

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP393//2016

### CATCHWORDS

DOMESTIC BUILDING: Supply of plastering services and window installation services; invoices issued for work performed; respondent refused to pay the balance of the applicant's outstanding invoices; respondent claimed that the applicant failed to install windows that complied with Australian Standards for educational institutions; whether work defective or incomplete; whether respondent breached the contracts; whether applicant entitled to monies owed; whether respondent entitled to damages for removal and replacement of windows.

<b>APPLICANT</b>	Mr Oleksiy Khrapko
<b>RESPONDENT</b>	Southern Cross Education Institute Pty Ltd (ACN 121 182 027)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	F Marks, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	1 and 2 June 2017 and submissions filed on 16 June 2017
<b>DATE OF ORDER</b>	30 August 2017
<b>CITATION</b>	Khrapko v Southern Cross Education Institute Pty Ltd (Building and Property) [2017] VCAT 1390

### ORDERS

1. The respondent must pay the applicant \$16,438.
2. The respondent must reimburse the applicant, the applicant's filing fee of \$575.30.
3. The respondent's counterclaim is dismissed.

F. Marks  
**Member**

### APPEARANCES:

For the Applicant	Mr M Harris, Solicitor
For the Respondent	Mr Ozturk, Solicitor

## REASONS

### The Parties

- 1 The applicant and cross respondent (**Mr Khrapko**) is a plasterer and a window installer. The respondent and cross claimant (**Southern Cross**) is a company which carries on business as a provider of educational services in Melbourne.

### Background

- 2 In December 2014 Mr Khrapko entered into agreements with Southern Cross to carry out plaster works and install windows (**Works**) at its property in North Melbourne (**Property**).
- 3 On 15 December 2014 Mr Moiz, accountant and site manager employed by Southern Cross, who managed the building works at the Property, left for Pakistan on vacation. He returned to work on or about 28 or 29 January 2015. On 25 December 2014 Mr Rahaman, Chief Executive Officer and director of Southern Cross, left for his overseas vacation and returned in February 2015. While Mr Moiz and Mr Rahaman were overseas, Southern Cross arranged for a person called Bashir to be on site at the Property each day. Mr Khrapko continued with the Works while Mr Moiz and Mr Rahaman were overseas.

### The Dispute

- 4 Mr Khrapko claims \$20,633 from Southern Cross which he says is the outstanding balance of his invoiced costs. He claims \$10,018 for plastering work and \$9,440 for the installation of windows. Southern Cross admits that it has not paid all of Mr Khrapko's invoices but says the Works were defective and incomplete.
- 5 By way of counterclaim Southern Cross alleges that Mr Khrapko failed to install the agreed windows. It also says Mr Khrapko installed windows which did not comply with Australian Standard AS 1288 of 2006. Southern Cross claims damages of \$9,169 for the removal and replacement of the windows.
- 6 Mr Khrapko denies Southern Cross' claims and says the Works were not defective. He says he stopped works before they were completed because Southern Cross refused to pay him. He says he always intended to complete the Works on payment of his outstanding invoices. He says that in February 2015 Southern Cross directed him not to return to the Property.

### Witnesses

- 7 The parties were represented by solicitors. Mr M Harris appeared for Mr Khrapko. Mr S Ozturk appeared for Southern Cross. Mr Khrapko gave evidence for himself. Mr Azezur Rahaman, Chief Executive Officer and director of Southern Cross and Mr Adhul Moiz, accountant and site manager, gave evidence for Southern Cross.

## **The issues**

- 8 The issues for determination are:
  - a. What were the terms of the contract?
  - b. Were the works defective?
  - c. Is Mr Khrapko entitled to claim the balance of the unpaid invoices?
  - d. Did Mr Khrapko lawfully terminate the contract?

