

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

CATCHWORDS

“Cost plus” domestic building contract; unenforceable by the builder by reason of builder’s failure to comply with section 13(2) of the Domestic Building Contracts Act 1995. Builder entitled to reasonable profit pursuant to section 13(3) of the Act. Identity of parties to the building contract. Identity of the parties to the cabinetry subcontract. Termination of cabinetry subcontract by builder justified. Termination of building contract by owners justified. Assessment of owners’ various claims for damages having regard to “cost plus” nature of the building contract. Owners’ claim for “overpayment” over and above a “reasonable” contract sum found to be a misconstrued claim. Finding that the Owners are entitled to liquidated damages for delay and damages in respect of the cost to rectify defective building works. Owners’ damages set off against builder’s entitlement to reasonable profit. Builder’s contribution claim against cabinetry subcontractor successful. Cabinetry subcontractor’s claim for monies owed dismissed.

VCAT REFERENCE NO. D979/2013

FIRST APPLICANT	Heski Carpenters Pty Ltd (ACN 102 685 745)
SECOND APPLICANT	Mr Amet Eski
FIRST RESPONDENT	Gaycel Pty Ltd (ACN 007 425 621)
SECOND RESPONDENT	1A Enfield Street, St Kilda Pty Ltd (ACN 145 050 255)
FIRST JOINED PARTY	Mr Ergun Gulcan
WHERE HELD	Melbourne

VCAT REFERENCE NO. D1193/2013

APPLICANT	Mr Ergun Gulcan
FIRST RESPONDENT	Heski Carpenters Pty Ltd (ACN 102 685 745)
SECOND RESPONDENT	1A Enfield Street St Kilda Pty Ltd (ACN:145 050 255)
THIRD RESPONDENT	Gaycel Pty Ltd (ACN:007 425 621)
FOURTH RESPONDENT	Mr Amet Eski
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing

DATE OF HEARING 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18 (half day),
22 and 23 (half day) December 2014; 10, 11
and 12 August 2015; 29 January 2016. Final
written submissions received February 2016

DATE OF ORDER 5 May 2016

CITATION Heski Carpenters Pty Ltd v Gaycel Pty Ltd
(Building and Property) [2016] VCAT 688

ORDERS

Orders in proceeding D979/2013

1. The applicants must pay the respondents \$107,618.09.
2. The first joined party must pay the applicants \$43,351.
3. Interest and Costs reserved with Liberty to apply. Any application to be listed for hearing by Senior Member Farrelly with a half day allocated.

Orders in proceeding D1193/2013

1. The applicant's claims as against each of the respondents are dismissed.
2. Costs reserved with Liberty to apply. Any application to be listed for hearing by Senior Member Farrelly with a half day allocated.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

Proceeding D979/2013

For the Applicants	Mr J. Selimi of Counsel
For the Respondents	Mr J. Gray, Solicitor
For the First Joined Party:	Mr P. Lithgow of Counsel

APPEARANCES:

Proceeding D1193/2013

For the Applicant: Mr P. Lithgow of Counsel

For the First and Fourth Respondents: Mr J. Selimi of Counsel

For the Second and Third Respondents: Mr J. Gray, Solicitor

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REASONS

INTRODUCTION

- 1 These two proceedings involve claims between the owners of a two storey, eight unit apartment block in St Kilda, Victoria, the builder engaged to extend and renovate the units and the cabinet maker engaged to install new cabinetry in the units as part of the renovation works.
- 2 In 2010, 1A Enfield Street St Kilda Pty Ltd and Gaycel Pty Ltd (collectively, “**the owners**”), two corporate entities controlled by their common director Mr Ken Yucel, purchased the St Kilda units. Mr Yucel planned to extend and modernise the units.
- 3 Mr Amet Eski is a registered building practitioner and the director of Heski Carpenters Pty Ltd. By a building contract dated 15 July 2012 (“**the building contract**”), the owners engaged Mr Eski and/or Heski Carpenters Pty Ltd to extend and renovate the St Kilda units. As discussed later in these reasons, I find that both Mr Eski and Heski Carpenters Pty Ltd are “the builder” under the building contract, and I will refer to them collectively as “**the builder**”.
- 4 As a “costs plus” contract, the building contract did not specify a fixed price for the building works. Instead, the contract provided that the contract price would be the total of :
 - (i) the “*direct costs*” incurred by the builder in carrying out the works;
 - (ii) a “*builder’s fee*” calculated as 16% of the direct costs sum; and
 - (iii) GST “*in accordance with clause 29*” in the contract.
- 5 Section 13 of the *Domestic Building Contracts Act 1995* (“**the Act**”) makes special provisions in respect of “cost plus” contracts:

Restrictions on cost plus contracts

- (1) A builder must not enter into a cost plus contract unless—
 - (a) the contract is of a class allowed by the regulations for the purposes of this section; or
 - (b) the work to be carried out under the contract involves the renovation, restoration or refurbishment of an existing building and it is not possible to calculate the cost of a substantial part of the work without carrying out some domestic building work.

Penalty: 100 penalty units.

- (2) A builder must not enter into a cost plus contract that does not contain a fair and reasonable estimate by the builder of the total amount of money the builder is likely to receive under the contract.

Penalty: 100 penalty units.

- (3) If a builder fails to comply with this section—
 - (a) the builder cannot enforce the contract against the building owner; but
 - (b) the Tribunal may award the builder the cost of carrying out the work plus a reasonable profit if the Tribunal considers that it would not be unfair to the building owner to do so.

- 6 To arrive at an estimate as to the total amount of money it was likely to receive under the contract, the builder engaged Mr Odicho, an engineer with substantial experience in building project management and estimating, to prepare an estimate for the direct costs of the proposed works. The proposed works were those set out in the construction plans provided to r Odicho by the owners.
- 7 The builder says it received Mr Odicho’s cost estimate, and then added an additional 16% of that sum (as agreed with the owners) for the builder’s fee or profit margin, to arrive at a total sum of \$1,047,485.80. The builder entered this total sum in the building contract as the builder’s fair and reasonable estimate of the total amount of money that it is likely to receive under the contract (“**the builder’s contract price estimate**”).
- 8 A building permit was issued on 21 August 2012, and the builder commenced works around that time. The building contract specifies a construction period of 258 days. The builder and the owners agree that the due date for completion of works under the building contract was, subject to any approved extensions of time, around 2 May 2013.
- 9 Mr Yucel was thoroughly involved in the progression of the building works from the outset. He attended the building site frequently to inspect the progress of works and, on occasions, gave directions to the builder in respect of various works.
- 10 At Mr Yucel’s request, quotations for works obtained by the builder from sub-contractors were provided to Mr Yucel, and Mr Yucel had discussions with the builder as to which quotations would be accepted. Further, at Mr Yucel’s direction, all payment claims of sub-contractors engaged by the builder were to be forwarded to Mr Yucel who would arrange for payment of those claims to be made directly by Gaycel Pty Ltd to the subcontractors. As part of this arrangement, many of the subcontractors’ invoices were, at the direction of the builder, addressed to Gaycel Pty Ltd.
- 11 Under these arrangements, Mr Yucel had control of the financial records as to the cost of the building works. The builder kept records of its own workers’ labour time, but otherwise relied on information provided by Mr Yucel as to the accruing “direct cost” of building works.

The cabinetry works

- 12 The renovations to the St Kilda units included the installation of new cabinetry to kitchens, bathrooms and bedrooms in the 8 units. The sub-contractor first engaged to supply and install the cabinetry was Mr Ibrahim trading as “*IBO Cabinets*”. The owners [Gaycel Pty Ltd] paid a deposit of \$25,000 to IBO Cabinets on 28 September 2012.
- 13 Before any cabinetry was installed, Mr Ibrahim fell into financial difficulty and he was unable to complete the cabinetry contract. The cabinetry contract was, with the agreement of the owners, taken over by a business known as “*Winlife Cabinets*”. Mr Ergun Gulcan was at the relevant time, and is currently, a proprietor of the business trading as Winlife Cabinets (“**Winlife**”).
- 14 In mid May 2013, the installation of the cabinetry was approaching completion. Mr Yucel was dissatisfied with the quality of the cabinetry works and he discussed his concerns with Mr Eski. Mr Eski and Mr Yucel agreed that the Winlife contract should be terminated and that a replacement cabinetry subcontractor be engaged to rectify and complete the cabinetry works.
- 15 Mr Yucel and Mr Eski, together, prepared a letter which was sent to Winlife on 31 May 2013. By that letter, the builder notified Winlife that Winlife was no longer permitted access to the building site, and that legal action would ensue for the recovery of costs associated with rectifying defects in the cabinetry works.

Termination of the building contract

- 16 Mr Yucel was also dissatisfied with the builder. He considered that the builder was responsible for unnecessary delays and expense caused by the builder’s poor scheduling of works and site supervision. Mr Yucel was also concerned that the builder refused to accept responsibility for the cost of rectifying the defective cabinetry installed by Winlife.
- 17 By letter to the builder from the owners’ lawyer dated 16 July 2013, the owners purported to terminate the building contract citing various alleged breaches of the contract by the builder.
- 18 The owners subsequently engaged other contractors to complete the building works, including the replacement of much of the cabinetry.
- 19 The builder says that the owners were not entitled to terminate the building contract.
- 20 By letter dated 31 July 2013 from the builder’s lawyers to the owners, the builder purported to terminate the building contract by reason of the owners’ failure to pay an outstanding invoice.

CLAIMS IN THE PROCEEDINGS

PROCEEDING D979/2013

Builder's claim

- 21 Towards the end of June 2013, a couple of weeks prior to the owners' purported termination of the building contract, Mr Yucel informed the builder that the total cost for building works, not including the 16% builder's fee/margin, had reached around \$1,350,000.
- 22 With that information, Mr Eski calculated the total builder's fee payable up to late June 2013 as \$216,000, being 16% of \$1,350,000. Mr Eski says the builder had been paid only \$98,545 (\$108,400 including GST) as the builder's fee up to that time, thereby leaving a balance owing of \$117,455. The builder forwarded an invoice to the owners dated 1 July 2013 for a sum of \$117,455 plus GST of \$11,745 for a total of \$129,200.50. It is this sum, \$129,200.50, which the builder now claims in this proceeding. The builder also claims interest on the sum at the rate prescribed in the building contract, or alternatively at a rate prescribed by law.
- 23 The builder relies on the building contract to press its claim.

Owners' counterclaim

- 24 The owners say that the builder's contract price estimate was not a fair and reasonable estimate of the total amount of money the builder was likely to receive and, as such, pursuant to section 13(3)(a) of the Act, the builder cannot enforce the building contract.
- 25 The owners say that they terminated the building contract with good cause on 16 July 2013. They say further that, if any moneys are owed to the builder, the sum owed is more than offset by the damages they claim against the builder.
- 26 The owners present a variety of claims making up their counterclaim for damages. During the course of the hearing, Mr Yucel produced numerous spreadsheets he had prepared in an attempt to clarify the nature and quantum of the various heads of damage claimed. A number of Mr Yucel's spreadsheets were created or amended during the course of the hearing, and the nature and quantum of damages claimed was amended, or sought to be amended.
- 27 The owners' claims for damages are as follows:

a) **"Overpayment" to builder \$356,159**

The owners say that the contract price, notwithstanding the "costs plus" nature of the contract, cannot be more than a *reasonable* sum. They say that they paid \$356,159 more than a reasonable sum. The methodology in calculating this sum is discussed later in these reasons.

b) **Misleading/deceptive conduct**

Alternative to the above “overpayment” claim, the owners claim the same sum, \$356,159, as loss they say they have suffered by reason of the misleading and deceptive conduct, or unconscionable conduct, of the builder.

c) Delay damages \$69,524

The owners claim \$69,524 as delay damages. The sum is made up partly of “liquidated damages” for delay pursuant to the terms of the building contract, and partly of common law damages incurred after the date the owners terminated the building contract.

d) Management and supervision time of Mr Yucel \$28,551

After termination of the building contract, Mr Yucel arranged and managed the completion of the renovations to the units. The owners claim the value of Mr Yucel’s time spent in this regard, calling it the “*lost value of the supervision and management of post termination repair and completion work*”. The sum claimed, \$28,551, is 15% of \$190,341.96. \$190,341.96 is the sum the owners say they have spent, thus far, on rectifying and completing works following their termination of the building contract.

e) “Overcharge” for builder’s own workers \$86,124

During the hearing, the owners sought to amend their counterclaim to include a further claim for damages in respect of the builder’s alleged overcharging for the builder’s own labourers/employees. The sum claimed is the owners’ estimate as to the difference between the sum charged by the builder, \$500 per day per worker, and the estimated actual cost to the builder for its own labourers/employees engaged on the project.

As discussed later in these reasons, the application to include the new claim is refused.

f) Repair of defective works \$286,328

The owners claim \$286,328 as the cost to rectify defects in the works carried out by the builder or the builder’s subcontractors. The rectification works include rectifications carried out by the builder itself (or its sub-contractors) prior to the termination of the building contract, the cost of rectifications carried out by the owners after the termination of the building contract, and the estimated cost of rectification works yet to be carried out.

Claim against the joined party

28 Mr Ergun Gulcan was, on application made by the builder, joined as a party to the proceeding. The builder says that if it is found liable to pay damages

to the owners, it seeks contribution from Mr Gulcan, as proprietor of Winlife, in respect of the alleged defective cabinetry installed by Winlife.

29 Mr Gulcan denies that the cabinetry installed by Winlife was defective.

PROCEEDING D1193/2013

30 There is dispute between the builder and the owners as to which of them engaged Winlife. The owners say that the builder engaged Winlife as a sub-contractor. The builder says that the owners directly engaged Winlife.

31 Mr Gulcan, proprietor of Winlife, is unsure. He says that either the builder or the owners, alternatively the builder and the owners together, engaged Winlife to supply and install the cabinetry to the St Kilda units.

32 Mr Gulcan says that Winlife was wrongly denied access to the St Kilda units on and from 31 May 2013. He says that, at that time, the cabinetry works were 97% complete. He denies that the cabinetry works were defective. Mr Gulcan says that the total price payable for the works is \$86,999, of which only \$50,000 has been paid. He brings a claim against the builder and the owners for the unpaid balance, \$36,999, plus interest on that sum.

33 Mr Gulcan brings a further claim for \$14,993 against the builder in relation to an unrelated cabinetry job. In late 2012, Mr Gulcan had for several months worked with Mr Ibrahim on several cabinetry jobs, one of which was the installation of cabinetry at two new townhouses being developed and constructed by the builder in Essendon (“**the Essendon cabinetry job**”).

34 The Essendon cabinetry job was completed in December 2012 and it is not in dispute that the builder has not yet made full payment for the job. What is in dispute, however, is how much is owed and to whom it is owed. Mr Gulcan says that he, trading as Winlife, is owed \$14,993. The builder says the sum owed is \$10,793, and it is owed to Mr Ibrahim, not Mr Gulcan or Winlife.

