

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP506/2014

CATCHWORDS

Sub-contract for rendering, domestic building, identity of parties, contract sum, loss where no amount paid or obliged to be paid by the builder to a third party, non-appearance by the respondent on the third hearing day.

FIRST APPLICANT	Mr Murat Kertis
SECOND APPLICANT	Necmi Gemalmaz
FIRST RESPONDENT	Mr Kadir Gurleyen
SECOND RESPONDENT	AG Advanced Constructions Pty Ltd (ACN 089 153 597)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	30 October and 7 December 2015 and 18 January 2016
DATE OF ORDER	18 February 2016
CITATION	Kertis v Gurleyen (Building and Property) [2016] VCAT 208

ORDERS

- 1 The Second Respondent must pay the Applicants \$8,577.25 forthwith.
- 2 **I direct the Principal Registrar to send certified copies of these orders to the Applicants.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants

Mr M Kertis in person and Mr N Gemalmaz in person

For Respondents

Mr K Gurleyen in person and as director of the Second Respondent on 30 October 2015 and 7 December 2015. There was no appearance for the Respondents on 18 January 2016

REASONS

- 1 Mr Murat Kertis and Mr Gemalmaz are the Applicants. Mr M Kertis trades as MK Homes and Rendering Services (“MK”). Mr Gemalmaz trades as CDF Bricklaying (“CDF”). For the relevant work the Applicants appear to have traded as an informal partnership where they shared the work and the proceeds of the work.
- 2 The Applicants are renderers and claim that they contracted with either Mr Gurleyen or AG Advanced Constructions Pty Ltd who are the Respondents. The Second Applicant, Mr Gemalmaz, and Second Respondent (“AG”) were joined to the proceeding at a review hearing on 2 April 2015. The original application concerned only Mr M Kertis and Mr Gurleyen. Mr Gurleyen is the director of AG.
- 3 In the original application Mr M Kertis claimed that he undertook a number of rendering jobs for Mr Gurleyen, and that he was paid for all of them, except the property for which he claims payment in this proceeding.
- 4 Mr M Kertis alleged that he rendered a house at 233 Harvest Home Road, Epping (“Property”) for which he was not paid. He added that Mr Gurleyen has sold the house and both Applicants claim the outstanding amount is the whole rendering bill of \$18,630. AG claims that the sum agreed to render the Property was \$9,000 and the invoiced amount was \$17,000. The carbon copy of invoice 20 of 9 July 2014 tendered by the Applicants is for \$18,630.
- 5 Both the Applicants appeared for themselves and they were assisted by a Turkish interpreter. Mr Gurleyen appeared for both Respondents.

RESPONDENTS’ NON-APPEARANCE ON 18 JANUARY 2016

- 6 The Tribunal notes with concern that there was no appearance by or on behalf of the Respondents on 18 January 2016. At the hearing on 7 December 2015, the Tribunal attempted to arrange the next date while all parties were present, but it was not possible. The adjourned hearing was arranged for half a day, commencing at 10:00 a.m. and concluding at 1:00 p.m.
- 7 Copies of the orders containing the hearing date were sent to the parties on 8 December 2015. No correspondence was received from any party since that date, until 18 January 2016.
- 8 At 10:20 a.m. on 18 January 2016 the Tribunal attempted to call Mr Gurleyen’s mobile telephone. The clerk who made the call said it sounded as though the call had been answered but the recipient of the call had hung up.
- 9 The following email was received from Mr Gurleyen at 12:39 p.m. on 18 January 2016:

Kadir Gurleyen
<kadir@aglhomes.com.au>

18/01/2016 12:39 PM

To vcat-civil@vcat.vic.gov.au, vcat-civil@justice.vic.gov.au,
cc Murad Kertis <kertismurad@gmail.com>, darren horley <aspect.vic@gmail.com>, Darren Horley <aspectbuildingconsulting@gmail.com>
Subje BP506/2014 MK Homes And Rendering Services,
ct Necmi Gemalmaz v Mr Kadir G