## **THE PLASTERING CONTRACT**

### **What were the terms of the contract?**

- 9 Mr Khrapko said he first visited the Property to attend a site meeting with Mr Moiz to enable him to prepare a quotation. He said Mr Moiz showed him the walls and the ceilings on Level 1 but did not show him all of the areas that required work. He said he measured what he was shown for the purpose of providing a quotation.
- 10 Mr Khrapko prepared a quotation dated 27 November 2014 (**Quotation**)<sup>1</sup> for the plastering works. It is common ground that Southern Cross did not accept the Quotation and that the Quotation did not form the plastering contract. It was common ground that Southern Cross did not enter into a fixed price contract with Mr Khrapko for the plastering works.
- 11 In early December 2014 the parties entered into a contract for plastering works to be carried out at the Property. The contract comprised an oral agreement between Mr Khrapko and Abdul Moiz of Southern Cross, following Mr Khrapko's inspection of the Property.
- 12 Mr Khrapko said he was not provided with drawings which he would normally have used to provide a quotation, so he agreed to work on a daily basis at an agreed hourly rate. Mr Khrapko gave evidence about the terms of the plastering contract, the scope of the Works and the manner in which he invoiced Southern Cross. Mr Khrapko claimed he was to invoice Southern Cross on the completion of blocks of work, and that payment was due on receipt of his invoices.
- 13 Mr Rahaman said Southern Cross agreed to supply the materials and hire the labour at an hourly rate of \$50. However, he said his aim was for the labour cost to be less than \$14,100 quoted by Mr Khrapko in the Quotation. He said Mr Moiz was responsible for engaging Mr Khrapko.
- 14 Mr Moiz said he agreed an hourly rate of \$50 to keep the costs under budget and reduce the building costs. He said Mr Khrapko issued invoices every couple of days for his work.
- 15 Mr Khrapko said he supplied some of the materials which Southern Cross failed to supply. Mr Khrapko said he discussed the work with either Mr Moiz or Bashir, before doing the work. Mr Khrapko issued invoices 131,

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<sup>1</sup> Exhibit R2

132 and 133 for plastering work carried out between 11 and 17 December 2014. Southern Cross paid these invoices on or shortly after receipt.

- 16 Mr Khrapko said that he carried out additional plastering work which was not included in the Quotation, but which was set out in invoice 152 dated 5 February 2015. He said he was asked to do additional work which Mr Moiz had not shown him on his original visit. He said the additional work also included work which Southern Cross had initially agreed to do but did not do.
- 17 Mr Rahaman said that Mr Khrapko was engaged to do additional plastering work which comprised the following. First, insulation work. He said Southern Cross obtained a quotation for \$2,100 from another contractor which was less than that charged by Mr Khrapko.
- 18 Second, the additional work included installing aluminium framing and plasterboard in the cleaning room on the ground floor<sup>2</sup> of the Property. Mr Rahaman calculated this work to be a two day job based on two people working for 8 hours each day at \$50 per hour. Third, he said additional work included the extended ceiling which he considered to be a two day job. Mr Rahaman said the plastering works should have only involved seven days of labour, based on the Quotation. He said the work was to be completed by 15 December 2014.
- 19 Mr Khrapko denied these claims. He said the agreement was not a fixed price contract and he did not agree to a date for completion of the works. He said the framing for the extended ceiling could not be done in two days. He also said the works to be carried out in the cleaning room could not be done in two days.
- 20 Mr Rahaman continued to assert that Mr Khrapko charged too much for his work, that his costs exceeded the Quotation and were excessive. He said Bashir did not have authority to enter into, or vary, any agreement that Southern Cross made with Mr Khrapko. He also said Mr Khrapko had charged an hourly rate of \$60 in some of the invoices when the agreed hourly rate was \$50.
- 21 Mr Khrapko agreed that the cost of the plastering work was more than double the labour component quoted in the Quotation. However he said that the agreement was for work to be carried out at \$50 per hour and that he had been asked to do additional work.

## Findings

- 22 Mr Rahaman did not give direct evidence of the terms of the contract because he said he did not negotiate the contract. I reject Mr Rahaman's assertion that Mr Khrapko agreed to charge less than \$14,100 for the plastering work. I find his assertion to be inconsistent with his evidence that his aim was for Mr Khrapko's costs to be less than \$14,100 quoted in the Quotation. It is also inconsistent with the evidence of Mr Moiz and Mr

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<sup>2</sup> Exhibit R3 page A105 of the Plan (plan of proposed ground floor)

Khrapko who both said that the contract was for plastering services with an agreed labour cost of \$50 per hour.