SUMMARY OF FINDINGS

35 For the reasons discussed below, I find:

- (a) Mr Eski and Heski Carpenters Pty Ltd were both “the builder” under the building contract.
- (b) The builder did not comply with s13(2) of the Act, that is the builder’s contract price estimate was not a fair and reasonable estimate as to the total amount of money the builder was likely to receive under the contract. As such, the builder cannot enforce the building contract.
- (c) The builder’s scope of works under the building contract included the cabinetry works carried out by Winlife. The builder, not the owners, engaged Winlife.

- (d) The builder terminated the Winlife cabinetry contract on 31 May 2013. The builder was entitled to do so.
- (e) The owners were entitled to terminate the building contract, which they did on 16 July 2013.
- (f) I think it fair that the builder be awarded a reasonable profit for the building work it carried out, including the works of its sub-contractors. I assess such reasonable profit as \$119,605.36, and after deducting the sum of \$108,400 already paid to the builder by the owners, the balance owed is \$11,205.36.
- (g) The owners are entitled to liquidated damages for delay, assessed at \$26,071.50. The owners are also entitled to compensation for the cost of rectifying defects in the works carried out by the builder or the builder's sub-contractors, such compensation assessed at \$92,751.95. The owners' other claims for damages fail.
- (h) After setting off the sums owed as between the builder and the owners referred to above, the net result is that the builder must pay the owners \$107,618.09.
- (i) The builder's contribution claim against Mr Gulcan succeeds, and Mr Gulcan must pay the builder \$43,351, that sum being my assessment of the cost of rectifying the defects in the cabinetry works.
- (j) Mr Gulcan's claims against the owners and the builder, including the claim against the builder in respect of the Essendon cabinetry job, are dismissed.

THE HEARING

- 36 Mr Selimi of Counsel represented the builder. Mr Gray, solicitor, represented the owners. Mr Lithgow of Counsel represented Mr Gulcan.
- 37 The hearing was due to commence on 1 December 2014, however on that day orders were made for the filing and service of further documents. The hearing subsequently proceeded on 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18 (half day), 22 and 23 (half day) December 2014.
- 38 The hearing was listed to continue on 23 February 2015, however it was adjourned following the builder's notification to the Tribunal, on 19 February 2015, of the non-availability of its Counsel, Mr Selimi.
- 39 Partly due to my unavailability in mid 2015, it was not until 10 August 2015 that the hearing recommenced and ran for three days on 10, 11 and 12 August 2015.
- 40 All closing written submissions were received by mid February 2016.
- 41 The builder called evidence from Mr Eski and Mr Odicho.
- 42 The owners called evidence from:

- Mr Yucel
- Mr D. Djuric, manager of “VRBAS Cabinetmakers” who was engaged by the owners in July 2013 to replace much of the cabinetry to the St Kilda units.
- Mr J. Villetti who, under the business name “Tru Bond”, carried out rendering works to the St Kilda units.
 - Mr S. Gilligan, an electrical contractor who carried out electrical works at the St Kilda units.
 - Mr Ibrahim, the proprietor of “IBO Cabinets”.
 - Mr A. Johnson, a carpenter trading under the name “Jarrah Constructions”, who was engaged by the owners to assist in carpentry works to the St Kilda units from around 3 December 2012 onwards.
 - Mr H. Singh, a stone mason engaged by the owners to provide replacement benchtops to the St Kilda units.
 - Mr N Tineo, director of “Pat Baygar & Associates Pty Ltd who provided structural engineering design, inspections and certifications in respect of the building works to the St Kilda units.

Each of the above witnesses, save for Mr Yucel, Mr Singh and Mr Tineo, attended the hearing in answer to a summons issued at the request of the owners.

- 43 For Mr Gulcan (Winlife), Mr Gulcan gave evidence. He also called evidence from his son, Mr Ertugral Gulcan, and his nephew, Mr Ekram Gulcan, both of whom were involved in the installation of the cabinetry to the St Kilda units.
- 44 Concurrent expert evidence was given by Mr Mitchell (engaged by the owners), Mr Simpson (engaged by the builder) and Mr Beck (engaged by Mr Gulcan). The experts also produced written reports.

WHO IS “THE BUILDER” UNDER THE BUILDING CONTRACT?

- 45 In Points of Claim filed in August 2013, only Heski Carpenters Pty Ltd was named as the [applicant] builder. At the commencement of the hearing on 4 December 2014, I granted leave for the filing of an Amended Points of Claim which adds Mr Eski as the second applicant. By the Amended Points of Claim, Heski Carpenters Pty Ltd and Mr Eski plead that one or other of them, or both of them, are “the builder” under the building contract.
- 46 For the reasons discussed below, I am satisfied that both Heski Carpenters Pty Ltd and Mr Eski are both “the builder” under the building contract.
- 47 The building contract document is in the form of a Masters Builders Association standard form “Cost Plus Major Domestic Building Contract (Vic)”. Mr Amet Eski is named as the builder on the front page of the contract document. The “*definitions*” section of the document states that the

builder is the person stated in item 2 of the appendix to the document. Item 2 in the appendix names the builder as “*Amet Eski (Heski Carpenters Pty Ltd)*”.

- 48 An amended building permit in respect of the project works dated 2 October 2012 names Mr Eski as the builder.
- 49 Warranty insurance certificates, one for each of the 8 St Kilda units, issued by VMIA/QBE Insurance (Aust) Ltd identify the builder as “Heski Carpenters Pty Ltd.”
- 50 When giving evidence, Mr Eski confirmed that he considered himself to be the builder.
- 51 Having heard Mr Eski’s evidence, it is my view that when he inserted the name of “the builder” in the building contract, Mr Eski drew no distinction between himself, as the “registered building practitioner”, and his corporate vehicle Heski Carpenters Pty Ltd.
- 52 Having regard to Mr Eski’s evidence, and having regard in particular to the fact that “*Amet Eski (Heski Carpenters Pty Ltd)*” is named as the builder in item 2 in the appendix to the building contract, I am satisfied that the builder under the building contract is both Mr Eski and Heski Carpenters Pty Ltd.

DID THE BUILDER COMPLY WITH SECTION 13(2) OF THE ACT?

- 53 In item 10 in the appendix to the building contract, the builder, in purported compliance with s13(2) of the Act, has specified \$1,047,485.80 as the builder’s contract price estimate, that is the builder’s *fair and reasonable estimate of the total amount of money that the builder is likely to receive under the contract*.
- 54 The owners say that the builder has not met the requirement under s13(2) of the Act and that this is evident from the fact that the actual cost of the building works, up to the date they terminated the contract on 16 July 2013, was well in excess of the builder’s contract price estimate. As noted above, Mr Yucel kept the financial records as to all of the costs of the building works paid by the owners. I accept Mr Yucel’s evidence that the “direct costs” of the building works up to 16 July 2013 was \$1,288,805.55, and that in addition to these costs, the owners had up to that time paid the builder \$108,400 as the builder’s fee.¹
- 55 The owners say that a variance from the builder’s contract price estimate of more than 5% is “unacceptable” in terms of the requirement of s13(2) of the Act.
- 56 In my view, a determination as to whether a builder has complied with s 13(2) of the Act is not reached by simply comparing the builder’s price estimate in the contract with the costs subsequently actually incurred, even

¹Figures extracted from spreadsheet Exhibit KY12A

if allowance is made for variations to the works after the contract was signed.

- 57 In my view, it is necessary to assess the fairness and reasonableness of the builder's contract price estimate at the time the contract was entered.
- 58 Mr Eski says that the building contract was the first *costs plus* contract he had entered. He was aware of his obligation to provide an estimate of the total amount of money the builder was likely to receive and, to assist him in this regard, Mr Eski engaged Mr Odicho to prepare a cost estimate for the works.
- 59 Although not a quantity surveyor, Mr Odicho has extensive experience in building construction management and estimating. Mr Odicho prepared his cost estimate after receiving the construction plans which were emailed to him by Mr Yucel in June 2012.
- 60 On about 9 July 2013, Mr Odicho emailed to Mr Eski his cost estimate, a four page document containing itemised costings for the building works with a total cost estimate of \$976,383. The document makes no reference to a builder's fee or profit margin, or GST. Mr Odicho confirmed in evidence that his cost estimate did not include any allowance for builder's profit margin or GST. In this sense Mr Odicho's estimate was an estimate of the "direct costs" of the building works, excluding GST.
- 61 In my view, having regard to the builder's obligation under s13(2) of the Act, and Mr Eski's admitted inexperience with "cost plus" contracts, it was prudent for Mr Eski to obtain a cost estimate from an independent experienced estimator such as Mr Odicho.
- 62 It would also have been prudent for Mr Eski to base his contract price estimate on Mr Odicho's estimate. Mr Eski says that this is precisely what he did. However, it is apparent that the contract price estimate in the building contract has been based on a direct costs estimate significantly lower than Mr Odicho's estimate.
- 63 As noted above, the builder specified \$1,047,485.80 in item 10 in the appendix to building contract as the builder's *fair and reasonable estimate of the total amount of money that the builder is likely to receive under the contract*. It is clear from the additional notes written by Mr Eski in item 10 in the appendix that the estimate is the total of two sums, \$903,005 and \$144,480.80. Mr Eski wrote these figures in item 10 on the day he and Mr Yucel signed the building contract. Mr Eski says that the first figure, \$903,005, is what he *believed*, at the time, was Mr Odicho's [direct costs] estimate. The second sum, \$144,480.80, is the builder's fee for profit margin and insurance, which the parties agreed would be calculated as 16% of the direct costs component. \$144,480.80 is 16% of \$903,005.
- 64 The first figure, \$903,005, is significantly less than Mr Odicho's [direct costs] estimate of \$976,383.

- 65 Mr Odicho produced at the hearing a copy of his cost estimate which identifies a total estimate of \$976,383. He says that after he emailed the document to the builder, he did not make any changes to it and nor did he discuss any changes to it with Mr Eski or Mr Yucel.
- 66 On 15 July 2012, Mr Eski attended the home of Mr Yucel for the purpose of completing and signing the building contract. He says that he took with him Mr Odicho's cost estimate document in electronic format on his laptop computer. Mr Eski says that when he was at Mr Yucel's home, Mr Yucel took Mr Eski's laptop for the purpose of adding to Mr Odicho's cost estimate the agreed 16% builder's fee allowance.
- 67 Item 8 in the appendix to the contract lists the documents forming part of the building contract. One of the listed documents is described as the "*cost estimate attached*". A copy of that attached cost estimate document was produced at the hearing. The document appears to be a copy of Mr Odicho's cost estimate document with one amendment being the addition of the agreed 16% builder's fee. However, on closer scrutiny it can be seen that the document is significantly different to Mr Odicho's "original" document:
- a number of the itemised costings in the copy document are lower than the sums provided in Mr Odicho's original document;
 - the total cost estimate (before allowing the 16% builder's fee) in the copy document is \$903,005, whereas the total estimate in Mr Odicho's original document is \$976,383.
- 68 Mr Eski says that at the time he completed and signed the building contract, he believed that the cost estimate document which became the attachment to the building contract was Mr Odicho's original document, amended only to include the additional 16% allowance for the builder's fee.
- 69 When giving evidence, Mr Eski expressed surprise when the full extent of the differences between Mr Odicho's original document and the document attached to the building contract were identified. Mr Eski says he now believes that Mr Yucel must have produced the amended "copy" document during the course of Mr Eski's visit to Mr Yucel's home on 15 July 2012. Mr Eski says that he relied on the altered document, believing it to be Mr Odicho's true cost estimate, when calculating the builder's contract price estimate and completing the building contract.
- 70 Although he does not directly say so, Mr Eski implies that he has been duped by Mr Yucel into inserting into the building contract a price estimate based on a direct works estimate lower than the "true" estimate provided by Mr Odicho.
- 71 Had the builder's contract price estimate been founded on Mr Odicho's "true" direct costs estimate, it would have been significantly higher. After adding the agreed 16% builder's fee, the estimate would have been

\$1,132,604, that is \$85,119 more than the estimate inserted in the contract by Mr Eski.

72 Mr Yucel strongly denies that he amended Mr Odicho's estimate document. He says that on 15 July 2012, Mr Eski arrived at Mr Yucel's home with a document that Mr Yucel understood to be Mr Odicho's estimate. Mr Yucel denies making any changes to that document. He denies that he used Mr Eski's laptop at all.

73 Mr Eski says that, after he received Mr Odicho's cost estimate, and before he attended Mr Yucel's home on 15 July 2012, he met with Mr Yucel on site at the St Kilda units to discuss the proposed building works.

74 In circumstances where:

- Mr Eski has engaged Mr Odicho for the purpose of obtaining an independent works cost estimate which Mr Eski intended to rely upon when calculating the contract price estimate; and
- After receiving Mr Odicho's estimate, and before inserting the contract price estimate into the building contract document, Mr Eski has attended the building site to discuss the building works with Mr Yucel; and
- Mr Eski has subsequently inserted the contract price estimate into the building contract;

I do not accept that Mr Eski was unaware that Mr Odicho's estimate had been altered to produce a significantly lower direct costs estimate.

75 On the evidence before me, I do not accept that Mr Yucel made any alterations to Mr Odicho's cost estimate document. If it was not Mr Yucel who altered the Odicho estimate, it can only have been Mr Eski.

76 I can only speculate as to why Mr Eski would "lower" Mr Odicho's estimate. Perhaps he was more focused on "winning" the building contract than providing a genuine contract price estimate. Whatever his motivation, I am satisfied on the evidence that the builder's contract price estimate, inserted into the contract by Mr Eski, was not the builder's genuine reasonable estimate of the total amount of money the builder was likely to receive. As such, I find that the builder has failed to comply with s13(2) of the Act and, accordingly, pursuant to s13(3) of the Act, the builder cannot *enforce* the building contract.

CHRONOLOGY OF EVENTS AFTER SIGNING THE BUILDING CONTRACT

77 The building works commenced in August 2012 and the parties agree that the due date for completion of the works, subject to approved extensions of time, was around 2 May 2013.

- 78 The two-storey double brick building, approximately 100 years old, has four units side-by-side at ground level, and for further units side-by-side on the above level 1.
- 79 The builder's own team of workers was to be used for demolition and general carpentry/framing works. Mr Yucel and Mr Eski agreed on a charge rate of \$500 per day per worker for each of the workers in the builder's team.
- 80 The first stage of the works involved partial demolition along the north side of the building ahead of extensions to the units. The demolition works were tedious and included the temporary "propping" of parts of the building.
- 81 Mr Yucel became concerned at the amount of time being taken to complete the demolition works. His concern was partly due to the fact that the builder's workers were being charged out at the agreed rate of \$500 per worker per day.
- 82 Mr Eski says that, because of the tedious nature of the demolition works and the limited access to site on the northern side of the property, the demolition works had to be done entirely by hand, including the painstaking removal of rubble to waste bins. Mr Yucel says that machinery could have been used to hasten the removal of rubble.
- 83 Mr Eski says also that the demolition works were, at the direction of Mr Yucel, expanded to include the removal of a number of internal walls, approximately 22 sections in all, on the upper storey. He says that Mr Yucel expressed concern that these walls were unstable and should be replaced. Mr Eski says that, in response, he advised Mr Yucel that the walls in question could be removed and replaced with stud timber walls. Mr Eski says that Mr Yucel instructed him to proceed with the removal and replacement of the walls.
- 84 The demolition works were completed by around November 2012, after which the builder's team moved on to carpentry/framing works.
- 85 Mr Yucel believed that the builder was content to proceed slowly because it meant more profit for the builder. Mr Yucel voiced his frustration in a letter he sent by email to Mr Eski on 29 December 2012 wherein he says, amongst other things:

Since the start of this project I have been uncomfortable with the arrangements for the HESKI work team under the cost plus contract terms as I have pointed out to you that in my view you as the builder and also the employer of the HESKI work team, you had a conflict of interest and it was in effect a double dipping of profits from your workforce and the cost plus payments under the contract ...