Dear Member firstly I sincerely apologise being absent from the hearing scheduled today. For variety of the reason I have missed the opportunity of being present at hearing today. My record on the electronic calendar missing and due to being on annual leave did not arrive to office until one hour ago. One of my solicitor friend Peter Micevski called and asked me the result of the hearing and then I realised the hearing was today once I checked the file. I called vcat to be connected by way of phone and they tried few times but phone in the room was not answered. I also called Necmi Gemalmaz 12:14 noon from the applicants he said vcat session already finished. I called my building consultant and due to being on holiday he also missed the date. Myself and my building consultant available anytime required to provide any information requested. I apologise from other party and the honourable vcat member.

Kind Regards,

Kadir Gurleyen [sic]

- 10 The Tribunal notes that no telephone call was received in the hearing room during the hearing and there is no record of a telephone call to the Tribunal from Mr Gurleyen, although not every telephone call is necessarily recorded.
- 11 In circumstances where Mr Gurleyen's email does not necessarily disclose a reasonable excuse for non-attendance, the proceeding is concluded without granting the Respondents a further adjournment. This does not preclude them from seeking a second order under s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") which would be heard by another member and may or may not be granted.

HISTORY OF THE RELATIONSHIP BETWEEN THE PARTIES

- 12 According to the Respondents' Points of Defence ("PoD"), there were seven defective rendering jobs undertaken by the Applicants for AG. According to the evidence of the Applicants, the work was done between May and August 2014.
- 13 Mr Gurleyen gave evidence that Mr Huseyin Mindemir, Project Manager, negotiated on behalf of AG with Mr Kemal Kertis, who is Mr M. Kertis's father, for rendering work when their previous renderer was unavailable.

- 14 The parties disagree about how the sums for the projects were set. The Applicants claim it was agreed that they would receive an amount based on a square meter rate. Mr Gurleyen said that an amount was agreed for each project. Apart from the invoices, nothing was in writing.
- 15 The parties agree that the Applicants were paid in full for all the other projects.
- 16 The parties also agree that the Applicants have been paid nothing for rendering at the Property.

CORRECT RESPONDENT

- 17 Mr Gurleyen stated that he did not contract personally with the Applicants, but that Mr Mindemir agreed on behalf of AG that someone associated with the Applicants would perform rendering at certain properties. He said he understood the discussion had been between Mr Mindemir and Mr K Kertis.
- 18 I note that the invoice dated 9 July 2014 was addressed to “AG Advance Construction” [sic].
- 19 In answer to my question, Mr M Kertis said that for the other jobs undertaken for the Respondents, he or Mr Gemalmaz had been paid by cheques drawn on the bank account of “AG Homes”.
- 20 I find that the respondent with whom the Applicants contracted for rendering was AG.

CORRECT APPLICANT

- 21 Paragraph 3 of the PoD is:
The Applicant [sic] and Mr Huseyin Mindemir (Project Manager) on behalf of the Second Respondent, agreed that the Applicants would perform rendering services at certain properties being built by the Second Respondent.
- 22 On the first day of hearing Mr Gurleyen raised for the first time the possibility that the contract was not with either of the Applicants, but with Mr K Kertis. I declined to give him leave to amend his pleading at that late date in circumstances where AG had admitted to a deal between it and the Applicants.
- 23 Mr K Kertis said in evidence that he arranged the deal with Mr Gurleyen. I am satisfied in accordance with his evidence that he did this on behalf of the Applicants.
- 24 I also note that Mr Gurleyen gave evidence that the invoices for the relevant work carried Mr Gemalmaz’s ABN number. The invoices presented to me in evidence are exhibit A1, a carbon copy of invoice 20 dated 9 July 2014 for \$18,630, and two of MK’s invoice books. Some

invoices were issued by MK and I accept the evidence of the Applicants that the others were issued by CDF.

- 25 I accept Mr Gemalmaz's evidence that regardless of which of the Applicants invoiced and was paid, the Applicants shared the money.