- 23 Mr Moiz said the agreed hourly rate of \$50 was to keep the project under budget and reduce the building costs. However, Mr Moiz did not give evidence of the budget for the building works at the Property. Nor did he give evidence of the amount by which the budget and the cost of the building works would be reduced by agreeing an hourly rate for the plastering works.
- 24 Further, Mr Moiz did not give evidence of an agreement for a fixed contract price. In fact he gave evidence that Southern Cross did not agree to the Quotation. I find his agreement to an agreed hourly rate to be inconsistent with a fixed price contract. I find that Mr Moiz's aim to reduce costs did not amount to a term of the contract.
- 25 I find that Mr Moiz and Mr Khrapko negotiated the terms of the contract. I find that the parties entered into an agreement where Mr Khrapko and his assistants agreed to carry out specified plastering works at the Property for an hourly rate of \$50. The plastering work was to be identified in each invoice and Mr Khrapko was to issue invoices after he completed blocks of work. I find that Southern Cross' prompt payment of Mr Khrapko's invoices 131, 132 and 133 evidenced Southern Cross' agreement to pay the invoices on, or shortly after, receipt of invoice.
- 26 I find that the Quotation did not form part of the contract because I accept the evidence of Mr Khrapko about the supervening events. I find that the contract was not a fixed price contract and did not include a term that Mr Khrapko would carry out the plastering works for less than \$14,000. I find that neither the oral or documentary evidence supports Southern Cross' claim.

#### **Were the works defective?**

- 27 It was common ground that Mr Khrapko did not complete the plaster works. Mr Khrapko said he had completed between 90% and 95% when he stopped work. Mr Moiz said Mr Khrapko had completed about 85% of the work.
- 28 Southern Cross claimed that the plastering work was defective. Mr Moiz said the sanding of the corners of the plaster had to be completed. Southern Cross arranged for painters to paint the plasterboards as Mr Moiz refused to complete them. Mr Moiz said that the plaster around the glass panels was uneven and the screws used to hold the plaster were visible and not filled. He relied on a number of photographs which he said showed the work to be defective.
- 29 Mr Khrapko said that when he stopped work he had a couple of days of plastering to complete on Level 1 and had some work to do on the ground floor of the Property. The work involved rectifying minor issues which he intended to do in the ordinary course of completing the work.

- 30 He said he told Mr Moiz about the work that needed to be completed and the time needed for completion. He said the work included patching and sanding the plaster to make it smooth and ready for painting. He said he did not have an opportunity to remove some scratches and patch screws because he was directed by Mr Moiz, in February 2015, not to return to the Property.
- 31 Mr Khrapko agreed that some of the photographs on which Southern Cross relied showed that the plasterboard reveal was not smooth. He said some of the plastering work was not in accordance with what would be expected but that this was because the work was not completed and minor issues were yet to be rectified.
- 32 Mr Khrapko said the plasterboard, in some of the photographs,<sup>3</sup> required another top coat and sanding after being painted with a further coat of plaster. He said the plaster work had been painted over prematurely and should not have been done until the plaster works had been completed.
- 33 Mr Rahaman said he became concerned about the amount of Mr Khrapko's invoices and the cost of the Works in late December 2014. Mr Khrapko said Southern Cross did not raise any issue with him about his invoices or the quality of his work while he was on site.

## Findings

- 34 I accept Mr Khrapko's evidence that the work which Mr Moiz alleged to be defective was in fact incomplete and/or involved rectification of minor issues. I accept Mr Moiz' evidence that further work was required to complete the plaster work. I accept Mr Khrapko's evidence that he intended to complete and rectify the minor issues on being paid.
- 35 Southern Cross did not rely on expert evidence to support its allegations that the plaster work was defective. I prefer Mr Khrapko's evidence about the state of the works at the time that he stopped work to that of Mr Moiz. Mr Moiz is not a plasterer, painter or builder. Mr Khrapko is an experienced plasterer who has been involved in plastering for some years.
- 36 I find that Mr Khrapko is not liable for any plastering work which Southern Cross alleged to be defective. I find that Mr Khrapko's plastering work was not defective but was incomplete. I find that Southern Cross engaged painters prematurely to paint over Mr Khrapko's unfinished plaster work. I find that Mr Khrapko is not liable for any defects in the works which have arisen as a result of the painters prematurely painting over the unfinished plasterboard.

## Is Mr Khrapko entitled to the balance of his invoices for plastering work?

- 37 Southern Cross did not dispute Mr Khrapko's claim that he carried out the work set out in the invoices. At the hearing each of the parties produced a

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<sup>3</sup> Photograph 58 (as also shown in photographs 48, 54 and 72)

document which they said set out the balance owing to Mr Khrapko for Works.

