-examination that he told the Builder on a number of occasions that he was not willing to make any further payments until Unit 3 was completed.

64. In my view, the Owner had no right to make that demand and it constitutes an anticipatory breach of the contracts. The statement meant that no further

progress claims could be submitted in respect of the Unit 1 & 2 Contract until Unit 3 was completed, nor could any interim progress claims be submitted in respect of the Unit 3 Contract until all of the work under that contract was completed.

65. Looking then at the Unit 3 Contract, the Owner's breaches were limited to his failure to provide evidence of capacity to pay the balance of that contract price, moving into Unit 3 and refusing to make further payments until that unit was complete. However, as at 1 November 2009, no payments were due under that contract, given that *PC-3* had been rendered incorrect by the issuing of *PC-4* and *PC-5*. Further, without there being any evidence that the occupation of Unit 3 resulted in the Builder being denied access; I do not regard the breaches, taken collectively, as amounting to a repudiation of that contract.

66. In respect of the Unit 1 & 2 Contract, there were two progress claims that had not been fully paid coupled with a refusal to pay anything further under that contract until the work under the Unit 3 Contract was completed. It was not simply that the Owner was late in paying a progress claim or had refused to pay a progress claim because of some irregularity or dispute as to the work completed but rather, an unjustified and blatant refusal to pay anything further until something outside of that contract was undertaken. In my view, such conduct, coupled with the failure to provide evidence of his capacity to pay the contract price, amounts to a repudiation of the Unit 1 & 2 Contract.

67. Mr Alexander submitted that on 1 November 2009 the Builder had verbally given notice of his election to accept the Owner's conduct as a repudiation of the contracts and had thereby elected to determine both contracts. He relied on paragraph 110 of the affidavit of the Builder as evidence of the notice of termination, where the Builder states:

> I said unless we pay the outstanding progress claims and put sufficient money into an account to complete the project, I could not and would not work to him any more. I also asked him to obtain a letter from the lender that there were sufficient funds to complete project.
>
> The Respondent hung up. I did not hear from the respondent after that.

68. In my view the words spoken by the Builder do not constitute notice of an election to treat the contracts at an end. Rather, those words mean what they say, namely, that the Builder would not perform the Works *unless sufficient money was put into account to complete the project*. The Builder had no right to make that demand. There was no contractual term, express or implied, that

required the Owner to put funds into a special account. The contracts merely required that the Owner provide satisfactory evidence of his capacity to pay the contract price but no more. Although I appreciate that the Builder may have had legitimate concern that sufficient funds were available to pay for the balance of the contract price, that concern did not give him a right to make such a unilateral demand. In my view, the refusal to undertake further work unless that demand was fulfilled also constitutes conduct evincing a repudiation of the contracts on the Builder's part.

69. However, the Owner makes no allegation that the Builder repudiated the contracts. In fact, Ms Moorhouse Perks submitted that the conduct of the parties did not go far enough to establish that the contracts were terminated with cause, albeit that both parties were in breach of the contracts for one reason or another. She submitted that the conduct of the parties clearly demonstrated that as of November 2009, the parties had abandoned the contracts.

70. There is evidential support for the proposition advanced by Ms Moorhouse Perks. In particular, it is clear that neither party made any attempt to perform either contract after November 2009. The conduct of both parties indicates that neither had a desire to continue to work together, at least without the terms of the original contracts being altered.

71. In particular, it is not in dispute that the Builder ceased work from late October or early November 2009. However, the question arises whether that cessation of work constitutes a contractual suspension of the Works, in which case it can be said that the Builder was continuing to affirm the contracts – by exercising a contractual right under them; or whether the cessation of work was evidence of him abandoning the contracts. The answer to this question is made more difficult by the fact that the Builder did not give any written notice of suspension, as required by clause 35 of the contracts.