CONTRACT SUM

- 26 On 18 January 2016 I examined the invoice book from which invoice 20, dated 9 July 2014, had been taken, having particular regard to the invoices on either side of the relevant invoice. Invoice 19 was dated 11 June 2014 and invoice 21 was dated 10 July 2014. I accept Mr M Kertis's evidence that invoice 20 was presented to AG for the work, on or shortly after 9 July 2014.
- 27 Mr M Kertis gave evidence that he discussed the proposed work at the Property with Mr Mindemir, who accepted the oral quotation of \$18,630. He said he believed that at the time the work was undertaken the Property was owned by Mr Gurleyen, then sold when it was finished.
- 28 Under cross-examination Mr Mindemir agreed that he had not objected to the invoice for \$18,630 when he received it. When Mr M Kertis asked him to explain that he said "Sometimes there has been more work done so I have to explain it to the office". Neither party gave evidence that more work was done on this job than was contemplated when it was arranged.
- 29 Mr Gurleyen gave evidence that most of the work on the various sites was done within a few months and AG paid the Applicants "without too much fuss" because there was an ongoing relationship. He said that AG had a quotation from another renderer for a similar job at 237 Harvest Home Road for \$8,000. He said the top half of the Property had already been rendered and he estimated that about 60% of the total rendering for this property was undertaken by the Applicants.
- 30 Mr Gurleyen also gave hearsay evidence that he understood Mr Mindemir had agreed to the sum of \$9,000 with Mr K Kertis for rendering the property. Mr Mindemir said that Mr K Kertis had quoted \$10,000 but Mr Mindemir said he could not accept that amount and the sum agreed by telephone was \$9,000 including GST.
- 31 Mr K Kertis gave evidence about negotiations for the work to the property. He said Mr Gurleyen had said the limit would be \$10,000. He also claimed Mr Mindemir had said, somewhat surprisingly, that he would pay \$2,000 out of his own pocket being a total of \$12,000. Mr Mindemir denied making that offer.
- 32 Mr K. Kertis said "we made an offer we asked for \$15,000". When I asked what the deal was for the Property Mr K Kertis replied that it was the same as for the other properties per square metre. He said it was

about \$38 per square metre and the area was about 400 m². I note that this equals \$15,200.

- 33 Mr Gemalmaz gave evidence that there was about 455 m² of rendering for the property and that the price charged by the Applicants was between \$42 and \$45 per square metre. The invoice states in part:

233 Harvest home

Road Epping Double

Storey house and

Garage render +

Texture colour work

Completed.

Double storey home

335 meter x \$42 \$14,070 % 10 \$14,070

Garage 120 meter x 38 \$4,560 % 10 \$4,560

\$18,630 [sic]

- 34 In answer to my question about the amount agreed for rendering, Mr Gurleyen said that for pure rendering the sum was between \$30 and \$40 per square metre for a top job but that the Applicants had agreed to \$9,000 for this job. He also said that the interior of the garage was just a base coat, not a complete rendering job and the whole job took about 15 person-days. Mr M Kertis disagreed and said that the job was five people by five days which equals 25 person days.

- 35 The evidence about the agreed price for the job is vague. Although I accept that Mr M Kertis invoiced AG for \$18,600 and that Mr Mindemir did not object when he first received the invoice, I prefer the evidence of Mr K Kertis and Mr Mindemir regarding negotiations for a sum to that of the other parties, as it is the most consistent. Between them, I prefer the evidence of Mr Mindemir, and find the sum agreed for the rendering to the Property was \$9,000.

ALLEGED DEFECTS

- 36 AG pleaded in the PoD that it was entitled to set off defects in various properties.

If there are defects, is AG entitled to a set off?

- 37 Although the PoD does not expressly say so, it appears AG claims that the Applicants have breached their contracts with it, with respect to the Property and the other six homes mentioned.
- 38 None of the houses now belong to either of the Respondents. It is noted that no evidence was given that AG has either paid the current owners for these alleged defects or had them repaired, although the PoD states

that AG paid \$800 to rectify defects at 1 Tesche Walk, Epping. It therefore follows that AG has not proved that it has suffered a loss.