I went along [with] the early arrangements as you gave me the impression the HESKI team would complete the demo and framing in an efficient and quick timeframe which has not happened. I believe this has been due to poor site supervision and not enough qualified carpenters being on the job. This

has led to poor quality and inefficient work ... I therefore cannot justify the costs associated with using HESKI staff on the job site any longer.

This decision is to take effect from today.

The project will continue with Aarons and the crew he has assembled to enable me to reign in the costs.

- 86 The reference in the above letter to “Aarons and the Crew” is a reference to Mr Aaron Johnson and his crew of workers who were brought onto the project by Mr Yucel in December 2012. Mr Johnson is a carpenter who trades through his corporate entity, Jarah Construction Pty Ltd (“**Jarah Constructions**”).
- 87 Mr Eski received the above email letter in Thailand, where he was on his honeymoon. Mr Eski responded by advising Mr Yucel that he would meet Mr Yucel to discuss the matter when he returned from his honeymoon.
- 88 In January 2013, the structural engineer for the project, Pat Baygar and Associates Pty Ltd (“**the engineer**”), provided a report to Mr Yucel detailing rectification works required to be carried out to the framing to meet concerns raised by the relevant building surveyor for the project, Mr Raptopoulos.
- 89 On around 21 January 2013, when Mr Eski had returned from his honeymoon, Mr Yucel met Mr Eski on site. Mr Eski says agreement was reached that :
- (a) The builder would attend to the rectifying the framing works, as per the engineers instructions, at no extra cost; and
 - (b) After attending to the framing rectification works, the builder’s team of workers would play no further part in the project. That is, Mr Eski accepted that the builder’s team would be replaced by Mr Aaron Johnson and his team; and
 - (c) The builder would discount its charges by \$10,000.
- 90 I accept Mr Eski’s evidence in relation to this agreement. It is not contested by Mr Yucel. The \$10,000 discount appeared in the next invoice from the builder to the owners. After completing the framing rectifications, the builder’s team of workers ceased working on the project.
- 91 The works progressed through to around the end of May 2013. Along the way Mr Yucel requested a number of variation extra works, that is works not included in the original construction plans, including:
- (a) two new fire places, new walls constructed around six existing fireplaces, granite steps around fire places;
 - (b) new roofing over external stairs to the building;
 - (c) disabled access ramp into the building;
 - (d) extra wall insulation and sound batts;
 - (e) battening of ceilings to accommodate a higher quality plaster finish;

- (f) bamboo flooring in the units in place of carpet;
- (g) scion matrix wall in courtyard replaced by brick wall;
- (h) front picket fence replaced with powder coated aluminium fence;
- (i) new decking; and
- (j) extra electrical works – LED lights, data and Internet network points.

- 92 Along the way, a number of works carried out by the builder's workers or subcontractors had to be rectified. For example, some rendering works had to be re-done as a result of damage caused by the installation of electrical wiring.
- 93 There is dispute as to whether some rectification works arose from builder mistakes or from a change of mind by the owners. For example, external doors leading to the decking were installed, but had to be removed and reinstalled with alternative hinging. The builder says the change was required to meet the owners changed request as to the functioning of the doors. The owners say the builder used the wrong hinges when first installing the doors.
- 94 Cabinetry was installed by Winlife Cabinets in April and May 2013. The formation and termination of cabinetry contract are discussed in detail later in these reasons. For present purpose, it is enough to say that Mr Yucel was dissatisfied with the quality of the cabinetry work and he discussed his concerns with Mr Eski, and that the result of that discussion was a letter from the builder to Winlife dated 31 May 2013 terminating Winlife's contract. Mr Yucel helped Mr Eski draft that letter. The letter states:

Re: cabinetry works for 1A Enfield Street, St Kilda

Heski Carpenters Pty Ltd (builder) and the owners (Gaycel Pty Ltd and 1A Enfield Street, St Kilda Pty Ltd) have engaged your company to provide:

- kitchen cabinets
- vanity units and shaving cabinets
- wardrobes with sliding glass doors
- storage cupboards

For 8, 2 bedroom units located at 1A Enfield Street, St Kilda.

During the installation phase of the cabinet works, the owner expressed concern about the quality of the cabinets and the quality if [of] the installations which have been communicated through the builder to you. The defects are too numerous to mention and they have not been rectified and the product is not fit for purpose. Furthermore the delays in installation have caused significant delays and associated costs on the projects.

To date you have been paid \$50,000 for the works with \$22,290 still outstanding.

This is to advise you that we are now in dispute and we will take the following action to recover costs for reinstatement and losses incurred as a result of delays caused by your defective works:

- We will engage an independent assessor from the building commission or the Archicentre to compile a detailed report of the defects.
- Based on the above report obtain necessary quotes to address the defects
- Commence legal action to recover associated costs and losses.

As a result of the dispute, you and or your representatives are advised NOT to enter the work site or contact any workers on the site under any circumstances. The site supervisor has been advised to contact the police if this happens.

All correspondence in relation to this matter should be directed to the builder.

Yours sincerely

[signature of Mr Eski]

Ahmet Eski

Heski Carpenters Pty Ltd

- 95 After termination of the Winlife contract, both Mr Eski and Mr Yucel began making enquiries as to a suitable replacement cabinetmaker. However, they quickly fell into dispute as to who should bear the cost of rectifying the defective cabinetry. Mr Eski alleges that the owners had directly engaged Winlife, and as such the owners should bear responsibility for the cost to rectify the cabinetry. Mr Yucel says that the cabinetry works were part and parcel of the building contract works and that Winlife was engaged as a sub-contractor by the builder. As such, Mr Yucel says that the builder, and not the owners, should bear the cost to rectify the defects in the cabinetry.
- 96 In June 2013, Mr Yucel sought legal advice.
- 97 By letter dated 19 June 2013, the owners' lawyer gave notice to the builder of alleged breaches of the building contract on the part of the builder. The letter is set out in full below:

Re: Major Domestic Building Contract For Building Works at 1A Enfield St Kilda

We act for Gaycel Pty Ltd instructed by Ken Yucel in relation to the above building contract to refurbish and extend a block of apartments. We are instructed as follows.

We note the works have proceeded slowly due to your lack of competent supervision. One of your obligations was to control and schedule the many contractors on site across the 8 apartments to ensure a smooth flow of work: this has never been achieved and as a result our client's budget has been blown, there are major defects (especially the cabinetry) and the project is significantly delayed.

During the early parts of the project from Aug 2012 to Feb 2013 you were seldom on-site to manage the project resulting in significant errors, corrective works and resulting delays. Your contract breaches include as follows:

1. Poor scheduling has resulted in cost overruns with the scaffolding which was installed too early and subsequently the costs have escalated.
2. To date you have not been able to meet any verbal deadlines given nor produced any written project schedule to which you have attempted to work too. This has led to a project with no end date.
3. At significant expense our client was requested to provide laminated full-size structural and architectural plans to be kept on site. The plans were provided in a bound format with a clear notice that they were not to be separated or removed from site. Within a short space of time the plans were all over the site and yet you were not working from the stamped authorised drawings as per the building permit. This oversight has led to the omission of three laundries (units 6, 7, 8) from the final build. As the error was not discovered until all kitchens and floors were installed, it was not possible to install the laundries as per the approved drawings. As this error is your responsibility, our client expects to recover costs associated with making provision for laundries in the bathrooms and seek compensation for the loss of amenity in the bathrooms due to the compromises having to be made to accommodate the error.
4. Lack of your availability to instruct new contractors and to ensure they understand the scope of works and coordinate with other contractors.
5. Inability to supervise contractors and work to approved drawings resulting in the failure of frame inspection for both the timber framing and the structural steel components resulting in a 4 week delay to the project to carry out rectification and re-engineering works. You and our client have reached agreement on costs recovery for this and you did carry out rectification works at your cost on the timber frame to meet compliance.
6. Failure to supervise plastering works and associated contractors resulting in a very poor outcome for straightness/plumb of walls. Furthermore progress payments to your subcontractors were cleared without a full assessment of completeness and quality of works carried out. Your subcontractors refused to address the defects and walked off the job. This resulted in finding another contractor to finish the plastering at additional cost.
7. All external doors and windows were ordered by you with undersized reveals which has caused a significant amount of reworking on site to redo the reveals for all aluminium windows and to add extension pieces to the timber windows and doors. This has resulted in significant additional labour and material costs and associated delays.
8. Failure to properly supervise and instruct the electrical contractor has led to an acceptable wiring being installed, damage to the fire protection layers in the apartments due to inappropriate penetrations, illegal wiring and generally poor workmanship, and damage to the outside of the building in multiple locations for

cable runs. You were requested to deal with this contract by way of removing them from the project but you insisted on persevering with them to the detriment of this project. You were also requested to obtain written documentation from the contractor to prove that they had ordered the main switchboard/metering enclosures and EWR order for the local supply authority. No such documentation was obtained.

The Electricians have also caused significant damage to the outside of the building in their clumsy attempt to run their cables. This damage has resulted in additional expense for bricklayers to fill in the significant voids they carved up and also to re-render the walls which had been completed to final base coat level. You advised our client that the electrician had agreed for the renderer to redo the work and he would pay the costs. This has not happened to date and the renderer has sought payment from our client for the full amount.

The electricians have also incurred council fines for working outside the nominated hours for \$1000. They have not paid this fine and our client has had to pay this as the council had issued it to Gaycel Pty Ltd as the owner.

The electricians have been on site since the start of the project in August 2012 but had not made any significant progress towards completing the rough in up to the time of their termination in April 2013.

This contractor was ordered to cease all work on site due to their non-compliance and finally they were dismissed. A new electrical contractor has since been appointed with significant cost and time overruns on the electrical works. The new electrical contractor is compiling an ever growing list of all electrical defects to date.

9. The doors opening out to the ground floor decking were to open all the way out. The way they were installed with the narrow reveals required significant sized hinges which were supplied at great additional expense. After a lot of work in installing them and trialling the large parliament hinges they proved ineffective. All doors were finally removed, extended the reveals and reinstalled them with normal hinges to achieve the desired outcome. All this could have been avoided if you were on the job and supervising the construction and ordered the correct materials.
10. Lack of supervision of cabinetmakers resulting in very poor workmanship which was evident at the early stages. Your inability to manage this contractor has resulted in all cabinetry not being fit for purpose and having to be replaced at great cost and significant delays in completion. To date you have been forced to obtain an independent report by an architect from Archicentre on the defects to pursue the contractor. For some strange reason you think it is our client's responsibility to address your obligations.
11. Delays in the project have added additional cost to temporary fencing, on site toilet, parking fees and all other time related project cost.
12. The Caesar Stone bench tops and fireplace surrounds have been installed out of level in all cases no further payments will be made until this is corrected.

13. The project duration has now reached 306 days as of 19th of June 2013 (cf 260 days in contract) and is now 46 days over schedule. Our client's holding costs are in line with the liquidated damages amount allowed for in the contract, \$2,483 per week, and our client is entitled to recover these costs.
14. The project is heading toward a \$300,000 cost overrun which is in part covered by additional works approved by our client but the significant part is attributable to you as the builder and your inability to discharge your obligations under the contract.
15. As the builder you have obligations under the contract to ensure that work is carried out to an acceptable standard and all works and materials are fit for purpose. You have not made any attempt to recover costs from subcontractors that have carried out unacceptable works and have subsequently been dismissed from the project. It appears that you are expecting our client to simply foot the expense of pursuing legal avenues to recover costs or address such contractors through VCAT. As the contract stands this is your responsibility as the Builder to pursue these contractors at your cost and additional project costs incurred to remedy defects will be recovered from you.
16. Indeed your conduct has caused our client such a significant loss of time to cover for your inadequacies that he has lost an estimated \$60,000 in personal income.

Our client wishes to settle the contractual matters as amicably as possible, however with the significant cost overruns, defects with the cabinets yet to be resolved and ongoing holding costs client reserves the right to take every action to recover costs.

As a matter of urgency please advise your position re cabinetry. We require a meeting on site at 1 pm Friday 21 June to hear your position. Please contact James Gray of our office to confirm the meeting.

Yours faithfully

- 98 Many of the alleged breaches of contract listed in the letter appear to me to be commentary on events rather than clearly identified breaches of contract. In any event, it is clear that the owners have an urgent concern in respect of the cabinetry and that they requested an urgent meeting with the builder.
- 99 Mr Eski agreed to the meeting. Mr Eski met Mr Yucel and the owners' lawyer, Mr Gray, on site on 21 June 2013. At this meeting the parties did not resolve their dispute as to who should bear the cost of rectifying the cabinetry work.
- 100 On 27 June 2013, Mr Mitchell, engaged by the owners, inspected the cabinetry installed by Winlife.
- 101 As noted earlier in these reasons, in around late June 2013 Mr Yucel advised Mr Eski of the approximate cost of the works up to that time, following which Mr Eski calculated the outstanding 16% builder's fee and issued the builder's invoice to the owners dated 1 July 2013 in the sum of \$129,200.50.

102 On 1 July 2013, the owners' lawyer sent a further letter to the builder which states:

Re: major domestic building contract for building works at 1A Enfield St Kilda & notification of breach of contract and risk of termination thereof.

We refer to our letter to you of 19 June 2013 wherein we listed the various extensive breaches of contract by Heski Carpenters Pty Ltd and recent on-site discussions. We note the matters of your breaches of contract remain unresolved.

We hereby give you notice that unless the breaches of contract are rectified within 7 days hereof our client intends to terminate the building contract between Gaycel Pty Ltd and Heski Carpenters Pty Ltd and sue Heski Carpenters Pty Ltd for damages.

In particular, we note the following contract breaches:

1. Major defects to all wardrobes which you have failed to have rectified.
2. Major defects to all kitchens which you have failed to have rectified.
3. Lack of a plan to have the above defects remedied.
4. Massive cost over-runs due to your defaults as described in our letter to you of 19 June 2013.
5. Significant general delay in completion".

Yours faithfully

103 As noted above, much of the so-called "extensive list" of breaches contained in the owners' lawyer's previous letter to the builder dated 19 June 2013 appears to be general commentary rather than clear identification of alleged breaches of contract.

104 Nevertheless, it is clear from the correspondence that the owners were concerned to have the cabinetry works rectified and completed as soon as practicable. It is also clear from Mr Eski's evidence given at the hearing that he did not consider the builder to be contractually responsible for the cost of such works.