72. Clause 35 of the contracts states:

> 35.0 Builder may suspend the Building Works if the Owner:
>
> - does not make a Progress Payment that is due within 7 Days after it becomes due; or
> - is in breach of this Contract.
>
> 35.1 If the Builder suspends the Building Works, the Builder must immediately give notice in writing by registered post to the Owner. The Owner must remedy the breach within 7 Days after receiving the notice. The Builder must recommence the Building Works within 21

Days after the Owner remedies for breach and gives notice of this to be Builder.

35.2 The date on which the Building Works are to be completed is changed and extended to cover the period of suspension.

73. Clause 35.0 provides a builder with a right to suspend upon an owner being in breach of the contract. Clause 35.1 then requires the Builder to give a written notice of suspension. However, it is not clear whether the right to suspend is subject to the Builder giving a notice of suspension, notwithstanding that a failure to do so would constitute a breach of the contracts on his part. In other words, can the Builder suspend the Works in consequence of the Owner being in breach of the contracts without giving a notice of suspension?

74. Clearly the object of giving a notice of suspension is to alert an owner of the need to do something in order to allow the building work to recommence and thereby avoid undue delay. However, clause 35.1 does not expressly state that the right to suspend is contingent upon a notice of suspension being served. Nevertheless, the clause needs to be read in context. In particular, the purpose of the clause is to arrest conduct constituting a breach of the contract. Without there being notice of the breach, that purpose may be defeated. In particular, it may not always be apparent when works are suspended, given that there are periods of high activity and periods of low activity during the course of a building project. Clearly, for the suspension to have the desired effect, notice of the suspension must be given. Consequently, I am of the opinion that clause 35.0 and clause 35.1 must be read together so that in order to lawfully suspend the contract, a builder must also serve a written notice to that effect.

75. As no notice of suspension was given, I find that the Builder's conduct in ceasing work indicated that he no longer desired to perform the contracts, at least in accordance with the terms that were originally agreed.

76. The same can be said of the Owner's conduct. Taking possession of Unit 3, while insisting upon the Builder undertaking the Works only in the manner or sequence dictated by the Owner again is conduct indicative of a party that no longer desires to contract according to the terms that were originally agreed.

77. In *CGM Investments Pty Ltd v Chelliah*,[9] Finkelstein J reviewed a number of authorities dealing with the issue of abandonment. He concluded:

> [18] In my view, the authorities to which I have referred establish not only that an agreement can be abandoned by conduct, but also that the question whether an agreement has been abandoned does not require one to examine

[9] (2003) ALR 548

> whether the parties actually had the intention of abandoning the agreement; only whether their conduct, when objectively viewed, manifests an intention….
>
> [22] In my opinion to show that the contract has been abandoned by inactivity on both sides it is necessary to establish that the inactivity (which may sometimes amount to no more than silence on one side) produces the clear inference that one party does not wish to proceed with the contract and the other party consented to that situation.

78. In my view, the facts in the present case clearly demonstrate that the parties have, by their conduct, abandoned the contracts as of 1 November 2009. In particular, the Builder ceased work without regard to suspending the works under clause 35.0, even though he sought legal advice on 13 November 2009.[10] Similarly, the Owner made no attempt to remedy his breaches of the contracts. In fact, according to the Builder, in mid November 2009, the Owner attempted to take or retrieve fixtures from the Builder's factory that had been earmarked for installation into Unit 3. Again, that conduct is consistent with the Owner not wishing to proceed with the contracts.

79. There is no evidence of any attempt by either party to resurrect performance of the contracts after November 2009. There is no evidence of either party attempting to affirm the contracts after November 2009, nor is there any evidence of either party attempting to enforce their rights under the contracts. For example, neither party issued default notices under the contracts. They simply walked away from their contractual obligations, a fact made clear by there being no communication between the parties until 10 April 2010 when the Builder gave formal notice that the contracts were at an end.