39 I raised the issue of whether AG would be able to recover if it could not demonstrate that it had suffered a loss, and Mr Gurleyen's response was to the effect that AG had not received full value for the money sought from it.

40 In this respect the facts are quite similar to those in *Alucraft Pty Ltd (in Liquidation) v Grocon Ltd (No 2)* [1996] 2 VR 386. This was a case heard by Justice Smith of the Supreme Court of Victoria.

41 Briefly stated, the facts were that Alucraft had been a subcontractor to Grocon. Grocon was the builder of 101 Collins Street. When Alucraft sued for unpaid money under the sub-contract, Grocon counterclaimed for defects in some of the steel work supplied and installed by Alucraft. Smith J found that four years after the parties became aware of the defects, and after a final certificate was given, "the proprietor appears to have accepted the work" but Grocon remained at risk, although the risk was "very remote".

42 His Honour remarked: "I am conscious of the fact that damages must be awarded once and for all", but he also found Grocon was entitled to damages for the breach. He assessed the cost of rectification (if Grocon had rectified, or was obliged to rectify) at \$35,000. He stated that damages should be awarded on the higher of either loss to Grocon of the "immediate benefit" that it should have received; that is, work without defects to pass on to the proprietor, or the cost of rectification discounted to take into account the remote risk that Grocon would have to pay the proprietor.

43 His Honour discounted the cost of rectification to one seventh of the full sum - \$5,000. He also estimated that the cost of labour and materials to Alucraft of undertaking the defective work was \$5,000, which was the sum he deducted from the amount payable by Grocon to Alucraft.

44 This case is complicated by sections 8 and 9 of the *Domestic Building Contracts Act 1995*. This was discussed by DP Aird in *Lefkas Builders Pty Ltd v Dondas Constructions (Domestic Building)* [2005] VCAT 537, where she said at paragraph 34:

I accept that under [sections 8 and 9](#) of the [Domestic Building Contracts Act 1995](#) the builder may be required by subsequent owners to rectify any defective works which were not readily apparent at the time of purchase. I also accept that the builder is entitled to make a claim for damages for the risk of future detriment – *Alucraft Pty Ltd (In Liquidation) v Grocon Ltd (No 2)* [1996] 386. In my view the effect of the implied warranties set out in [s8](#) is to afford some protection to homeowners should defects subsequently become apparent.

45 Frequently, where a builder must do work or pay money to an owner for defective work of a sub-contractor, the builder will claim against the sub-contractor to do the work or recoup the amount paid. Given that there is no evidence of work done or amounts paid, I will assess any damages to be set off from the unpaid contract sum of \$9,000 in the context of *Alucraft* and *Lefkas*.

Defects pleaded by AG

46 The Applicants relied on a report by Mr Simon Brownhill of SRB Building Consultants, concerning only the Property.

47 The Respondents relied on three reports, each by Mr Darren Horley. They concern the Property, 88 Rotino Crescent and 3 Teschke Walk. There are no reports concerning the other houses at which the Respondents claim there is defective rendering. During the hearing of 7 December 2015 Mr Gurleyan withdrew the claim for set off concerning 1 and 3 Greenfield Drive, Epping.

The Property - \$5,500 claimed as set off

48 Mr M Kertis gave evidence that Mr Gurleyan told him of alleged defects that had been raised by a prospective purchaser, about three or four months after the Applicants had completed their work. He said “We fixed everything told to us so it could be sold”.

49 Mr M Kertis said that the Property was sold to someone other than that prospective purchaser and that he was not advised of any more defects until they were alleged in the PoD.

50 Mr Mindemir said that when the job was finished it was not very good and he called on Mr K Curtis who tried to fix things up. He said he gave a defects list to the Applicants and the most important fault was rendering over the expansion joints. He said that the expansion joints had still not been repaired and that some edges were not smooth. The Respondents did not bring a copy of the list to the hearing.

51 Mr Mindemir said there was a discussion between himself, Mr Gurleyan, the Applicants and Mr K Curtis and there was an agreement that when all the defects were fixed \$9,000 would be paid.