105 Also on 1 July 2013, the owners' lawyer sent a further letter to the builder outlining a proposal for settlement:

Re: major domestic building contract for building works at 1A Enfield St Kilda & Offer to settle

Our client Gaycel Pty Ltd will settle all outstanding matters between Gaycel Pty Ltd and Heski Carpenters Pty Ltd on the following basis:

1. Amet Eski / Heski Carpenters Pty Ltd pay the cost of
 - replacing all Kitchens in whole including stone benchtops and
 - replacing all Wardrobes (excluding sliding mirror doors);
 - repairing all storage cupboards in all 8 apartments less
2. All work to be carried out by qualified and experienced cabinet makers to the satisfaction of Ken Yucel.

3. Gaycel Pty Ltd will pay the amount outstanding on the original cabinetry contract being \$22,290 to Heski Carpenters Pty Ltd.
4. Amet Eski / Heski Carpenters Pty Ltd to reimburse Gaycel Pty Ltd for the \$1000 council fine incurred by electricians.
5. Amet Eski / Heski Carpenters Pty Ltd agrees that all monies paid to it to date are the final amount owing on the contract between the parties (other than the above \$22,290).
6. Amet Eski / Heski Carpenters Pty Ltd agrees to do all things in its power to bring the project to completion and obtain occupancy certificates.

This offer remains open for acceptance for 7 days from 1 July 2013.

Yours faithfully

- 106 It appears that the builder did not respond to the above proposal. There is no suggestion that the proposal was accepted.
- 107 On about 4 July 2013, Mr Yucel received Mr Mitchell's report on the cabinetry in which Mr Mitchell opines that the cabinetry is of such poor quality that most of it will need to be removed and replaced.
- 108 On about 12 July 2013, Mr Eski sent to the owners a notice dated 12 July 2013 purporting to be notice, pursuant to clause 24.1 in the building contract, of the builder's intention to terminate the building contract. The notice refers to the builder's invoice to the owners dated 1 July 2013 in the sum of \$129,200.50 and states:

NOW THE BUILDER HEREBY GIVES the Owner written notice that it is in default of the Contract in failing to pay the sum of \$129,200.50 due and payable on 9 July 2013 and the Builder hereby gives intention to terminate the Contract unless within 14 days after service of this notice upon the Owner, the Owner pays to the builder the sum of \$129,200.50 or otherwise provides reasonable cause why the Builder should not thereafter terminate the contract".

- 109 By letter dated 16 July 2013 from the owners' lawyer to the builder, the owners purport to terminate the building contract. The letter states:

Re: Notice of termination of the Contract For Building Works at 1A Enfield St Kilda

We refer to our letter to you of 19 June 2013 wherein we listed the various extensive breaches of contract by Heski Carpenters Pty Ltd and recent on-site discussions and our letter to you of 1 July 2013 warning of unresolved contract breaches and noting our client intended to terminate the contract unless your contract breaches were remedied. We note the matters of your breaches of contract remain unresolved and in fact you have failed to attend to any contract breaches, you have apparently failed to attend on site at all in the past 3 weeks and you have failed to respond at all to our letters.

We hereby terminate the building contract between Gaycel Pty Ltd and Heski Carpenters Pty Ltd and give notice of our clients' intention to sue Heski Carpenters Pty Ltd for damages.

In particular we note the following contract breaches which you have failed to rectify:

1. Major defects to all wardrobes.
 2. Major defects to all kitchens.
 3. Lack of a plan to have the above defects remedied.
 4. Massive cost over-runs due to your defaults as described in our letter to you of 19 June 2013.
 5. Significant general delay in completion.
- 110 Under cover of letter dated 31 July 2013 from the builder's lawyers to the owners, the builder served a *Notice of Termination of Contract*. The notice refers to the builders prior default notice of 12 July 2013 and confirms the termination of the building contract by the builder on the ground that the owners failed to pay \$129,200.50 and/or failed to provide reasonable cause why the builder should not terminate the contract.
- 111 From late July 2013, the owners engaged contractors to complete the building works, including a number of rectification works. Much of the cabinetry, particularly in the kitchens, was replaced. Certificates of occupancy for the 8 units were issued on 20 November 2013.

THE CABINETRY WORKS

Who were the contracting parties?

- 112 The contractor first engaged to supply and install the cabinetry was Mr Ibrahim trading as "*IBO Cabinets*". The cabinetry works were confirmed in a quotation prepared by Mr Ibrahim and forwarded to the builder on 20 September 2012 ("the IBO quotation"). The IBO quotation specified a total price of \$53,000 plus GST, of which \$25,000 was to be paid as a deposit. On or around 28 September 2012, before any of the cabinetry works had commenced, Gaycel Pty Ltd made direct payment to "IBO Cabinets" of the \$25,000 deposit.
- 113 At the time of the IBO quotation, Mr Ergun Gulcan had for several months worked with Mr Ibrahim on several cabinetry jobs, including the Essendon cabinetry job.
- 114 Mr Gulcan says that he and Mr Ibrahim had, from around the beginning of 2013, formed a partnership using the trading name "Winlife Cabinets" under which they intended to obtain cabinetry works contracts. The partnership registered an Australian Business Number ("ABN") on 1 January 2013, however the name "Winlife Cabinets" only first became a *registered* business name on 23 August 2013.
- 115 In mid April 2013, at which time IBO Cabinets had commenced the fabrication of cabinets for the St Kilda units, Mr Ibrahim was facing financial difficulties and he was locked out of his rented factory premises in Derrimut. As a consequence, Mr Ibrahim was unable to complete the cabinetry works for the St Kilda units.

- 116 A proposal was put to Mr Eski and Mr Yucel that the St Kilda cabinetry job be taken over by Winlife. The proposal was put verbally by Mr *Ekrem* Gulcan, a nephew of Mr Ergun Gulcan. Mr Ekrem Gulcan was, at that time, acting in a managerial capacity for Winlife. Ekrem Gulcan says, and it is not disputed, that the proposal was put to Mr Eski and Mr Yucel at a meeting in a cafe on around 17 or 18 April 2013. The proposal was accepted on the understanding that the \$25,000 deposit already paid to IBO Cabinets would stand as the deposit for the contract with Winlife.
- 117 In late April and May 2013, Winlife installed cabinetry in the St Kilda units. The Winlife personnel engaged on the project included Mr Ergun Gulcan, Mr Ertugral Gulcan, Mr Ekrem Gulcan and Mr Ibrahim. It is not disputed that the scope of the cabinetry works became, by agreement with builder and the owners, more extensive than the scope of works provided for in the original IBO quotation.
- 118 Winlife's invoices for the works, totalling \$86,999, were addressed to Gaycel Pty Ltd. The invoices include an ABN which, on the face of the invoices, appears to be Winlife's ABN. The ABN is in fact the abovementioned ABN of the partnership of Mr Gulcan and Mr Ibrahim.
- 119 The builder says that IBO Cabinets, and subsequently Winlife, were engaged directly by the owners. The owners, through Mr Yucel, say that IBO Cabinets, and subsequently Winlife, were subcontractors engaged by the builder. I agree with Mr Yucel.
- 120 As noted earlier, the [altered] Odicho cost estimate document was annexed to, and formed part of, the building contract documentation. That document itemises joinery/cabinetry works which were ultimately carried out by Winlife. Bearing in mind also that the building contract price estimate inserted into the building contract by Mr Eski was founded on Mr Odicho's [altered] direct costs estimate, it is clear in my view that, from the outset, the scope of works under the building contract included the joinery/cabinetry works. From the outset, contractual responsibility for the joinery/cabinetry works lay with the builder.
- 121 While the owners, through Mr Yucel, played a part in the selection of Winlife to replace IBO Cabinets, and while Mr Yucel was involved in the decision to terminate Winlife's contract, in my view the builder's contractual responsibility for the cabinetry/joinery works did not change.
- 122 The fact that Winlife's invoices were addressed to, and paid directly by, Gaycel Pty Ltd does not amount to a shifting of contractual responsibility. As noted earlier, Mr Eski and Mr Yucel agreed that all sub-contractor invoices were to be forwarded to, and paid directly by, the owners.
- 123 In calculating its builder's fee, 16% of "direct costs", the builder has included the cabinetry works as part of the direct costs.

124 On all the evidence, I am satisfied that the builder, and not the owners, contracted first with Mr Ibrahim trading as IBO Cabinets, and later with Winlife, for the supply and installation of the cabinetry to the St Kilda units.

Who is Winlife Cabinets?

125 Mr Ibrahim says that he and Mr Ergun Gulcan were partners in the business trading as “Winlife Cabinets”.

126 Mr Ekrem Gulcan, nephew of Ergun Gulcan, has experience in financial and business affairs. He says that he had, for a short while, an interest in the Winlife business, however the nature of the interest is vague and Ekrem confirms that his interest was never documented or formalised in a legal sense.

127 Mr Ergun Gulcan says that he operated under the name “Winlife Cabinets”, and while he agrees that his nephew Ekrem and Mr Ibrahim had an interest in the Winlife business, he is unclear as to the nature of their interests and unable to say whether their respective interests amount to “ownership” in a legal sense.

128 The *registration* of the business name “Winlife Cabinets” sheds little light on the issue because it first became a registered business name, held by Mr Ergun Gulcan alone, on 23 August 2013.

129 On all the evidence, I find that “Winlife Cabinets” was, at all relevant times concerning the issues in this proceeding, the *unregistered* trading name under which the partnership of Mr Ergun Gulcan and Mr Ibrahim operated. I reach this finding having particular regard to the tax invoices issued by Winlife for the supply and installation of cabinetry to the St Kilda units. As noted above, the invoices cite the ABN belonging to the partnership of Mr Ergun Gulcan and Mr Ibrahim.

130 Having heard evidence from Ekrem Gulcan and Ergun Gulcan, I am satisfied that Ekrem’s role was limited to assisting his uncle Ergun by providing managerial assistance to Winlife in respect of the cabinetry contract for the St Kilda units, and providing some of his own labour for the installation of the cabinetry. There is insufficient evidence for me to determine how Ekrem was remunerated for such assistance. I am not satisfied, on the evidence, that Ekrem has ever been a “proprietor” of the Winlife business.

131 For the above reasons, I am satisfied that Mr Ergun Gulcan, as one of the partners trading under the *unregistered* name “Winlife Cabinets”, has standing to bring the proceeding for monies allegedly owed to Winlife.

132 Having found that the builder, and not the owners, contracted with Winlife, I am satisfied that if Winlife is owed any money in respect of the St Kilda cabinetry contract, the money is owed by the builder.

The Winlife contract price

- 133 Winlife says the contract price for the cabinetry works (as varied) was \$86,999. It has issued two invoices, one for \$58,300 and the other for \$28,699, which total \$86,999. There is no dispute that Winlife has been paid \$50,000. Winlife claims the unpaid balance, \$36,999.
- 134 Mr Eski says the Winlife contract price was \$72,290, not \$86,999, and that after allowing for the \$50,000 paid to Winlife, the unpaid balance is \$22,290.
- 135 Mr Eski produced a copy of the above-mentioned second Winlife invoice for \$28,699 which includes various handwritten notes and figures. Mr Eski says that the handwritten notes and figures were made by him at a meeting he had with Ekrem Gulcan, and that the notes confirm the agreement reached at that meeting that the allowance for variation extra works would be \$13,990, in place of \$28,699, thereby bringing the total contract price to \$72,290.
- 136 Having examined the copy invoice with the handwritten notes, and having regard to the fact that there is no contradictory evidence from Ekrem Gulcan, and having regard also to the fact that, as confirmed by Ergun Gulcan, Ekrem Gulcan held managerial responsibility for Winlife, I accept Mr Eski's evidence.
- 137 Accordingly, I find that the Winlife contract price was \$72,290, of which \$50,000 has been paid.

Termination of the Winlife contract

- 138 Winlife took over the cabinetry works in mid April 2013. The works were approaching completion by around 20 May 2013. Mr Yucel was frustrated at the amount of time being taken to complete the works. He also considered the quality of the works to be poor.
- 139 On 20 May 2013, Mr Yucel sent an email to Mr Ekrem Gulcan expressing his frustration at the progress of the cabinetry works and requesting that Winlife put additional resources into the job so that the cabinetry installation would be completed by 22 May 2013.
- 140 It is not clear what, if any, further works were carried out by Winlife after 20 May 2013.
- 141 As discussed earlier, Mr Eski and Mr Yucel prepared the letter sent to Winlife on 31 May 2013. In my view, by this letter the builder terminated the Winlife cabinetry contract. Winlife was given no opportunity to rectify any defects in the cabinetry, or to complete the cabinetry job. Winlife was barred from the work site.
- 142 Subsequently, on 6 June 2013, the owners obtained a brief report on the cabinetry works prepared by Mr Rozenbes of "Archicentre". Mr Rozenbes inspected only 3 of the units. His report contains 24 photographs with accompanying brief notes as to alleged defects in the cabinetry works. The

report includes the general comment that “overall, the condition of the finished joinery in the 3 apartments was considered to be poor with numerous defects and deviations from accepted standards”.

- 143 By letter dated 7 June 2013, Mr Ergun Gulcan’s lawyers responded to the builder’s email letter of 31 May 2012. The response letter disputes the allegations made in respect of the cabinetry, and demands payment in the sum of \$44,000 alleged to be owed by the builder to Winlife for both the St Kilda units job (\$28,300 alleged as owing) and the Essendon cabinetry job (\$15,700 alleged as owing). The letter says, amongst other things:

“Job 1 at the first property [the St Kilda units] is ninety seven percent (97%) complete with minor adjustments to be made.

Our client is receptive to arrangements for our client to finalise [the St Kilda units job] and we hereby afford you the professional courtesy and invite you to contact our offices to arrange for our client to complete [the St Kilda units job] and arrange for the outstanding balance to be paid to our client.

Further or alternatively, our client disputes that defects at [the St Kilda units job] are caused by our client. However, please notify us of any alleged defects in writing, and upon payment of the outstanding balance into our firm’s Trust Account (details of which are below), our client will endeavour to rectify such alleged defects”.

- 144 The builder did not respond to the letter. Instead, the builder sent a letter to “Ekrem Gulcan Winlife Cabinets” dated 18 June 2013 enclosing a copy of Mr Rozenbes’ report. The letter states:

As per our letter dated 31 May 2013, attached is the independent Archicentre report on the condition of the cabinets...

This report clearly indicates that the cabinets provided are not fit for purpose and will be replaced.

Since our last communication you have not made any attempt to resolve the matter and as such I wish to advise you that we will now obtain other contractors to finish the work and commence legal proceedings to recover costs associated with remedying the defects across all 8 apartments and associated legal costs...

Yours sincerely

Amet Esli

Heski Carpenters Pty Ltd

- 145 I do not accept the implication that the builder decided to obtain other contractors to finish the cabinetry works only *because* Winlife failed to attempt to resolve the matter since the builder’s previous letter of 31 May 2013. The letter of 31 May 2013 banned Winlife from the worksite and notified Winlife of its intention to obtain quotations to address the defects in the cabinetry works.

- 146 In my view, the builder terminated the Winlife cabinetry contract by its letter to Winlife dated 31 May 2013.