80. Viewed objectively, I find that both contracts were abandoned by the parties on about 1 November 2009. The notice given by the Builder on 10 April 2010 is to be seen as mere confirmation of that fact. Consequently, I find that both contracts were mutually determined as of 1 November 2009.

81. However, I do not regard the contracts as being rescinded *ab initio*. Whatever rights accrued prior to 1 November 2009 survive termination of the contracts. That proposition is entirely consistent with the majority judgement in *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Ltd*.[11] In that case, Dixon and Evatt JJ stated:

> We are concerned only with a liability to pay a liquidated demand. In general the termination of an executory agreement out of the performance of which

[10] Paragraph 113 of the affidavit of Peter Arapoglou.
[11] (1936) 54 CLR 361

> pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of a contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation. [12]

82. Accordingly, it is therefore necessary to examine both the Builder's claim and the Owner's counterclaim to ascertain what, if any, accrued rights crystallised prior to the determination of the contracts.

The Builder's claim

The Project Management Agreement

83. The Builder claims $100,000 pursuant to a collateral agreement, which it describes as an agreement to pay the Project Management Fee. The Builder gave evidence that during pre-contractual discussions, the Owner indicated that he intended to upgrade the specification for the Works. In response, the Builder said that he could either increase the amount of the fixed price contract, enter into a cost plus contract or alternatively, cap his *profit at a fixed fee to build and manage the project*.[13] In his affidavit, the Builder said:

> 12. The Respondent then discussed with me the project management fee option. We discussed the costs of the building with high specifications. Obviously, the final specifications would affect the total building price. I said that any costs in excess of the $820,000 that were the result of changed specifications would be at the Respondent's cost. The Respondent was concerned about the true cost of building and asked if I would be willing to show him the invoices or simply pay a management fee. I agreed that I would.
>
> 13. The Respondent was satisfied with this option and we settled on a fee of $100,000 including GST as a project management fee. This fee was instead of profit that would normally be calculated as part of the building costs.

84. The Builder subsequently prepared a one-page document which stated:

[12] Ibid at pages 379-380
[13] Paragraph 11 of the affidavit of Peter Arapoglou.

AGREEMENT

AN AGREEMENT IS MADE TODAY 29/3/2008 THAT ARON SHKLOYAR WILL PAY PETER ARAPOGLOU A BUILDING FEE OF $100,000 INCL GST TO BUILD THREE UNITS AT ... CAULFIELD.

ARON WILL PAY $10,000 IN FEES TO START PROJECT AND WILL BE REFUNDED THIS AMOUNT BY PETER ARAPOGLOU ONCE DEPOSIT IS PAID BY LENDER.

85. The collateral agreement was signed by both parties. During cross examination, the Builder repeatedly said that the Project Management Fee was only payable if additional work was undertaken. In other words, the Project Management Fee was not payable if the original specification was not upgraded. In those circumstances, the aggregate value of the two contracts would remain fixed at $820,000. The Builder explained that the Project Management Fee was payable instead of raising variations for changes to the scope of the Works. The Owner disputed that any collateral agreement was entered into in a manner suggested by the Builder. He gave evidence that he had no recollection of signing that document at the time when all documents were presented to him for his signature.

86. In my view, the explanation given by the Builder is illogical. It would mean that if the specification was only slightly upgraded by, for example, more expensive taps, the Owner would incur an additional fee of $100,000 even though the upgrade might have only cost $100. Conversely, it would also mean that the Owner could demand upgrades worth hundreds of thousands of dollars but only be liable to pay $100,000.

87. Moreover, the words of collateral agreement do not literally mean what the Builder contends they mean. In fact, the words simply state that the Owner will pay the Builder a building fee of $100,000. It is not clear whether that amount is included within the two contracts executed by the parties or an amount payable in addition to the contracts.

88. Further, the collateral agreement is contrary to clause 3 of the building contracts. That clause states:

> 3.0 This Contract is complete in itself and overrides any earlier agreement, whether made verbally or in writing.