Who owns the Property now?

52 The current owner is Mr Vasfi Ajro, who gave evidence for the Respondents by telephone on 30 October 2015. I asked him if there were still problems with the render. Mr Ajro said that there are a few gaps but he said “I have no idea – Kadir (Mr Gurleyan) and the renderer both had a look. I don’t know what they are doing. [sic]”

53 I asked Mr Ajro whether Mr Gurleyan had promised to do anything regarding the rendering. Mr Ajro replied that Mr Gurleyan was “chasing for it to get done” and that he had shown Mr Ajro some gaps. I

also asked if he was aware of the cost of the proposed works. He replied that he was not and that it was not his business.

54 Mr Gurleyen asked Mr Ajro if he wanted the defects fixed. Mr Ajro replied: “yes, if they need to be fixed.”

55 In cross examination, Mr M Kertis asked Mr Ajro when anyone on behalf of the Respondents had first mentioned the render problems. Mr Ajro could not recall the date, but said it was after the second rendering when he and Mr Gurleyen were inspecting the house. He was not able to say whether the inspection was before or after settlement of the purchase of the home.

56 Mr Ajro said that he and his family took possession of the home on 19 September 2014. He said that there have been other trade contractors who have come to fix various items but no further work was done to the rendering. I remark that AG’s failure to repair rendering at any of the homes where it claims the rendering is defective makes it less believable that the defects exist.

Defects alleged for the Property

57 The PoD state:

- i) External corners were very rough.
- ii) All of the expansion joints the brick veneer parts were filled with render.
- iii) All of the areas inside garage require complete rendering.
- iv) All of the window frames require cleaning. The applicant scratched the window frames while cleaning them.
- v) The Colorbond fence required cleaning. The applicant scratched the fence while cleaning it.

The cost to repair or attend to the above has been quoted as \$5500, which is claimed as a set off. [sic]

Expansion joints rendered over

58 Mr Gurleyen said that he built as an owner-builder and when he undertook a final inspection he discovered that the expansion joints had been rendered over. He said the Applicants came to fix the problem and when he inspected again he discovered that expansion joints had been cut into the render, but they did not line up with the true expansion joints in the masonry. Mr Gurleyen said this is an item he would rectify for Mr Ajro. He added that the problem is to find the position of the expansion joints which might necessitate recoating the whole of the ground floor. AG gave no evidence that there had been consequential damage such as spalling of the rendering at the Property.

59 Mr Gemalmaz admitted that the Applicants did render over the expansion joints because they were instructed to do so by AG’s

supervisor. He said “I should have got him to write it.” I am not satisfied that a reasonably competent renderer renders over expansion joints other than in exceptional circumstances.

60 Having regard to the evidence of the experts, and to the admission of Mr Gemalmaz that he had rendered over expansion joints, this is a significant defect. Nevertheless, there is no proof of rectification or expenditure and only a very vague statement by Mr Ajro that parts of the rendering will be repaired by AG “if they need to be fixed”.

- Damages

61 I am not satisfied that AG has a current obligation to Mr Ajro arising out of defective rendering, although it might have.

62 The evidence about cost to rectify left much to be desired. Mr Horley’s reports did not include amounts. Mr Brownhill appears to have misunderstood the problem because his report stated that installing expansion joints is not the role of the renderer. This is undoubtedly true, but it is the role of the renderer to ensure that the rendered joints match the joints in the substrate.

63 Mr Horley expressed concern that locating then repairing the joints could result in extensive colour matching to the remaining render. In the absence of better evidence, had the Property still belonged to a respondent I would have allowed \$1,000. Following the lead of *Alucraft* I allow one quarter of that amount - \$250.

Expansion joints beside garage

64 Mr Horley’s report states that expansion joints to the external of the garage to both the left and right of the garage door opening are of poor finish and have been “cut in” with the use of an angle grinder and are non-continuous for the full length of the expansion joint.

65 Mr Brownhill’s report stated that the substrate above the garage door is light weight cladding and not brickwork. He recommended that the expansion joints be straightened using an angle grinder, flexible sealant installed and allowed a total cost of \$56.