147 Meanwhile, Mr Yucel engaged Mr Mitchell to inspect and report on the quality of the cabinetry works. Mr Mitchell inspected all 8 of the St Kilda units and took photographs on 27 June 2013. Mr Mitchell subsequently produced a brief report dated 4 July 2013.

Was the builder's termination of the Winlife contract justified?

148 The reasons for the builder's termination of the Winlife contract are briefly stated in the builder's letter to Winlife dated 31 May 2013:

During the installation phase of the cabinet works, the owner expressed concern about the quality of the cabinets and the quality if [of] the installations which have been communicated through the builder to you. The defects are too numerous to mention and they have not been rectified and the product is not fit for purpose. Furthermore the delays in installation have caused significant delays and associated costs on the project

149 It appears then, that the builder terminated the Winlife contract by reason of the poor quality of the cabinetry works, and the delay in carrying out the works.

Delay

150 There is no evidence that Winlife and the builder agreed to a specific period of time for the completion of the cabinetry works. The most that might be said is that the contract included an implied term that the works would be carried out within a reasonable time.

151 The evidence before me is that:

- On about 17 or 18 April 2013, agreement was reached for Winlife to take over the cabinetry works contract;
- While some of the cabinetry, perhaps even a significant proportion, had been fabricated at the time Winlife took over the cabinetry contract, cabinetry had not yet been installed in the St Kilda units;
- 5 to 6 weeks after taking over the cabinetry contract, that is by late May 2013, Winlife says the works were 97% completed.
- Photographs produced in Mr Rozenbes' report and the photographs taken by Mr Mitchell at his inspection on 27 June 2013 indicate that the installation of the cabinetry was well progressed as at the time the builder terminated the Winlife contract. In my view it is fair to say that the works were well progressed and approaching completion, albeit that there were issues as to quality of the works.

152 The evidence does not support the proposition that Winlife was taking an unreasonably long time to complete the cabinetry works. Rather, the evidence indicates that a significant proportion of the cabinetry works to the 8 units, including kitchens, bathrooms and wardrobes, had been carried out in the 5 to 6 week period since Winlife took over the job.

153 I am satisfied on the evidence that the builder was not entitled to terminate the Winlife contract on the basis of delay on the part of Winlife.

Quality of cabinetry works

- 154 I heard evidence from three expert witnesses, Mr Mitchell, Mr Simpson and Mr Beck. Each of them also produced written reports.
- 155 Only Mr Mitchell had the benefit of inspecting the full extent of the cabinetry installed by Winlife. At his inspection on 27 June 2013, Mr Mitchell took a large number of photographs of the cabinetry in each of the 8 units. In around late July 2013, the owners arranged for the cabinetry to be rectified and completed. A number of tradespersons were engaged by the owners for these works, including Djuric Nominees Pty Ltd trading as “VRBAS Cabinet Makers” (“VRBAS”). The rectifications included replacing much of the cabinetry, particularly in the kitchens of the 8 units.
- 156 By the time Mr Simpson and Mr Beck were engaged to inspect the premises in 2014, the rectification / replacement works were completed. While they were able to inspect such of the Winlife works which had not been replaced, their assessments as to the alleged defects in the cabinetry installed by Winlife are founded primarily on their inspection of the photographs taken by Mr Mitchell on 27 June 2013.
- 157 Much of the concurrent evidence of Mr Mitchell, Mr Simpson and Mr Beck was spent examining and discussing Mr Mitchell’s numerous photos of the alleged defective cabinetry works in each of the 8 units.
- 158 The photos depict numerous instances, across all 8 units, of defects including the following:
- rough saw cuts to cabinetry panels;
 - small chips to laminated panels and doors;
 - cabinetry installed out of plumb/out of level;
 - unsightly filling of gaps, particularly where cabinetry abuts out of plumb walls;
 - misaligned cupboard doors/uneven door margins;
 - panels cut short / over cuts leaving unsightly gaps;
 - excessive/unnecessary unfilled screw and nail holes;
 - sloppy use of a button sized cover plates over screw heads;
 - sloppy fitting of sliding the wardrobe door tracks; and
 - out of level bench tops.
- 159 Mr Mitchell acknowledges the challenge in achieving a satisfactory finish when one is installing new cabinetry in old buildings where some walls are out of plumb, as was the case here. He says, however, that the result achieved by Winlife was very poor.
- 160 Mr Mitchell acknowledges that many of the defects depicted in his photographs are, when taken in isolation, minor items which might

ordinarily be rectified in the “finishing” stage. However, he says that the defects cannot be considered in isolation. He says the defects covered almost every aspect of the cabinetry and were so numerous that piecemeal rectification would not achieve a satisfactory finish. He says it was necessary to replace much of the cabinetry to achieve a satisfactory finish.

- 161 Mr Beck does not accept that all of the items depicted in Mr Mitchell’s photographs constitute defective works requiring rectification. He says that some of the items are so minor, or in such hidden places such as the insides of cupboards, that rectification is not warranted.
- 162 Mr Beck does, however, agree that many of the items depicted in Mr Mitchell’s photographs depict cabinetry work that requires rectification. The items are plain enough to see, such as misaligned cupboard doors, unsightly gap finishing, over cuts and excessive nail/screw holes. Unlike Mr Mitchell, however, Mr Beck says that the vast majority of defects were not out of the ordinary, and that they could have been rectified by Winlife in the ordinary course of finishing off the cabinetry work. Misaligned cupboard doors, for example, would ordinarily be aligned in the finishing off stage by adjusting the adjustable hinges. Mr Beck does not agree that wholesale replacement of the cabinetry was required.
- 163 Mr Simpson’s opinion falls somewhere between Mr Mitchell and Mr Beck. While he agrees with Mr Beck that a number of the items depicted in the photographs are too minor to be considered “defects”, and while he agrees that some of the alleged defects are simply items requiring “adjustment”, he also considers that the prevalence of the defective items throughout all the cabinetry adds up to generally unacceptable workmanship.
- 164 Having heard the evidence from the experts, and having viewed the photographs, and allowing for the fact that Winlife had not fully completed the cabinetry installation, I am satisfied that the cabinetry installed by Winlife was so riddled with defects that it was necessary, in order to bring the cabinetry to a satisfactory standard finish, to remove and replace much of the cabinetry, as the owners ultimately did. I do not accept that the majority of the defects were matters that would ordinarily be addressed in the “finishing” stage of the works. In my view, the cabinetry was substantially defective, not merely unfinished.
- 165 The Winlife contract with the builder was a contract for works and materials. The contract carried implied terms that Winlife would exercise reasonable care in carrying out the works and that the materials would be reasonably fit for purpose. These terms are implied by law. They go to the essence of the contract. If the terms are not met, the benefit the builder is entitled to expect under the contract would be rendered worthless or seriously undermined. In this sense, the terms are essential or “fundamental” terms of the contract.

- 166 Breach of a fundamental term raises an entitlement in the hands of the party who has, by the breach, been substantially deprived of the intended benefit of the contract to terminate the contract.
- 167 Having regard to the poor quality of the cabinetry as discussed above, I find that Winlife breached the implied fundamental terms of the contract, and the builder was entitled to terminate the contract, as it did.

TERMINATION OF BUILDING CONTRACT

- 168 The works under the building contract attract the mandatory warranties set out in section 8 of the Act (“**the section 8 warranties**”), which include the following:
- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
 - (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
 - (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act²;
 - (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

169 It is clear from Mr Eski’s evidence that, after the Winlife cabinetry contract was terminated, the builder refused to bear the cost of rectifying the defective cabinetry work. The builder was aware that rectification of the defective cabinetry would involve significant cost, with much of the cabinetry to be replaced. Mr Eski had, after the termination of the Winlife contract, began seeking quotations from cabinetmakers. The builder was prepared to engage a replacement cabinetry sub-contractor, but only at the owners’ cost.

170 As I have found above, the cabinetry works fell within the builder’s scope of works under the building contract.

171 On 1 July 2013, the builder forwarded to the owners its invoice for outstanding “builders fee” in the sum of \$129,200.50. Mr Eski had calculated the invoice on the basis of the total of all “direct costs” as advised to him by Mr Yucel. Mr Eski made no deduction in respect of the cabinetry works. That is, in calculating the builder’s fee, the “direct cost” of the cabinetry works was included. On 12 July 2013, the builder gave notice

of its intention to terminate the building contract unless the owners paid the invoice in full.

- 172 In my view it is not credible for builder to assert, on the one hand, that the owners, not the builder, engaged Winlife, and then on the other hand to calculate its builder's fee as a percentage of the "direct cost" of works including the cabinetry works.
- 173 Upon the assertion that the cabinetry installed by Winlife was not "fit for purpose", the builder terminated Winlife's cabinetry contract. As the cabinetry was within the builder's scope of contract works, cabinetry not "fit for purpose" constitutes building works which do not meet the section 8 warranties.
- 174 In my view, the builder was obliged to bear the cost of rectifying the defective cabinetry because the cabinetry fell within the builder's scope of works under the building contract. By refusing to do so, the builder was refusing to comply with its contractual obligation in respect of the section 8 warranties. In my view the builder, by such refusal, evinced an intention to not be bound by the contract. That is, the builder "repudiated" the building contract and the owners were entitled to "accept" such repudiation and bring the contract to an end.
- 175 I find that, by their letter dated 16 July 2013, the owners exercised their entitlement to "accept" the builders' repudiation of the contract and bring the contract to an end. It does not matter, in my view, that the letter references numerous other grounds (numerous other alleged breaches of the building contract on the part of the builder) that may not have been sustainable. In my view, the owners were entitled to bring the contract to an end by reason of the builder's repudiatory conduct as discussed above, and the owners, by their letter dated 16 July 2013, unequivocally elected to exercise that entitlement.
- 176 For the above reasons, I find that the owners validly terminated the building contract on 16 July 2013.

ASSESSMENT OF CLAIMS

THE BUILDER'S CLAIM FOR \$129,200.50

- 177 As discussed above, the builder cannot enforce the contract. As such, its claim for payment of its last invoice in the sum of \$129,200.50 fails. As discussed later in these reasons, I think it fair that, pursuant to section 13(3) (b) of the Act, the builder be fairly compensated for the works it carried out.

THE OWNERS' CLAIMS

OVERPAYMENT OF \$356,159

- 178 The owners say that they have "overpaid" the builder \$356,159. They arrive at this figure as follows:

First, they say that the total sum properly payable by them for the works under the building contract should not, under any circumstance, have exceeded a *reasonable* sum. They say a reasonable sum is \$1,099,860, calculated as the builder's contract price estimate specified in the building contract, \$1,047,485.80, plus 5% of that estimate as a reasonable extra allowance for contingencies.

Next, they say that the total sum paid for works carried out up to the date they terminated the building contract, excluding the 16% builder's fee, was \$1,288,805.55. To this figure they:

- add 16% allowance for builder's fee, \$206,208.89,
- subtract \$138,402.94 as allowance they say ought be made for variation reductions in the scope of the building contract works, and
- add \$99,407.72 as the cost they say they have incurred to complete some, but not all, of the building contract works after they terminated the building contract,

to arrive at a total of \$1,456,019.22.

From this figure they subtract the abovementioned "reasonable" contract sum, \$1,099,860, to arrive at the claimed "overpayment" of \$356,159.

179 The quantum of this claim changed several times: In their counterclaim filed in November 2013, the owners claimed \$294,223.60. In their amended counterclaim dated 19 September 2014, the sum was amended to \$236,708.41. In their updated Particulars of Loss and Damage, filed during the course of the hearing on 23 December 2014, the sum was amended to \$395,543.49. By the conclusion of the hearing, the sum was \$356,159.

180 In my view the claim is fundamentally misconstrued. It is founded on the premise that the parties' entitlements and obligations under the *cost plus* contract are akin to the entitlements and obligations of parties under a fixed price contract, and a nominal fixed price is reached by adding a reasonable allowance (say 5%) on top of the contract price estimate. The rationale for the premise is broadly stated in the owners' closing written submissions:

Section 13 [of the Act] must be read in statutory context, that is, in light of the Act's focus on a regime of fixed-price contracts in order to avoid cost blowouts to Owners.³

181 I do not accept the submission. The purposes of the Act are clearly set out in section 1 of the Act :

The main purposes of this Act are—

- (a) to regulate contracts for the carrying out of domestic building work; and
- (b) to provide for the resolution of domestic building disputes and other matters by the Victorian Civil and Administrative Tribunal; and

³ Owners' written submissions paragraph 106

- (c) to require builders carrying out domestic building work to be covered by insurance in relation to that work; and
- (d) to amend the **House Contracts Guarantee Act 1987**, and in particular, to phase out the making of claims under that Act.

182 True to purpose (a) above, the Act makes numerous provisions regulating contracts for the carrying out of domestic building work. Part of the regulatory framework is to place restrictions on cost plus contracts. Under section 13(1), a builder must not enter a cost plus contract unless it is of a class allowed by the regulations, or:

the work to be carried out under the contract involves the renovation, restoration or refurbishment of an existing building and it is not possible to calculate the cost of a substantial part of the work without carrying out some domestic building work.

- 183 In my view, the renovation of a 100-year-old block of apartments, as was the case here, falls squarely within the type of work contemplated under section 13 (1).
- 184 Section 13 of the Act provides that a builder will be unable to enforce a cost plus contract against an owner if the contract does not contain a fair and reasonable estimate by the builder of the total amount of money the builder is likely to receive under the contract, however the tribunal may award the builder the cost of carrying out the work plus a reasonable profit if the tribunal considers that it would not be unfair to the owner to do so.
- 185 These are specific provisions regulating cost plus contracts. I do not accept, as the owners appear to be submitting, that having regard to some perceived “focus” of the Act, a cost plus contract can be treated as if it was a fixed price contract.
- 186 A cost plus contract, by its very nature, has no fixed price. In this case, the contract price was to be the sum of the “direct costs”, as defined in the contract, plus a builder’s fee of 16% of the direct costs sum, plus GST.
- 187 For the reasons set out above, I do not accept that the contract can be treated as a fixed price contract with a nominal fixed price. Accordingly, the owners’ claim for the alleged “overpayment”, over and above a nominal fixed contract price, fails.

MISLEADING/DECEPTIVE CONDUCT

- 188 As an alternative to the “overpayment” claim, the owners claim the same sum, \$356,159, as the loss they say they have suffered by reason of the misleading and deceptive conduct, or the unconscionable conduct, of the builder. As I understand it, the alleged misleading and deceptive or unconscionable conduct is the builder’s false representation, contained in the building contract, as to the total amount of money the builder was likely to receive under the contract.
- 189 The owners say that the representation was made without reasonable cause and was false, as is demonstrated by the significant “cost blowout” in the

actual cost to carry out the works. The owners say they were induced to enter the building contract by reason of the builders misleading and deceptive/unconscionable conduct.

190 I do not accept this claim for two reasons.

191 First, I am not satisfied on the evidence that the owners [through Mr Yucel], were induced to enter the contract on the basis of the builder's contract cost estimate as written into the building contract by Mr Eski. There is no evidence as to what Mr Yucel might have done had the contract price estimate been based on the [true] estimate of Mr Odicho. The evidence before me is that the owners, through Mr Yucel, were agreeable to a cost plus contract under which Mr Yucel would exercise considerable control in relation to the selection and payment of subcontractors.