89. In my view, the collateral agreement is expressed far too ambiguously to give it any meaning. Does it mean that the Builder is entitled to $100,000 if the specification is upgraded or alternatively, does it mean that the profit comprising the two contracts has been capped at $100,000, such that any

variation made to the Works would not attract any further *builder's margin*? Therefore, I find that the words expressed in the collateral agreement are devoid of any definitive meaning. I find that the document suffers from uncertainty, such that it is of no contractual effect.

90. Moreover, the Builders contention that the collateral agreement entitles him to an additional $100,000 in the event that the specification is upgraded is contrary to the Act. In particular, it seeks to increase the contract price in the event that variations are made to the scope of the Works. Section 33 of the Act states:

> (1) This section applies to a major domestic building contract that contains provision –
>
> (a) that allows for the contract Price to change; but
>
> (b) that is not a cost escalation clause as defined in section 15.
>
> (2) A builder must not enter into such a major domestic building contract unless there is a warning that the contract price is subject to change and that warning –
>
> (a) is placed next to that price; and
>
> (b) is in a form approved by the Director; and
>
> (c) specifies the provisions of the contract that allow for the change.
>
> (3) If a warning is not included in the contract as required by subsection (2), any provision in a contract that enables the contract price to change only has the effect to the extent that it enables the contract price to decrease

91. In my view, the collateral agreement, were it contained within either of the contracts, offends s.33 of the Act. It provides for the contract price to increase but did not specify the provisions of the contracts that allow for the change in price, nor does it have a warning next the contract price. Further, it cannot be said that the collateral agreement constitutes a cost escalation clause, which is defined as in s.15 of the Act as:

> (1) In this section a ***cost escalation clause*** means a provision in a contract under which the contract price may be increased to reflect increased costs of labour or materials or increased costs caused by delays in the carrying out of the work to be carried out under the contract.

92. The collateral agreement is not reflective of increased costs of labour or materials. It is a flat fee payable when the scope of work changes.

93. Section 33 of the Act refers to a clause included in a domestic building contract. The collateral agreement is not a clause included in either of the contracts but purportedly sits alongside them. However, in my opinion, the effect of entering into a collateral agreement in order to give effect to something that would otherwise be contrary to the Act, if it were a provision of the contract, is an attempt to contract out of the Act - contrary to s.132 of the Act. That section provides:

> (1) Subject to any contrary intention set out in this Act-
>
> (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
>
> (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void. [emphasis added]

94. In my view, the right conferred by the Act, which the collateral agreement seeks to exclude, modify or restrict are rights under s.33 and s.16 of the Act. Section 16 of the Act provides:

> (1) A builder who enters into a domestic building contract must not demand, recover or retain from the building owner an amount of money under the contract in excess of the contract price unless authorised to do so by this Act.

95. Consequently, even if I accepted the meaning attributed to the collateral agreement by the Builder, I find that the collateral agreement is void pursuant to the relevant provisions of the Act. Consequently, the Builders claim for $100,000 pursuant to the collateral agreement is unsustainable.

Loan Agreement

96. The Builder claims $28,212.69, pursuant to what the parties have referred to as the *loan agreement*. Mr Alexander contends that the sum represents a reconciliation of amounts given to the Owner and amounts paid by the Owner on behalf of the Builder. The amount claimed is the net balance between these two amounts.

97. On the first day of the hearing, Mr Alexander and Ms Moorhouse Perks indicated to me that they needed more time in which to reconcile amounts loaned to the Owner and amounts that the Owner paid in respect of work and fixtures that would otherwise have been the responsibility of the Builder. Ultimately, I was provided with a document that reconciled those two competing amounts and which stated that $28,212.69 was payable to the

Builder. As a consequence, no *viva voce* evidence was adduced, nor were any of the parties cross-examined on that topic.