66 During concurrent evidence, Mr Horley agreed that these render expansion joints are in line with the underlying expansion joints. There was disagreement about the extent of work necessary because Mr Horley was concerned that when the work was completed the colour of the new work would not match the colour of the old work. He was of the view that if a renderer had to do this item only, and therefore this item would bear the whole cost of setting up and travel, the cost would be \$250.

67 I prefer Mr Brownhill’s view and allow one quarter of \$56, being \$14.

Control joints on the boundary line with 231 Harvest Home Road

68 Mr Horley described the rendering over the boundary line as “control joint to the external of garage”. Mr Brownhill said that the boundary line between the two properties should not have been rendered over. Mr Horley said that the line is not straight and true and deviates in places by more than 4 mm. Mr Brownhill said that reworking the joint is not required but the line between the two properties should be clearly defined by cutting the existing render at a cost of \$45.

69 In evidence before me Mr Horley again expressed concern about colour matching and suggested the cost of rectifying this area would be about \$250. Mr Brownhill revised his reported view to say that overcoming problems with colour matching could be achieved for a further \$90 therefore his allowance for this item was \$135.

70 Again, having regard to the photographs in both reports, I prefer Mr Brownhill’s view and allow one quarter of \$135, being \$33.75.

Poor finish to the surface joint between walls and concrete slab

71 With respect to this item, Mr Horley’s report states:

Render topcoat colour is of poor finish to the surface joint between the walls and concrete slab in internal of garage, and dwelling, clear, accurate and straight definition between the two surfaces has not been achieved with render topcoat having chipped and separated from its substrate in places. [sic]

72 Mr Brownhill reported:

As there were no specific areas identified where the surface joint was in poor condition as referred to [by Mr Horley] the areas which I inspected around the base of the dwelling and interior of the garage appeared adequate. Some staining of the existing concrete was present, but this could also be attributed to works completed by the initial rendering company by not protecting the surface in the first place.

73 I prefer Mr Brownhill’s view in general but note the parties agree that there was no “initial rendering company” for works to the ground floor level. Any staining would therefore be the responsibility of the Applicants. There is no allowance for this item.

Render colour matching on both sides of internal garage door

74 Mr Horley reported that render colour matching to both the left-hand and right-hand sides of the internal garage door is of poor finish and colour match.

75 Mr Brownhill said that he understood the garage door had not been installed at the time the rendering was undertaken. Mr Gemalmaz said the brackets for the garage door were in place but the blue board was

installed later and the Applicants did a patch up job after the blue board was installed.

76 Mr Horley said there were rendering dags on the tracks for the garage door, which leads to the conclusion that the tracks were in place at the time of rendering. Mr Brownhill agreed that some rectification would be necessary.

77 In the absence of better evidence I allow one quarter of \$200 for this item, being \$50.

Garage interior bagged

78 I note Mr Gurleyen's evidence that the internal surfaces of the garage should have been rendered rather than bagged and that this is consistent with paragraph 4(a)(iii) of the PoD, but I also note this is not consistent with Mr Horley's report.

79 Further I note that the nature of the garage surface would have been obvious at the time of purchase. Mr Gurleyen gave no evidence of how AG suffered a loss from this alleged breach of contract by the Applicants. I make no allowance.

Internal left-hand side of garage

80 Mr Horley's report refers to the need for additional coats and fixing the render as "external corner angle is exposed due to insufficient coverage".

81 During the hearing, Mr Horley remarked that the expanded metal angle which protects the corner is visible and there was trowelling damage.

82 Mr Brownhill said that he had thought this item had to do with the garage door itself and he was not able to comment on the inadequate cover of the angle.

83 The photographs in Mr Horley's report are not particularly clear and I cannot comment either. I am not satisfied that AG has proved this item.

Render spills and dags are present on metal fascia to both dwelling and garage

84 The photographs in Mr Horley's report do not clearly show the items that he reported upon and I note Mr Brownhill's statement that the render staining which is visible is light coloured – lighter than the render used by the Applicants – and therefore possibly caused by an earlier renderer who undertook work to the upstairs area of the Property. I am not satisfied that AG has proved this item.