192 Second, even if I found that the owners entered the contract in reliance on false or misleading conduct on the part of the builder, I do not accept that the owners suffered the loss claimed, \$356,159, as a result. The calculated sum is, as discussed above, founded on a misconception. There is no evidence upon which one might quantify a detriment, if any, to the owners arising from the alleged false or misleading conduct.

DELAY DAMAGES

193 The building contract provides for *liquidated* damages for delay payable by, or to be allowed by, the builder at a weekly rate of \$2,483 for each week after the due completion date until the building works are actually completed or until the buildings are occupied, whichever is the earlier date. The contract also provides that in the event the contract is terminated, the liquidated damages "*cease to accrue as of the date of termination.*"⁴

194 The parties agree that the due date for completion of the works under the contract, assuming no extensions of time, was on or about 2 May 2013.

195 Certificates of Occupancy for the 8 units were issued on 20 November 2013.

196 As I understand it, the owners claim \$69,524 as delay damages, calculated as \$2483 per week for the 28 week period from the due date for completion of works, 2 May 2013, until the issue of the certificates of occupancy, 20 November 2013.

197 In the owners' Amended Counterclaim dated 19 September 2014, this head of damage was characterised as liquidated damages payable pursuant to the contract.

198 In the owners' updated Particulars of Loss and Damage filed during the course of the hearing on 23 December 2014, this head of damage was characterised as "*liquidated damages alternatively damages at common law for delay*". The change in characterisation was the result of the owners'

⁴ clause 20 in the building contract

concession, made during the hearing, that their contractual right to liquidated damages could not extend beyond the date they terminated the contract, 16 July 2013.

199 As I understand it, then, the owners' delay damages claim is now made up of :

- a) \$26,071.50 as liquidated damages pursuant to the contract, calculated as \$2483 per week for the period 3 May 2013 (the day following the due date for completion) to 16 July 2013 (the date the owners terminated the contract), a period of 10.5 weeks; and
- b) common law damages, at \$2483 per week, for the period 17 July 2013 to the date of the issue of occupancy permits, 20 November 2013.

200 The building contract allows for the extension of the due date for completion of works when it is fair and reasonable, subject however to the builder providing written notice to the owner of the cause and expected length of the extension of time.

201 The builder may well have had valid reason to claim extensions of time, particularly having regard to a number of the variations to works carried out at the request of the owners. However, prior to the termination of the contract, the builder made no written claims for extension of the completion date. Accordingly, I am satisfied that the due date for completion of the works under the building contract was not extended beyond 2 May 2013. Accordingly, I am satisfied that under the terms of the building contract, the owners are entitled to the liquidated damages for delay in the sum of \$26,071.50.

202 The nature of the delay damages at common law claimed by the owners, over and above the contractual liquidated damages for delay, is unclear. In the owners' updated Particulars of Loss and Damage filed on 23 December 2014, the common law component of delay damages is characterised as "*interest cost on borrowings*".

203 In closing written submissions, the common law delay damages are characterised as lost rent:

[The contractual rate for liquidated damages]...is a good estimate of the Owners loss for delay and so at common law the Owner is entitled to damages for breach of contract equivalent to \$2,483 per week due to lost rent. The Owners are entitled to be put in the position they would have been but for the breach of contract.⁵

[underlining added]

204 The owners produced the following documents:

- NAB bank statements for the period 28 June 2013 to 30 November 2013 in respect of two bank accounts, one in the name

⁵ Owners' closing written submissions paragraph 18

of “Gaycel Pty Ltd”, and the other in the name of “Gaycel Pty Ltd Superannuation Fund”

- several documents from the NAB confirming the interest rate for loan facilities provided to “Gaycel Pty Ltd as trustee for Gaycel Pty Ltd Superannuation Fund”
- a schedule prepared by Mr Yucel sending out interest paid on loans, presumably by Gaycel Pty Ltd, in the period June 2013 to December 2013.

205 In his witness statement, Mr Yucel provides a brief summary of what appears to be alternative methods of calculating financial loss arising from the delay in completion of the building works and/or the extra borrowing costs associated with the extra cost of the building works over and above the builders contract price estimate.⁶ It is difficult to understand the commentary and calculations in his witness statement, and no further explanatory evidence was given at the hearing.

206 The common law delay damages are claimed for the period 17 July 2013 to 20 November 2013. I accept that further works, including replacement of much of the cabinetry, were required to bring the building works to completion. However, there is no satisfactory explanation as to why it took 4 months (after the owners terminated the building contract) to complete the works necessary to obtain occupancy permits for the units.

207 The owners counterclaim filed in this proceeding makes no reference to common law damages of this nature.

208 On all the evidence, I find that the owners have failed to prove their claim for delay damages allegedly incurred after the termination of the building contract.

209 For the above reasons, I will allow delay damages – liquidated damages for delay pursuant to the building contract - in the sum of **\$26,071.50**.

OVERCHARGE IN RESPECT OF BUILDER’S OWN WORKERS.

210 During the course of the hearing, the owners sought to bring a further new claim for damages for the builder’s alleged overcharging for its own workers/employees.

211 The building contract, at item 11.2 in the appendix in the contract, sets out the various costs and expenses which may be included in the “direct costs” incurred by the builder. One of the expenses included is “*where the builder... carries out any work directly, reasonable rates for carrying out that work*”.

212 Before the building works commenced, the builder and the owners agreed that the builder would charge its own employees/workers out at the rate of \$500 per day, per worker.

⁶ Tribunal book pages 17-18

- 213 The owners say that the builder exploited this agreement by taking an unreasonably long time to carry out works, particularly the first stage demolition works. The owners say also that \$500 per day per worker is an unreasonable charge rate, and a rate well in excess of the actual cost incurred by the builder.
- 214 Invoices produced by the builder indicate that the total sum paid by the owners for the “direct cost” of the builders own workers was \$124,960.
- 215 During the hearing, at the request of the owners, the builder produced some of its business records. On the basis of those records, incomplete as they were, the owners estimate that they paid the builder approximately \$86,124 more than the actual cost to the builder of its own workers engaged in the building works.
- 216 The builder objected to this new claim being raised after the commencement of the hearing. The owners say that they ought to be permitted to bring the claim because they were only first able to identify and calculate the claim upon the production of the builder’s business records during the course of the hearing.
- 217 In my view the claim should not be allowed. I do not accept that the owner was unable to identify this claim well prior to the commencement of the hearing. There is no reason why the owners could not have raised this claim early in the proceeding and sought discovery of relevant documents. To allow the claim so late in the proceeding, without notice and without full discovery of all relevant documentation would, in my view, raise an unfair prejudice against the builder.
- 218 In any event, even if I allowed the claim to be brought, I would dismiss it because the charge rate for the builder’s workers was the rate *agreed* to by the owners and the builder. In my view, it is not open to the owners to now, in hindsight, seek to amend that agreement or set it aside on the basis that the *agreed* rate was not reasonable. Further, as discussed above, Mr Yucel discussed his concerns with Mr Eski when Mr Eski returned from his honeymoon in January 2013. The outcome of that discussion was an agreement whereby the builder agreed to remove his workers from site once the frame rectifications were completed, and the builder also agreed to discount its charges by \$10,000. Again, it is not open to the owners to now, in hindsight, seek to change the prior agreement with the builder.

SUPERVISION AND MANAGEMENT BY MR YUCEL

- 219 After termination of the building contract, Mr Yucel arranged and managed the completion of the renovations to the units. The owners claim the value of Mr Yucel’s time spent in this regard, calling it the “*lost value of the supervision and management of post termination repair and completion work*”.
- 220 The sum claimed is \$28,551. This is 15% of the total sum (\$190,341.96) the owners say they have spent, after the termination of the building contract,

on rectifying and completing works. They say that 15% is a fair allowance having regard to the 16% allowance for builder's fee in the contract.

221 There is no evidence, and it is not suggested, that the owners have actually paid Mr Yucel, or are liable to pay him, any sum for this managerial/supervisory role. There is no evidence to substantiate any cost to the owners incurred by reason of Mr Yucel's management of the building works after the termination of the contract.

222 There being no evidence of any loss, this claim fails.

RECTIFICATION COSTS

223 The owners are entitled to be compensated for the reasonable cost they have incurred, or will yet incur, in rectifying defects in the building works carried out by the builder and the builder's subcontractors. Defective works in this sense means works which do not meet the section 8 warranties. This includes rectification costs incurred by the owners before the termination of the building contract, including rectification works carried out by the builder itself or its subcontractors where the owners have been charged for such rectification works.

224 In assessing the owners' claims in respect of costs incurred after the termination of the building contract, it is necessary to distinguish, as best it can be done, between the cost of *completing* works which were unfinished at the time of termination of the contract, and the cost of *rectifying defective* works.

225 The owners are entitled to be compensated for the cost of rectifying defective works, but they are not entitled to be reimbursed the cost of completing unfinished works. This is because the contract was a "cost plus" contract, not a fixed price contract.

226 Under a fixed price contract, the owners would be entitled to claim the extra expense, over and above the contract price, of completing the contract works. But, as discussed earlier in these reasons, this is not a fixed price contract. The effect of the owners' termination of the contract is that the contract is brought to an end and, if I think it not unfair to the owners, the builder is entitled to reasonable compensation for the works it carried out including a reasonable profit. I discuss the builder's entitlement in this regard later in these reasons. The owners remain entitled to be compensated for the reasonable cost incurred, or to be incurred, in rectifying defects in the building works which were carried out by the builder and the builder's sub-contractors.

Variation works

227 Mr Eski and Mr Yucel each gave evidence as to the nature and scope of variations to the contract works. Mr Mitchell and Mr Simpson also gave concurrent expert evidence as to the nature and scope of the variations and their opinion as to a reasonable allowance, whether a "plus" or "minus", in

respect of such variations. In my view, much of this evidence is irrelevant having regard to the “cost plus” nature of the building contract.

- 228 For example, a claim was made in respect of the exterior render works. The owners say that the building contract contemplated “patch and repair” render works whereas what was actually provided, and paid for, was a complete re-render of the exterior of building. The builder says that the owners requested and approved the render works actually carried out.
- 229 I heard evidence from Mr Mitchell and Mr Simpson as to what extent the render works carried out constituted variation “extra” works. That is, to what extent the render works differed from the works provided for in the building contract documentation. Mr Mitchell and Mr Simpson also gave their opinion as to the reasonable cost of render works. The point of the evidence, from the owners’ standpoint, was to show that the owners paid more than they should have for the render works, having regard to the contemplated works under the building contract.
- 230 In my view, the claim is misconstrued. It is founded on the previously discussed misconstrued premise that a “cost plus” contract can be treated as if it was a fixed price contract with a nominal fixed-price. The very nature of a “cost plus” contract is that it is not possible to calculate the cost of the proposed building works without carrying out some of the proposed works.
- 231 The renderer sub-contractor was paid directly by the owners for the render works actually carried out. I heard little, if any, evidence that the sum charged was excessive. The evidence was directed at whether the works carried out by the builder were variation works, and if they were, whether the builder was entitled to charge for the variation works, and if so how much.
- 232 The extent to which the render works actually carried out may have constituted “variations” to the original scope of works under the building contract is not the point.
- 233 The cost of the rendering may have exceeded the estimated “direct cost” of rendering works as at the time the contract was signed. But that does not create a claim in the hands of the owners.
- 234 On the evidence before me, I am satisfied that the owners have retained the benefit of the render works actually carried out, and there is insufficient evidence before me to find that the cost of such works, as paid directly to the sub-contractor by the owners, was excessive. For this reason, and because the building contract was a “cost plus” contract, I find that the owners have no entitlement to damages in respect of the alleged extra cost of the render works. My finding in this regard does not affect any claim the owners may have as to the cost of rectifying *defective* render works for which the builder holds contractual responsibility.
- 235 A similar analysis applies to other “variation” works raised by the owners:
- a) the cost of steelwork for roofing over the two stairwells;

- b) front porch roofs over stairwells;
- c) extra tiling to the extended roof line;
- d) additional fireplaces and timber framework around chimneys;
- e) granite steps around fireplaces;
- f) addition of disabled access ramp;
- g) strengthening of upper level floors;
- h) insulation to walls and sound batts;
- i) upper story ceiling battened down on channels;
- j) timber floors instead of carpet (the cost to rectify defects in bamboo flooring is discussed later);
- k) brick courtyard wall in place of scyon matrix;
- l) picket fence replaced with powder coated aluminium fence;
- m) extra eaves;
- n) extra decking;
- o) wardrobe mirror sliding doors;
- p) cost of extra tiling throughout the units;
- q) extra electrical works including LED lights, data and Internet points; and
- r) internal doors design change.

236 The owners have retained the benefit of all of the above works. They are not works which the builder has carried out under a frolic of its own. They are works requested by the owners or alternatively works carried out with the knowledge and approval of the owners. It is irrelevant whether some of the works, or parts of some of the works, constitute variation works under the building contract. The works have been done, the subcontractors have been paid directly by the owners and the owners have retained the benefit of the works. The owners are not entitled to compensatory damages in respect of the cost of such works.

237 A similar analysis applies to the charges made by the builder in respect of demolition works and wall framing works. I heard evidence from Mr Eski, Mr Yucel and the experts Mr Mitchell and Mr Simpson in relation to these works.

238 The builder says that, during the early demolition stage works, Mr Yucel expressed concern as to the structural integrity of a number of walls on the first level units. There is no dispute that the builder demolished extra sections of wall, 22 extra sections in all, over and above the sections of wall marked for demolition in the original construction drawings. There is no dispute that the builder constructed new timber stud walls in place of the removed walls. There is no dispute that the extra works included extra

“propping” of existing works while the demolition and replacement of walls took place.

- 239 The owners challenge the extent to which the builder was entitled to charge for these “extra” works. Much of the evidence on the issue was directed at whether the original construction drawings could be construed as including some, if not all, of the extra works. The experts also gave evidence as to the reasonable cost of such extra works.
- 240 Again, in my view it is irrelevant whether such works constituted variation works under the building contract. The works were carried out at Mr Yucel’s direction and/or with Mr Yucel’s knowledge and approval. The owners have retained the benefit of those works. The builder was paid for the works at the agreed “direct cost” charge rate for its workers, \$500 per day per worker. Whatever Mr Mitchell or Mr Simpson might consider to be a reasonable charge is, in my view, irrelevant in view of the agreed daily charge rate for the builder’s workers. I do not accept, on the evidence before me, that the builder extorted the situation by taking longer than necessary to carry out the works. Having heard evidence from the experts, I am satisfied that the demolition works were tedious and painstaking, and the builder took appropriate measures in carrying out such works. I am not satisfied on the evidence before me that the owner is entitled to compensatory damages in respect of these “direct costs” paid to the builder at the agreed rate.