98. In paragraph 51 of the written submissions filed by Ms Moorhouse Perks on the half of the Owner, she states:

> It is the contention of the Respondent that the Applicant is no longer pursuing the "total loan amount" relief sought in his Further Amended Points of Claim and is now only pursuing $28,213.00

99. Mr Alexander intimates in his closing submissions that the Owner is purporting to resile from what are agreed facts, namely the admission that $28,212.69 constitutes the *loan agreement* amount payable by the Owner to the Builder.

100. I do not accept that the written closing submissions filed by Ms Moorhouse Perks resile from the admission that the Owner is to repay the Builder $28,212.69. In fact, my reading of the closing submissions is that she confirms that this is the agreed position of the parties.

101. Consequently, I will order by consent that the Owner is to pay the Builder $28,212.69 in respect of the claim under the *loan agreement*.

Claim for outstanding progress claim or alternatively, quantum meruit claim

102. The Builder claims $120,000 representing the unpaid progress claims referred to above. Alternatively, he claims that amount on a quantum meruit basis.

103. Both the Builder and his wife, Sue Arapolgou, gave evidence that the value of the progress claims submitted exceed the value of the Works completed by the Builder as at the date that the contracts came to an end. There is no contrary evidence before the Tribunal indicating that the value of work completed is not commensurate with the value of the progress claims made.

104. Given my finding that the contracts were mutually determined on 1 November 2009, it is open for the Builder to claim damages commensurate with the value of unpaid progress claims that fell due prior to the contracts being determined or alternatively, equitable relief in the form of restitution on the ground that the Owner has been unjustly enriched to the value of the Works less what he has already paid.[14]

105. I accept the evidence of the Builder and Sue Arapoglou that the value of the progress claims was at least commensurate with the value of the work completed by the Builder as at the date of termination. I make this finding on

[14] *Pavey and Mathews Pty Ltd v Paul* (1987) 162 CLR 221

two grounds. First, there is no contrary evidence suggesting otherwise. Second, that evidence is consistent with cost estimates provided by Mr Lees, the building consultant engaged by the Owner, as set out in his report filed in the proceeding. Although Mr Lees was not called to give evidence in the proceeding, both parties advised that I was to accept Mr Lees' report as evidence in the proceeding.

106. According to Mr Lees, the cost of a third-party builder completing the Works is $199,485. That includes a builder's margin of 30% and GST. The amount that would remain unpaid under the contracts if all progress claims had been paid is $140,000. On this analysis, the cost of a third-party builder to complete the works from 1 November 2009 is $199,485, compared with $140,000, being the amount that the Builder would be paid under the contracts for undertaking the same work.

107. Of that amount, it is difficult to know what proportion of the $140,000 represents the Builder's overheads, supervision and profit. Further, there are other unknown factors that need to be taken considered, when comparing the two amounts:

(a) The level of upgrades undertaken by the Builder as at the date of termination.

(b) The fact that the original contracts were priced in February 2008. However, Mr Lees report is based on an inspection conducted in September 2010.

(c) The fact that Mr Lees' estimates relate to a third-party builder taking over the project rather than the original Builder continuing with work in progress. In my view, it is reasonable to assume that the cost charged by a third-party builder would be higher than the cost to the Builder given that the third-party builder would be unfamiliar with what work has been covered over and would necessarily run the risk of there being further work required in the event that the previous work was not properly carried out. In addition, Mr Lees' report includes items that would not need to be spent again by the Builder, such as obtaining warranty insurance certificates, which Mr Lees has estimated at $10,725.

108. Excluding the amount allocated to obtaining warranty insurance certificates ($10,725), the difference between Mr Lees' cost estimate to complete against the amount left in the contracts had all progress claims been paid is $48,760. That difference does not take into account the factors referred to above, which

in my opinion would explain why Mr Lees estimated cost to complete is more than the amount left to be paid in the contracts.