Poor and uneven render finish behind gas meter and hot water service

85 I accept the evidence of Mr Gemalmaz that the builder did not remove the hot water service or gas meter to enable the Applicants to properly render behind them. I accept the evidence of Mr Brownhill that any defects to this rendering cannot readily be seen from a normal viewing

position. I am not satisfied that AG has proved this item. Further, even if there is a defect I am not satisfied that the item was attributable to the Applicants.

- 86 Nevertheless, I note as shown on page 17 of Mr Horley's report that the Telstra cable connection has been adhered to the render rather than left free from the wall and serviceable. I prefer Mr Horley's evidence concerning this issue. In the absence of better evidence I allow one quarter of \$150 for this item, being \$37.50.

Down pipe clips rendered over

- 87 The experts agreed that downpipes and the clips should be removed before rendering but there was disagreement about precisely what happened on site and whether AG's supervisor, Mr Mindemir, was or was not aware that the clips were being rendered over. Mr Mindemir did not give evidence about this subject. I could not be satisfied that the clips being rendered over was a breach of contract by the Applicants and I make no allowance for them.

Window sills poorly defined

- 88 Mr Horley's report states that the edges below the window sills where they joined the walls are out of square and plumb and the junctions are rounded, uneven and not of a tradesmen like finish. Mr Brownhill said that he had not received a copy of page 19, and the following pages, of Mr Horley's report and therefore had not responded to this and subsequent items.
- 89 I note that the photographs do not indicate that the window sills look less than tradesmen like and remark that as the alleged defect is aesthetic, it would have been obvious at the time of purchase. I make no allowance for this item.

Render finish to external GPO at western side of dwelling

- 90 Mr Horley's report describes the render finish as poor, but the photograph on page 20 of his report does not support that view. I make no allowance for this item.

Weep holes above windows

- 91 Mr Horley's report describes the weep holes as not cleaned or sharply defined. The photographs in his report support his view. In the absence of better evidence I allow one quarter of \$150 for this item, being \$37.50.

Scratches to Windows

- 92 I note that Mr Horley's report refers to "scratches to a few window glass panes due to the cleaning of render or mortar over-spills". It is for the person who alleges a breach of contract to prove the breach is by the

other party, not by two or more people that includes the other party. I make no allowance for this item.

Render does not extend to ground level

93 The photograph that supports this view on page 22 of Mr Horley's report shows a level bottom edge of the rendering but without the landscape material being brought up to it. I am not satisfied that this is a rendering defect and make no allowance for it.

Render over spills and dags are present on gate

94 The photographs on page 23 of Mr Horley's report do not show the alleged over spills and dags. I make no allowance for this item.

Total set-off for the Property

95 The total set-off for the Property is as follows:

Expansion joints rendered over	\$250.00
Expansion joints beside garage	\$14.00
Control joints on the boundary line	\$33.75
Render colour matching on both sides of internal garage door	\$50.00
Telstra cable	\$37.50
Weep holes above windows	<u>\$37.50</u>
	\$422.75

88 Rotino Crescent Lalor - \$3,000 claimed as set off

96 Mr M Kertis gave evidence that the work at this site was undertaken in about June 2014. He did not know who owned the home at the time the work was done or who owns it now. He said that he has not been asked to rectify any defects and he has not been to inspect the property. He said that the Applicants were paid in full within two weeks of sending an invoice.

97 Mr Gurleyen gave evidence that AG had been engaged to undertake construction and he agreed that the rendering was undertaken in June 2014.

Defects alleged for this home

98 The PoD state that there are gaps between the lower level brick flashing and upper-level rendered polystyrene which are not equal for the full perimeter of the building and that the owner requires AG to rectify. The PoD state that the cost to rectify is \$3,000.