- 38 Mr Khrapko produced a document entitled “Final Cost Breakdown”<sup>4</sup> of which \$7,998 is alleged to be owed for the plastering work. I find that this amount has been calculated partly on an agreed hourly labour cost of \$50 and partly on the basis of an hourly labour cost of \$60 which was not agreed by the parties. Additionally, I find that the Final Cost Breakdown includes some of the plastering work in the summary that relates to the windows installation work. This is because invoices 151 and 159 include both plastering work and window installation work.
- 39 Southern Cross relied on a document which it said set out the balance owing to Mr Khrapko<sup>5</sup>. It alleged that only \$1,748 was owed to Mr Khrapko for the plastering work. I find that Southern Cross’s summary does not include, or take account, invoices 152 and 155. Additionally I find that the summary relating to the window installation work includes some of the plastering work because it has not separated the plastering work from the windows work set out in invoices 151 and 159.
- 40 Each of the parties filed written submissions. Mr Khrapko submitted the balance outstanding for the plastering work to be \$10,018.<sup>6</sup> I find that amount to be incorrect as it fails to take into account the undisputed evidence that Southern Cross has paid \$2,000 towards invoice 151.
- 41 I have examined each of the invoices and heard the evidence relating to each of the invoices. I have also read the submissions of the parties. Having done so I find that Mr Khrapko carried out the work described in the invoices set out below. However I find that Mr Khrapko overcharged Southern Cross for the labour costs set out in invoices 152, 155 and 151/159.

## THE INVOICES

### Invoice 134

- 42 Invoice 134 dated 18 December 2014 is for \$5,700. The work was carried out on 18 and 19 December 2014. The invoice describes the work and sets out the hours worked each day. The work is charged at the agreed hourly rate of \$50. Southern Cross has paid the amounts of \$1,952 and \$1,448 which Mr Khrapko allocated toward payment of this invoice. The balance of \$2,300 has not been paid.

### Invoice 135

- 43 Invoice 135 dated 18 December 2014 is for \$1,448 for the supply of plastering materials. Southern Cross sent Mr Khrapko cheque no 13315 for

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<sup>4</sup> Exhibit A5.

<sup>5</sup> Exhibit A6.

<sup>6</sup> Mr Khrapko’s written submissions dated 16 June 2017 at [7] and [21] state an amount of \$10,018 to be owed but also see [20] which states the amount owed to be \$10,020.

\$1,448 on 22 December 2014. As Mr Khrapko allocated this amount to invoice 134, the amount of \$1,448 remains outstanding.

#### Invoice 152

- 44 Invoice 152 dated 5 February 2015 is for \$3,510 and has not been paid. The invoice is for work carried out on 1 to 3 January (inclusive) and 27 to 30 January (inclusive). The invoice sets out the hours worked each day. The total number of hours worked is 59. However the hourly rate charged by Mr Khrapko is \$60 and not \$50 as agreed.
- 45 There was no reasonable explanation given by Mr Khrapko for charging \$60 per hour instead of the agreed hourly rate. If Mr Khrapko had charged the agreed hourly rate of \$50 the invoice would have totalled \$2,950.

#### Invoice 155

- 46 Invoice 155 dated 13 February 2015 is for \$420. The invoice has not been paid. The invoice is for work carried out on 12 February 2015. The hourly rate charged is \$60. The total number of hours worked is 7.
- 47 There was no reasonable explanation given by Mr Khrapko for charging \$60 per hour instead of the agreed hourly rate. If Mr Khrapko had charged the agreed hourly rate of \$50 the invoice would have totalled \$350.

#### Invoices 151/159

- 48 Invoice 151 is dated 23 January 2015. Invoice 159 is dated 9 February 2015. Each invoice includes the same items. Each sets out allowance for a client discount of \$8,010. However, invoice 159 also includes amounts paid by Southern Cross to Mr Khrapko in part payment of invoice 151. Each invoice list two items of plastering work. The first item is for \$2,040 for “installing a base coat and top coat compound to the ground lobby ceilings and wall ready for paint finish.” The number of hours worked is 34 and the hourly rate charged is \$60.
- 49 Mr Khrapko’s solicitor submitted in written submissions that Southern Cross had not paid \$2,040 and that this amount remained outstanding.<sup>7</sup> I reject this submission because it is inconsistent with Mr Khrapko’s oral evidence and his summary of outstanding invoices.<sup>8</sup> It is also inconsistent with Southern Cross’ summary of outstanding invoices<sup>9</sup> and the evidence given at the hearing. It was not in dispute that Southern Cross paid Mr Khrapko \$2,000 by cheque no 13387 on 20 January 2015, towards these plastering works. I find that invoice 159 incorrectly states that Southern Cross paid \$2,040. I find that Southern Cross paid \$2,000 towards Mr Khrapko’s invoiced costs.
- 50 Again, there was no reasonable explanation given by Mr Khrapko for charging \$60 per hour instead of the agreed hourly rate. If Mr Khrapko had

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<sup>7</sup> Mr Khrapko’s written submissions dated 16 June 2017 at [7(e)].