Plastering

- 241 The plastering works carried out were more extensive than those contemplated at the time the contract was signed. As with the above listed variation works, the owners have no entitlement to the “extra” cost of plastering works merely because the works were more extensive than the original contract scope of works.
- 242 However, the owners are entitled to be compensated to the extent that the plastering works carried out by the builder’s subcontractor were defective.
- 243 The builder’s plaster work subcontractor was “Shield Plastering Services Pty Ltd” (“**Shield**”). The Shield contract price was \$77,000. The price was increased by \$5,500 for variation extra works in relation to plastering a suspended ceiling.
- 244 Mr Yucel was dissatisfied with the quality of some of the plastering works carried out by Shield. Shield asserted that the plastering works they carried out were in accordance with the scope of works under their contract with the builder, and that if the builder required a higher quality finish or extra plastering work, then the builder must pay extra.
- 245 Before Shield had completed its contract works, Shield and the builder fell into dispute as to whether Shield’s works were in accordance with their contractual obligation, and whether Shield was entitled to extra payment for some of the works. The dispute was not resolved and Shield ceased works.

At the time it ceased works, Shield had been paid \$59,500, leaving an unpaid contract balance of \$23,000.

- 246 A replacement plasterwork contractor, Piint.Com.Plaster Pty Ltd (“**Piint**”) was engaged to complete the plastering works. The owners made direct payments to Piint totalling \$26,715. The owners claim from the builder \$3715, being the difference between the total sum paid to Piint and the unpaid contractual balance of the Shield sub contract (“\$23,000”). It is claimed as the cost to rectify defective plastering works carried out by Shield.
- 247 Having examined Piint’s invoices for the works it carried out, and having regard to a letter from Piint to the owners and the builder dated 18 March 2013 wherein Piint lists defects in the plaster works carried out by Shield, I am satisfied that Piint’s works included significant rectification works, and the claim of \$3,715 in respect of such rectification works is reasonable.
- 248 Accordingly I allow **\$3715** in respect of this item.

Roof trusses pitch

- 249 The owners claim \$1,294 as the cost they say they paid to rectify the incorrect pitch of the new roof trusses installed by the builder.
- 250 There is insufficient evidence to substantiate this claim.
- 251 The owners refer to an invoice of Jarah Construction to the owners dated 16 December 2012 in a sum of \$1,377.75. As noted earlier, Jarah Construction is the corporate vehicle of the carpenter Mr Aaron Johnson.
- 252 The invoice identifies the various items of work making up the total charge. Some of those items of work make reference to the construction of hip roofs at the front of the units. There is nothing in the invoice to suggest that the roof works were necessary to rectify incorrect pitch in the roof trusses. There is nothing in the invoice to suggest that any of the works were related to rectification of defective works.
- 253 Mr Johnson, who gave evidence at the hearing, gave no evidence as to the alleged incorrectly pitched roof trusses.
- 254 On the evidence before me, I am not satisfied that the owners incurred any cost in rectifying defective roof trusses installed by the builder. I make no allowance for this item.

Timber window extensions

- 255 The owners claim \$2,175.40 as the cost they say they incurred in rectifying timber windows. They say that the builder ordered windows with insufficient reveal size, and that the reveals had to be rectified (extended) on-site.
- 256 Mr Johnson confirmed in his evidence that the window reveals had to be extended on site.

- 257 Mr Eski concedes that the windows ordered by the builder were too narrow. However, he says that the windows ordered were standard size windows, and that windows of the correct width would have been non-standard size and, as a consequence, more expensive. Mr Eski says the extra cost to extend the undersized reveals was no more than the extra cost of the non-standard sized windows.
- 258 Mr Eski produced no documentary evidence to substantiate the alleged standard/non-standard sized windows and the cost differential between the two.
- 259 On all the evidence, I am satisfied that the owners incurred extra expense in rectifying incorrectly sized windows, and that it is reasonable that the builder bear the cost of the rectification works.
- 260 However, the evidence as to the cost of such rectification works is limited. The owners refer to two invoices of Jarah Construction, one dated 6 January 2013 and the other dated 10 January 2013. Each of the invoices itemise works carried out. I am satisfied that charges totalling \$495 (not including GST) relate to the rectification of the windows. Those charges are for labour only. Although the invoice dated 6 January 2013 makes reference to materials obtained from Bowens at a cost of \$4254.31, there is no indication as to what those materials were. Mr Johnson gave no evidence on this issue which might have assisted.
- 261 I am satisfied, however, that extra materials would have been required for the extension of the window reveals. In one of Mr Yucel's spreadsheets⁷, the owners identify that the materials included the cost of timber at \$427.09 and treated pine screws at \$84.40. If the owners have produced invoices in respect of such materials cost, I am unable to locate them. However, having regard to the nature of the rectification works, I am satisfied that the claimed material cost for timber is reasonable. I consider the claimed cost for screws to be excessive. I will allow \$450 as the reasonable cost for timber and screws. After also allowing \$544.50 (including GST) for labour, I allow a total of **\$994.50** for this item of rectification works.

Framing rectification

- 262 As noted earlier in these reasons, in January 2013 the engineer, Mr Baygar, detailed rectification works required to the framing in order to meet the requirements of the building surveyor. The required works are set out in Mr Baygar's letter to Mr Yucel dated 23 January 2013.
- 263 The builder attended to the rectifications and the framing was subsequently approved by the building surveyor. As noted earlier, the builder did not charge for the rectification works.
- 264 The owners claim additional costs associated with these rectification works:
- materials cost \$1250.79

⁷ Exhibit R6

- building surveyor (further inspection) \$192.50
- cost of the engineer, Mr Baygar \$2,453

265 Although the owner has produced sundry invoices from various general suppliers including Bowens and Bunnings, I am unable to say that any particular invoices relate to materials associated with the rectifications to the framing. It may be that the builder bore the cost of any extra materials associated with the rectification works. There is no evidence on this issue, and accordingly, I make no allowance for material cost.

266 I am satisfied that the owners incurred the extra cost of the building surveyor and the engineer in relation to these rectification works. The engineer inspected the works and prepared a detailed list of the rectifications required, and the building surveyor was required to carry out an additional inspection to certify the rectification works. I am satisfied that the charges are reasonable and I allow **\$2,685.50** for this item of rectification work.

Party wall

267 The owners claim \$480 as the cost they say they incurred in removing timber framing to install a fire rated plaster party wall. Reference is made to the Jarah Construction invoices dated 6 January 2013 and 10 January 2013. The invoice dated 10 January 2013 makes reference to works related to firewalls, however there is nothing in the invoices to suggest that the charges relate to any rectification works. Mr Johnson gave no evidence to assist on this issue.

268 On the evidence before me, I am not satisfied that the owners incurred the alleged rectification cost. I make no allowance for this item.

Aluminium doors and windows

269 The owners claim \$4127.06 as a cost they say they incurred in rectifying aluminium doors and window reveals. The works in question relate to the fitting of new aluminium windows and doors on the extension (northern) side of the building.

270 I am satisfied, on Mr Eski's evidence, that the works in question were simply part and parcel of the renovation extension works, not rectification of defective works.

271 I make no allowance for this item.

Interface between slab and timber floor

272 I accept Mr Johnson's evidence that he "packed up" areas of flooring at unit 1 on the north-western side of the building where the flooring was lower than the newly extended slab. However, I am not satisfied that these works constitute rectification of the builder's defective works.

273 Having regard to the age of the building, in my view it is no surprise that remedial/adjustment works would be required in some areas to marry old works to new. Mr Johnson confirmed this in his evidence.

274 There is no evidence that the slab was laid at the wrong height.

275 In my view these flooring works were part and parcel of the renovation works, and I am not satisfied on the evidence before me that the works constituted rectification of defective works carried out by the builder.

276 I make no allowance for this item.

Electrical works

277 The owners claim \$11,920 as the cost they say they incurred in rectifying defective electrical works carried out by the Builder's original electrical subcontractor.

278 There is little dispute that some of the works of the original electrical subcontractor, "Enter Electrical", were of poor quality and the subcontractor ceased carrying out works on site in around March 2013.

279 An alternative electrical contractor, Total Energy Vic Pty Ltd, was called in to inspect the electrical works, and was subsequently engaged to complete the electrical works including rectification of any defective works.

280 Mr Gilligan of Total Energy Vic Pty Ltd gave evidence. Mr Gilligan says that the electrical works carried out by the previous subcontractor were "a mess". Mr Gilligan identified numerous defects in the works including:

- unsupported or incorrectly clipped cables;
- cables installed in concrete with no protective conduit;
- no separation between television, data, phone and power cables;
- mains inappropriately installed through a firewall behind the chimney; and
- incomplete feeds.

281 Total Energy Vic Pty Ltd ultimately charged in excess of \$35,000 for the works it carried out, however the documents produced - Total Energy's estimate dated 9 April 2013 and its invoice dated July 10, 2013 - do not itemise rectification works separate from incomplete works.

282 The documents do, however, confirm Total Energy's hourly charge rate at \$80 per hour (not including GST) per person, and Mr Gilligan gave evidence that that Total Energy spent over 100 hours rectifying non-compliant electrical works.

283 Accepting Mr Gilligan's evidence, I am satisfied that substantial rectification works were carried out. I am also satisfied that it is fair to allow 100 hours at \$88 per hour (inclusive of GST) as the reasonable cost incurred by the owners in rectifying defective electrical works .

284 Accordingly, I allow **\$8,800** for this item.

French door hinges

285 The building works included installing French doors opening to outside areas of the units. The builder installed the French doors, however the hinges were found to be inadequate and the doors were removed and reinstalled with appropriate hinges. The hinges first installed allowed the doors to open approximately 90 degrees, whereas the replacement hinges allow the doors to be opened 180 degrees.

286 The owners claim the cost incurred to rectify the doors as follows:

- \$2174 labour charge (80.5 hours at \$27 per hour) for carpenter Mr Riki Fielding
- \$1815 labour charge (60.5 hours at \$30 per hour) for Jarah Construction (Mr Aaron Johnson)
- \$1828.40 materials charge, including \$1120 for the replacement “parliament hinges” and \$578 for timber.

287 Mr Eski says that the original construction plans allowed for doors opening 90 degrees, and that the doors had to be removed and reinstalled with replacement hinges to accommodate Mr Yucel’s request that the functioning of the doors be altered so that they open 180 degrees.

288 Having heard the evidence of Mr Eski and Mr Yucel, I am satisfied that the first hinges installed by the builder were inadequate having regard to the weight and size of the doors. That is, the hinges had to be replaced regardless of the degree to which they allowed the doors to open. I am also satisfied that, whatever the drawings indicate (and they are equivocal), before installing the doors the builder was aware of Mr Yucel’s expectation that the doors open 180 degrees.

289 On the evidence before me, I find that the initial installation of the doors was unsatisfactory. To rectify the unsatisfactory work, it was necessary to remove and reinstall the doors with appropriate hinges.

290 I am satisfied that the builder should bear the cost of rectifying the defective installation of the doors. However, the owners are not entitled to all the costs they seek.

291 In my view, the owners are not entitled to the cost of materials associated with the reinstallation of the doors. Had the doors been installed correctly in the first place, the owners would still have incurred the cost of the special “parliament hinges” and the extra timber and the other materials used in reinstalling the doors. The owners might have been entitled to the cost of wasted” materials, such as the cost of the original unsuitable hinges. However, there being no evidence as to the cost of any wasted materials, I make no allowance for materials cost.

- 292 As to the labour charge, the owners produced invoices of Jarah Construction and diary notes of Mr Fielding.
- 293 The Jarah Construction invoices briefly itemise the works for which the charges have been made. Having examined the invoices, I am satisfied that Jarah Construction charged 60 hours at \$30 per hour (inclusive of GST), a total of \$1800, for rectification works to the French doors in the period 9 to 15 May 2013. I allow this sum.
- 294 The diary notes of Mr Fielding itemise labour hours, at the rate of \$27 per hour, for works carried out in April and May 2013. On Mr Yucel's evidence, I accept that Mr Fielding was engaged by the owners to carry out various carpentry works, including rectification works to the French doors. Having examined the diary notes, I am satisfied that Mr Fielding charged approximately 31 hours, at \$27 per hour, a total of \$837, in respect of rectification works to the French doors. I allow \$837.
- 295 For the above reasons, I allow a total of **\$2,637** as costs incurred by the owners in rectifying the defective installation of the French doors.

Fence render repairs

- 296 The owners claim \$1,210 as the cost they say they incurred for render repair works to a fence at the property. The owners produced a "Tru-Bond" invoice dated 21 June 2012 in the sum of \$1,210. The invoice describes the works carried out as follows:
1. repair damage on walk way fence and Jackson St side fence
 2. repair work to fence where amet tried to do it himself and I rectified
 3. patch hole outside of door
- plus materials
- 297 Mr Villettri, who is the proprietor of the business which trades as "Tru-Bond" gave evidence at the hearing. However, he gave no evidence as to the abovementioned invoice or the works identified in the invoice.
- 298 There is no evidence from Mr Eski or Mr Yucel on this particular aspect of the Tru-Bond render works.
- 299 I am not satisfied that the above-mentioned Tru-Bond invoice demonstrates any cost incurred by the owners in rectifying defects in the works carried out by the builder. At best, the above invoice indicates that Tru-Bond may have attended to certain render repair works first attempted by Mr Eski ["amet"]. But this does not necessarily mean that the Tru-Bond works included rectification of defective building works carried out by the builder. It might simply mean that, as part of the general building works, the render to the fence was to be rectified, and that following an unsuccessful attempt by Mr Eski to carry out the work, Tru-Bond attended to the work. Further, the invoice does not identify the portion of the overall charge attributable to that bit of work.

300 On the evidence before me, the owners claim in respect of this item fails.

All State Building Consultants

301 As discussed earlier, in June 2013 the owners engaged Mr Mitchell to inspect the St Kilda units and prepare a report on the cabinetry. Mr Mitchell trades as “All State Building Consultants”. The owners claim Mr Mitchell’s charge, \$3,415.50, as confirmed in an invoice dated 11 July 2013.

302 I do not accept that this is a cost incurred by the owners in rectifying defective works carried out by the builder. At the time of Mr Mitchell’s inspection, the Winlife cabinetry contract had already been terminated. There is no evidence to suggest that Mr Mitchell’s inspection and report were necessary as part of the process of having the cabinetry rectified.

303 The costs might be considered as costs associated with this proceeding, however consideration of that matter will be made if and when a future application for costs is made.

304 I make no allowance for this item in assessing the owners’ damages.

Cabinetry

305 As discussed above, I find that the cabinetry works were riddled with defects to the extent that much of it, particularly the cabinetry in the kitchens of all 8 units, had to be replaced.

306 A number of different contractors were involved in rectifying the cabinetry. The owners have produced invoices or receipts from contractors to substantiate their claim. It is difficult to isolate “completion” costs from “rectification” costs. Having seen the photos, and having heard evidence from a number of witnesses including Mr Gulcan, Mr Yucel, and Mr Eski, I am satisfied that as at the date of the builder’s termination of the Winlife contract, the cabinetry works were, ostensibly, close to completion. This had not changed as at the date of the owners’ termination of the building contract.

307 Doing the best I can to be fair, I will adopt the following methodology in assessing the reasonable cost to the owners of rectifying the defective cabinetry:

- a) first I will calculate the total sum of all invoices relied on by the owners *and* which I am satisfied relate to cabinetry works after the termination of the building contract;
- b) from the above sum, I will deduct a modest allowance for “finishing off” works, such as final adjustment of cupboards and clean up works. I will allow 5% of the invoices total for this allowance;
- c) finally I will deduct the unpaid balance of the Winlife contract, \$22,290.