109. Although it is an imprecise calculation, comparing Mr Lees' cost estimates against what money remains to be claimed under the contracts provides some guidance in determining whether the Builder's evidence is to be accepted. In my opinion, the calculation set out above is largely consistent with the Builder's evidence that the progress claims submitted in the amount of $680,000 are commensurate with the value of the works completed by him as of 1 November 2009. I therefore accept the Builder's uncontested evidence that $680,000 represents a fair and reasonable price for the value of the work completed as at the date that the contracts came to an end. I therefore allow $120,000 being the unpaid portion of that amount to the Builder. That being the case, is unnecessary for me to consider the alternate claim for payment of the outstanding progress claims.

110. Accordingly, and subject to consideration of the Owner's counterclaim, I will order that the Owner pay to the Builder $148,212.69.

Owners Counterclaim

111. The Owner counterclaims against the Builder in respect of two separate heads of damage:

(a) liquidated damages for delay; and

(b) the cost of repairing defective work.

Defects

112. As I indicated above, the parties have agreed that I should accept the contents of Mr Lees' report as evidence in the proceeding. Mr Lees opines that there are a small number of defects in the work carried out by the Builder, which he estimates would cost a third-party builder $8,091.

113. The Owner was contractually entitled to have the works completed by the Builder in a professional and workmanlike manner. That right existed as an express term of the contracts and also existed as a warranty under s.8 of the Act. In my view, the mere fact that the contracts were prematurely ended does not destroy that right. It accrued prior to the contracts coming to an end and for the reasons stated above, survives termination of the contracts.

114. There being no contrary evidence disputing the existence of the defects or the cost to make good the defects as estimated by Mr Lees; and having regard to the Builder's concession that I am to accept Mr Lees' building inspection

report as evidence in the proceeding, I find in favour of the Owner in the amount of $8,091 in respect of this element of his claim.

Liquidated damages

115. The Owner claims damages in respect of delay caused to the Works as follows:

(a) In respect of the Unit 3 Contract, liquidated damages fixed in the amount of $450 per week from the date that the Works should have been completed (20 March 2009) to 1 November 2009, being the date that the Owner has nominated as being the earliest date that he took possession of Unit 3.

(b) In respect of the Unit 1 and 2 Contract, liquidated damages fixed in the amount of $900 per week from the date that the Works should have been completed (20 March 2009) until 10 April 2010, being the date that the Builder gave notice that the contracts were at an end.

116. Clause 40.0 of the contracts states:

> 40.0 If the Building Works have not reached Completion by the end of the Building Period the Owner is entitled to agreed damages in the sum set out in Item 9 of Schedule 1 for each week after the end of the Building period to and including the earlier of:
>
> - the date the Building Works reach Completion;
> - the date this Contract is ended; and
> - the date the Owner takes possession of the Land or any part of the Land

117. Item 9 of Schedule 1 of the Unit 3 Contract stated that the amount of liquidated damages was to be $450 per week. Item 9 of Schedule 1 of the Unit 1 and 2 Contract stated that the amount of liquidated damages was to be $450 per unit per week.

118. Mr Alexander submits that there is no entitlement to liquidated damages because the Owner repudiated the contracts prior to 20 March 2009. As I have already found, I do not accept that a contract can be retrospectively terminated for historical fundamental breaches in circumstances where the parties have continued to affirm the contract after the repudiatory conduct ceased.

119. Mr Alexander further submits that any delay in completing the Works was caused by the Owner's failure to make progress payments in a timely manner. There is no evidence of any critical delay caused by a failure to make payment of any progress claim. Further, the Builder gave evidence that no extension of

time claim was ever made under the contracts. In those circumstances, I do not accept the submission that time was extended as a result of any delay in making a progress claim payment.