99 Mr Gurleyen gave evidence that the "customer" expects work to be done on this property. I asked him why the work had not yet been undertaken. Mr Gurleyen's reply concerned with-holding the sum of \$9,000 which he said was payable for the Property, rather than

addressing my question of why he as the builder or owner-builder had not fulfilled his alleged obligation to the current owner of 88 Rotino Crescent. I also note that in the PoD there is no mention of a request by the current owner to repair rendering to this home.

100 No evidence was given by the “customer”, he or she was not named and the Respondents gave no evidence that any amount had been spent to rectify this property. I am not satisfied that AG has suffered a loss relating to the rendering of this home and make no allowance for it.

1 Tesche Walk, Epping - \$800 claimed as set off

101 Mr K Kertis gave evidence that rendering was undertaken in about August 2014 and that the Applicants were paid in full within two weeks of sending an invoice.

102 The PoD provided that:

- i) Base coat required rectification by another renderer at a cost of \$800.
- ii) All of the window frames had render spills and required cleaning.
- iii) Expansion joints were filled with render. These were to be kept free from any filling and caulked.

103 Mr K Kertis said he did not know about another renderer allegedly repairing work and that the Applicants were not invited to undertake any repairs, and no evidence was given for AG to that effect.

104 Mr Gurleyen said that he said to someone on behalf of the Applicants:

To show you my goodwill, I'll pay although the work has been done poorly. I'll give you the cheque but you must fix 233 and 88 Rotino.

105 Mr M Kertis denied that the Respondents told him of the alleged defects.

106 The Respondents did not file a report for this property.

107 The owner was not named and neither was any evidence given that \$800 was paid by AG for repairs.

108 I am not satisfied that AG has suffered a loss relating to the rendering of this home and make no allowance for it.

3 Tesche Walk, Epping - \$2,800 claimed as set off

109 Mr M Kertis gave evidence that the work was done in around May 2014 and that the Applicants were paid in full within two weeks of the invoice.

Defects alleged for this home

110 The PoD state:

- i) the gaps between the upper floor rendered foam and lower floor flashings installed over the bricks were not equal.
- ii) No expansion joints were installed on the rendered foam.

The cost to repair the above is \$2800 which is claimed as a set off.

111 Mr Horley stated at page 12 of his report:

The exterior render and base substrate finish attest [sic] and Western elevation is not parallel or level with roof covering, there are sections which are uneven and irregular in each finish

These areas require external edge foam to be inserted and render to North and Western elevation at first floor to be re-finished in base and top coat.

112 Mr Horley estimated the cost of rectification including scaffolding at \$2000.

113 In answer to my question, Mr M Kertis said that no one had told the Applicants about unequal gaps, expansion joints or rendered foam.

114 Somewhat surprisingly, the photographs of the alleged defects have been taken from the other side of the boundary fence.

115 I am not satisfied that AG has suffered a loss relating to the rendering of this home and make no allowance for it.

3 Green Place, Eltham - \$2,750 claimed as set off

116 Mr M Kertis gave evidence that the work was undertaken in May 2014 and that the Applicants were paid within two weeks of sending the invoice. He also gave evidence that he was not told of any alleged defect to this property until he received the PoD.

117 The PoD state:

- i) The gap between the lower level brick flashing and upper-level rendered polystyrene is not equal.

The cost to repair the above is \$2750, which is claimed as a set off.

118 There is no expert report to support the Respondents' claim that the work is defective.

119 Mr Gurleyen gave evidence that the work to this home was repaired by Ruben Rendering. He said that he did not recall how much it cost.

120 Mr Gemalmaz said to Mr Gurleyen in cross examination that the Applicants were assigned other jobs after the Green Place job and asked, if the work was defective, why that would happen. Mr Gurleyen replied that most of the jobs started at about the same time.

121 The owner was not named and neither was any evidence given of an amount spent by AG. I am not satisfied that AG has suffered a loss relating to the rendering of this home and make no allowance for it.

CONCLUSION

122 AG must pay the Applicants the sum of \$9,000 less damages set off of \$422.75 being a total of \$8,577.25. Payment must be made forthwith.

SENIOR MEMBER M. LOTHIAN