308 The primary contractor engaged by the owners to rectify the cabinetry was VRBAS Cabinet Makers. The owners have produced quotations from

VRBAS. They have also produced VRBAS invoices totalling \$55,400. I accept Mr Yucel's evidence that these invoices have been paid. Having viewed the invoices, and having heard evidence from Mr Djuric, I am satisfied that all of the invoices relate to the cabinetry work and, accordingly, I allow the full sum, \$55,400.

309 The other invoices relied upon by the owners, and my findings in respect of them, are as follows:

- a) Two "cash receipts" from "Martin", one dated 17 July 2013 in the sum of \$240 and the other dated 23 July 2013 in the sum of \$640. As the receipts include no notation of the works carried out, I am not satisfied that Martin's works, whatever they were, relate to rectification of the cabinetry. I make no allowance.
- b) Six invoices, totalling \$9,850, from Mr M Genecio who trades as "Art Dec". The owners say the invoices, which have all been paid, are for repainting around kitchens. The dates on the invoices range from 24 August 2013 to 22 November 2013. Five of the six invoices refer to "progress payment", but otherwise provide no indication of the works carried out. Only one of the invoices, the last dated 22 November 2013, provides a description of works, namely "*extras touch ups cupboards, ceilings, walls etc*". On the information provided in the invoices, I am not satisfied that any of them relate to rectification of the cabinetry. I make no allowance.
- c) Four invoices from Jarah Construction totalling \$3240.40. As discussed earlier in these reasons, Jarah Construction (Mr Johnson and his crew of workers) was brought onto the project by Mr Yucel in December 2012. Each of the invoices provides an itemised description of the works carried out including the charge for each item. Having viewed the invoices, I am satisfied that items totalling \$1,196 (including GST) relate to rectification of cabinetry, and I allow this sum.
- d) Invoice from Hans International in the sum of \$10,000. Having viewed the invoice and having heard evidence from Mr Singh, I am satisfied that this charge relates wholly to the replacement of defective bench tops. Accordingly I allow \$10,000.
- e) Two invoices from Bunnings totalling \$381.50. Having viewed the invoices, I am not satisfied that the items purchased from Bunnings relate to the rectification of the cabinetry. I make no allowance.
- f) Invoice from Mr Riki Fielding in the sum of \$553.50. Having viewed the invoice, I am not satisfied that it relates to rectification of the cabinetry. I make no allowance.
- g) Two Viper Plumbing invoices totalling \$2,500. Each of the invoices cites the works as related to the re-installation of the kitchen. I am

satisfied that they relate to the rectification of cabinetry and I allow the full sum, \$2500.

- h) The owners also claim \$1047.64 as the cost to replace damaged sinks. The owners were unable to produce any invoice or other substantiating documentation and, accordingly, I am not satisfied that the allowance should be included as part of the cost of rectifying the cabinetry. I make no allowance.

310 The total of the invoices I have allowed above is \$69,096. I deduct 5% of this sum, \$3455, as the modest allowance for finishing off works. I also deduct the unpaid balance of the Winlife contract, \$22,290, to arrive at a sum of **\$43,351** as my assessment of the reasonable cost incurred by the owners in rectifying the defective cabinetry.

Electrician damage to render

311 In the process of installing wiring, an electrical subcontractor (“Enter Group Pty Ltd”) engaged by the builder damaged a section of the newly applied external render to the building. The affected render works had to be re-done.

312 Mr Eski brokered a deal with the electrical contractor whereby the contractor agreed to pay the renderer \$7000 as a compromise sum for the extra render works. The electrical contractor did not pay the renderer, and the owners ended up paying the renderer \$9000 for the extra works.

313 The owners issued a separate proceeding in this tribunal, proceeding D500/2013, against both the electrical contractor and the builder (Heski Carpenters Pty Ltd) to recover the sum paid to the renderer. On 30 July 2013 an order was made in that proceeding that the electrical contractor pay the owners \$9000.

314 As I understand it, the owners do not pursue the builder in this proceeding in respect of this claim, because it has been heard and determined in proceeding D 500/13. If I am wrong, and the owners make a claim against the builder in this proceeding in respect of this claim, such claim must fail because it has been the subject of prior determination in a prior proceeding. The owners are estopped from reactivating a claim which has been the subject of a prior determined proceeding.

Bamboo floors

315 The owners say that the bamboo flooring installed in each of the 8 units is defective and needs to be entirely replaced. They rely on the expert evidence of Mr Mitchell, who also produced a written report. Mr Mitchell estimates the cost to replace the flooring is \$100,811.10. His estimate includes an allowance for the cost of alternative accommodation for the residents of the units for a period of 10 days while the floors are being replaced. The owners claim the sum of Mr Mitchell’s total estimate, \$100,811.10.

- 316 The builder relies on the expert evidence of Mr Simpson. Mr Simpson also produced a report dated 9 October 2014 (“**Mr Simpson’s report**”). In his report, Mr Simpson estimates the cost to rectify the flooring, if it is to be rectified, at \$28,846.35. The estimate includes allowance of three days alternative accommodation for the residents of five of the units. The estimate makes no allowance in respect of unit number 5 because it was unavailable for inspection on the day Mr Simpson inspected the other units.
- 317 During the course of the hearing, I attended a view of each of the 8 units. Mr Mitchell and Mr Simpson, amongst others, accompanied me on that view.
- 318 Having inspected the floors, I am find that the bamboo flooring in all 8 units is, to varying degrees, defective. In my view, the extent of the defective works in each of the units, save for unit 5 which was not inspected by Mr Simpson prior to the preparation of his report, is accurately described in Mr Simpson’s report.
- 319 In general terms, the bamboo flooring in the downstairs units (units 1, 2, 3 and 4) is, in some areas, “cupping”, particularly on the northern side of the units. The flooring in the upstairs units (units 5, 6, 7 and 8) is not cupping, but it has moved in some areas and one or several gaps between the boards is noticeable. I need not detail all of my observations because, as noted, I am satisfied that the defects are accurately described in Mr Simpson’s report.
- 320 I am satisfied that the defects in the flooring amount to a breach of the section 8 warranties as to works being carried out in a proper and workmanlike manner and with due care and skill. I am satisfied that the builder should bear the reasonable cost of rectifying the defective flooring.
- 321 Having viewed the floors, and having heard evidence from Mr Mitchell and Mr Simpson, I do not accept that the floors need to be entirely replaced. In my view the rectification works recommended in Mr Simpson’s report are adequate and reasonable. In general terms the rectifications will require replacement of sections of the bamboo flooring in each of the downstairs units, and replacement of selected boards in the upstairs units.
- 322 In my view the rectification works required for unit 5 (not included in Mr Simpson’s report) will be similar to the rectification works Mr Simpson has prescribed for unit 6.
- 323 I am also satisfied that Mr Simpson’s cost estimates are reasonable. They include an allowance for builder’s profit margin and contingencies of 35%. In my view that is a reasonable allowance for rectification works of this nature.
- 324 I am also satisfied that Mr Simpson’s allowance for alternative accommodation is reasonable. I accept that the residents of the ground floor units will need to move out for a few days while the sections of flooring are replaced. I also accept that the rectification work to unit 7 upstairs may also

require the resident to move out for a brief period. Mr Simpson allows alternative accommodation at \$150 per day for 3 days for 5 units. I consider that allowance to be reasonable.

325 Mr Simpson's cost estimate for the rectification works to unit 6 is \$1722.60. In my view, a similar allowance for unit 5 is reasonable. After making this allowance for unit 5, I find that the reasonable cost to rectify the defective bamboo flooring in all of the units is **\$30,568.95**.

Laundrettes to units 6, 7 and 8

326 The construction plans provided for basic laundry facilities to be housed within a cupboard adjacent to the kitchen areas in the units.

327 Mr Eski concedes that, as an oversight, these laundry facilities were not installed in units 6, 7 and 8. He says that to overcome this oversight, and to satisfy the requirements of the building surveyor, he installed basic laundry facilities in the bathrooms of units 6, 7 and 8. He says these works were carried out with the approval of Mr Yucel.

328 The owners say now that they are entitled to the laundry facilities as shown on the construction plans, and they estimate it will cost \$60,000 to carry out such works.

329 I reject the owners claim.

330 The alternative laundry facilities to units 6, 7 and 8 were carried out. The owners paid the "direct cost" of those works. I accept Mr Eski's evidence that Mr Yucel approved the alternative laundry facilities, albeit he may have been unhappy at the oversight and he may have felt he had little choice in the matter.

331 On the evidence before me, I am satisfied that the owners authorised the variation to the laundry facilities to units 6, 7 and 8, and they have no entitlement now to now claim the cost of installing further laundry facilities.

Total allowance for rectification works

332 in summary, allowances I make for rectification works are:

- plastering	\$3715
- timber window extensions	\$994.50
- framing	\$2685.50
- electrical works	\$8800
- French doors	\$2637
- cabinetry	\$43,351
- bamboo floors	<u>\$30,568.95</u>
Total	\$92,751.95

333 I allow a total of **\$92,751.95** as the reasonable cost to the owners to rectify defective works carried out by the builder.

REASONABLE COMPENSATION TO BUILDER

334 Under section 13(3) of the Act, I may award the builder the cost of carrying out the building works plus a reasonable profit if I think it would not be unfair to the owners to do so.

335 In my view, it is not unfair to the owners that the builder be reasonably compensated for the works carried out by the builder, which includes the works of sub-contractors engaged by the builder. The owners have retained the benefit of such works.

336 The direct cost of the building works, that is all the costs other than the builder's fee or profit margin, have been paid by the owners. Mr Yucel kept and controlled the records as to direct costs. I accept Mr Yucel's evidence that the total expenditure on direct costs up to the time the builder ceased works in around mid-July 2013 was \$1,288,805.55⁸.

337 In my view it is fair that the builder receive a reasonable profit for the works it carried out or supervised. I think it fair to assess the reasonable profit as a percentage (10%) of the total direct costs up to the time the builder ceased works, after first deducting from the direct costs sum the allowance I have made (\$92,751.95) for the reasonable cost to the owners to rectify defects in the builder's works.

338 Accordingly I first deduct \$92,751.95 from \$1,288,805.55 to arrive at the sum of \$1,196,053.60. I allow 10% of this sum, \$119,605.36, as reasonable profit to the builder. I considered 10% to be a fair percentage having regard to:

- a) the nature and scope of the building works;
- b) the agreed sum for the builder's fee contained in the building contract -16% of the total direct costs sum. This allowance is not determinative because the builder is unable to enforce the contract, however it is indicative of what the parties considered to be fair at the time they entered the building contract;
- c) the financial benefit the builder received from the "direct costs" sum paid by the owners for the builder's own workers engaged on the project. As discussed earlier in these reasons, the agreed rate was \$500 per day per worker, and the total sum paid by the owners in this regard was \$124,960. When giving evidence, Mr Eski conceded that the actual cost of his workers was less than \$500 per day per worker. He conceded that the builder received financial benefit from this arrangement. As discussed above, I have refused the owners application to bring a further new claim in respect of this alleged "overcharge". This does not mean, however, that I am not able to

⁸ Exhibit KY12A, spreadsheet prepared by Mr Yucel, sets out all costs, pre and post 17 July 2013

consider this issue as part of my determination of a reasonable profit for the builder.

339 As said, I allow \$119,605.36 as reasonable profit to the builder. As the builder has already been paid \$108,400 (as builder's fee), the balance owed is **\$11,205.36**.

OUTCOME AS BETWEEN OWNERS AND BUILDER

340 As set out above, I allow in favour of the owners \$92,751.95 as the reasonable cost of rectification works, and \$26,071.50 as liquidated damages for delay. A total allowance in favour of the owners of \$118,823.45.

341 After setting off the allowance to the builder of the unpaid balance of reasonable profit, \$11,205.36, the result is that the builder must pay the owners **\$107,618.09**.

CONTRIBUTION CLAIM AGAINST MR GULCAN [WINLIFE]

342 As discussed above, I have found that the builder engaged Winlife and the builder had just cause to terminate the Winlife contract by reason of the poor quality of the cabinetry installed by Winlife. I have assessed the cost of rectifying the defective cabinetry as \$43,351. I have also found that Mr Ergun Gulcan is and was at all relevant times a proprietor of Winlife. In these circumstances, the builder succeeds in its "contribution" claim against Mr Gulcan in respect of the assessed cost to rectify the defects in the cabinetry installed by Winlife.

343 Accordingly, I will order that Mr Gulcan must pay the builder \$43,351.

PROCEEDING D1193/2013

344 For the reasons discussed above, Mr Gulcan's claims against the owners and the builder in respect of monies allegedly owed in respect of the St Kilda units cabinetry job must fail.

345 Mr Gulcan also brings a claim against the builder (Heski Carpenters Pty Ltd and Mr Eski) for \$14,993 as monies owed for the Essendon cabinetry job.

346 Mr Eski says that the Essendon cabinetry job was a works contract between his company Heski Carpenters Pty Ltd and Mr Ibrahim trading as IBO Cabinets. Mr Eski concedes that the works under that contract were completed in December 2012, and that a balance of \$10,793 is owed to Mr Ibrahim.

347 I accept the uncontested evidence of Mr Ibrahim that, at all relevant times, he alone carried on business under the trading name "IBO Cabinets".

348 Mr Gulcan produced two invoices in respect of the Essendon cabinetry job. Each of the invoices is addressed to "Heski Carpenters". One of the invoices is dated 7 December 2012 and is for a sum of \$7758. The other invoice is dated 17 December 2012 and is for a sum of \$15,235. The invoices are clearly invoices issued by IBO Cabinets. The name "IBO

Cabinets” and the ABN 25978523403 appear on the top of each invoice. That ABN is registered to Mr Ibrahim as a sole trader.

349 When giving evidence, Mr Gulcan amended his witness statement filed in the proceeding such that paragraph 8 in the witness statement was amended to read “IBO Cabinets completed all works under the Second Agreement at Essendon [the Essendon cabinetry job].

350 I accept Mr Gulcan’s evidence that he worked with Mr Ibrahim on the Essendon cabinetry job. However, the evidence I have referred to above leads overwhelmingly to the conclusion that the Essendon cabinetry job was a contract between the builder and Mr Ibrahim trading as IPO Cabinets. Accordingly, I find that any monies owed by the builder in respect of the Essendon cabinetry job are owed to Mr Ibrahim, not Mr Gulcan.

351 For the above reasons, Mr Gulcan’s claim against the builder in respect of the Essendon cabinetry fails.

CONCLUSION

352 In proceeding D979/2013, I will order the builder to pay the owners \$107,618.09. I will also order Mr Ergun Gulcan to pay the builder \$43,351. I will reserve the question of interest and costs with liberty to apply.

353 In proceeding D1193/2013 I will order that Mr Gulcan’s claims against the owners and the builder be dismissed, and I will reserve costs with liberty to apply.

SENIOR MEMBER M. FARRELLY