120. The parties accept that the original date for completion was 20 March 2009. Accordingly, as from the 20 March 2009, the Builder was liable to pay liquidated damages. As I have already indicated, accrued rights survive termination of the contracts. In my view, the right to claim liquidated damages under the contracts in respect of delay constitutes an accrued right that survives termination of the contracts. I find this to be the case, irrespective of whether the contracts had been terminated as a consequence of the Owner repudiating the same or terminated as a consequence of the parties abandoning the contracts. Consequently, the Owner is entitled to deduct liquidated damages for delay from the Builder's claim.

121. In respect of the Unit 3 Contract, I accept that the calculation of liquidated damages should be assessed over the period 21 March 2009 to 1 November 2009, that being the date that the Unit 3 Contract came to an end or alternatively, the date that the Owner moved into Unit 3. Accordingly I calculate liquidated damages over that period to be 225 days at $64.28 per day, amounting to $14,463.

122. Similarly, I find that the calculation of liquidated damages in respect of the Unit 1 and 2 Contract extends over the period 21 March 2009 until 1 November 2009, being the date that that contract came to an end. In that respect, I do not accept the submission made by Ms Moorhouse Perks that the Unit 2 & 3 Contract was ended on 10 April when the Builder gave written notice that the contracts had been determined. For the reasons that I have already articulated, determination was effected by the conduct of the parties when they mutually repudiated their obligations under the contracts on 1 November 2009 bringing about an abandonment of the contracts.

123. Even if the contacts were not determined as of 1 November 2009, I do not consider that the Owner would have been entitled to liquidated damages after 1 November 2009. In particular, it is clear that as of 1 November 2009, the Owner was in breach of the Unit 1 & 2 Contract. He failed to provide satisfactory evidence of his capacity to pay the balance of the contract sum and had refused to make any further payments until completion of Unit 3. As a consequence thereof, the Builder ceased work, albeit not in accordance with clause 35 of the Unit 1 & 2 Contract.

124. It cannot be the case that a party can claim damages for delay in circumstances where the delay is caused by his or her own breach of contract. This proposition is consistent with the fundamental common law principle that one party may not rely upon failure of the other party to perform the contract where it is the former who has prevented the performance.[15] Consequently, even if the Unit 1 & 2 Contract had not been determined as of 1 November 2009, time ceased to run against the Builder from that date as a consequence of the Owner's breach of contract.

125. Accordingly, the amount of liquidated damages over that period is agreed under the contract to be $900 per week, which equates to $128.57 per day over 225 days amounting to $28,928.25.

126. I therefore calculate liquidated damages as against the Builder from 20 March 2009 until 1 November 2009 as $43,391.25.

127. Ms Moorhouse Peck further submits that the liquidated damages provided under the two contracts did not adequately compensate the Owner for the delay caused to the Works. She submitted that an additional amount representing general damages is also payable. I do not accept that an additional amount in respect of general damages can be claimed in addition to liquidated damages under the contracts. The clause requiring payment of liquidated damages constitutes a dispositive remedial code. I do not consider that there is room to claim common-law damages for delay outside the mechanisms prescribed by the contracts. The liquidated damages clause constitutes what the parties have agreed to be a pre-estimate of the Owner's loss and operates as a bar to claiming damages for delay at common law.

128. Further, I do not consider that any damages for delay after 1 November 2009 constitute accrued rights. Damages for delay after 1 November 2009 rely upon contractual rights which are dependent on future performance of the contracts. As the contracts were mutually ended on 1 November 2009, neither party had any obligation in respect of future performance of the contracts after that date.

Reconciliation of competing claims

129. As I have indicated, I allow the Builder's claim in respect of $120,000 representing unpaid work and $28,212.69 in respect of the *loan agreement* making a total of $148,212.69. From that amount, I deduct the amount I

[15] *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd* [1947] AC 428 at 436; *Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd* [1975] VR 202 at 209-16

award in favour of the Owner's counterclaim being $8,091 for defects and $43,274.25 for liquidated damages, making a total of $51,482.25.

130. Consequently I will order that the Owner must pay the Builder the sum of $96,730.44.

SENIOR MEMBER E. RIEGLER