<sup>8</sup> Exhibit A5 (page 1)

<sup>9</sup> Exhibit A6



charged the agreed hourly rate of \$50 the first item would have totalled \$1,700 and not \$2,040.

- 51 The second item of work in invoices 151 and 159 is for \$300 and described as “sanding to level 1 lobby x 1 men sanding to level 1 lobby x 1 men.” The hourly rate is \$60. Again, there was no reasonable explanation given by Mr Khrapko for charging \$60 per hour instead of the agreed hourly rate.
- 52 If Mr Khrapko had charged the agreed hourly rate of \$50 the second item should have totalled \$250 and not \$300. If Mr Khrapko had charged the agreed hourly rate of \$50 the total amount of the two items would have been \$1,950. Consequently Southern Cross has paid Mr Khrapko \$2,000 for plastering work itemised in invoices 151 and 159 where the labour component amounted to \$1,950 and not \$2,040 as invoiced.

### Findings

- 53 I have found that the parties entered into a verbal contract for plastering work, the terms of which were that Southern Cross would pay Mr Khrapko an hourly rate of \$50 for work invoiced by him. I have found that Mr Khrapko performed the work set out in the invoices no 134, 152, 155 and 151/159 and paid the suppliers of materials listed in invoice 135.
- 54 However, I find that Mr Khrapko issued invoices to Southern Cross for work charged at an hourly rate of \$60 and not the agreed hourly rate of \$50. I find that Mr Khrapko was only entitled to charge Southern Cross for the work performed at the agreed hourly rate of \$50.
- 55 As the invoices 152, 155 and 151/159 included an hourly charge of \$60 for labour I find that the following invoices should be amended to reflect the agreed hourly labour rate of \$50:
- a. Invoice 152: the amount for labour should be \$2,950 and not \$3,510;
  - b. Invoice 155: the amount for labour should be \$350 and not \$420;
  - c. Invoices 151/159: the amount for labour for the 2 items of work should be \$1,950 and not \$2,340.

### Did Mr Khrapko lawfully terminate the plastering contract?

- 56 I have rejected Southern Cross’ claim that Mr Khrapko’s plastering works were defective. I find that Southern Cross did not make any further payment to Mr Khrapko based on an hourly labour rate of \$50. I therefore find that Southern Cross is liable to pay the amount owed to Mr Khrapko for work performed at the agreed hourly rate of \$50 and not \$60. I find that Mr Khrapko overcharged Southern Cross for plastering work by \$1,070.
- 57 I find that Southern Cross is liable to pay Mr Khrapko **\$6,998** made up of:
- a. \$2,300 being the balance payable on invoice 134;
  - b. \$1448 being the total of invoice 135;
  - c. \$2,950 being the balance payable on invoice 152;

- d. \$350 being the balance payable on invoice 155;
- e. less a credit of \$50 on invoice 159 as Southern Cross paid to Mr Khrapko \$2,000 instead of \$1,950.

- 58 I find that Southern Cross had every opportunity to pay the amounts outstanding to Mr Khrapko based on the agreed hourly rate of \$50. However I find that Southern Cross did not pay the balance of the outstanding invoices, or any amount towards the invoices. I find that Southern Cross considered the amount charged by Mr Khrapko to be excessive because it exceeded the labour component of \$14,100 set out in the Quotation.
- 59 I find that Southern Cross in refusing to pay the correct amount outstanding, or any amount towards the outstanding balance, evinced an intention not to be bound by the contract for the plastering works and thereby repudiated the contract for the plaster works. I find that Mr Khrapko accepted Southern Cross' repudiation of the contract and lawfully terminated the contract. I find that Mr Khrapko was not under an obligation to complete the works.
- 60 I find that Southern Cross is liable to pay Mr Khrapko \$50 per hour for the work carried out as well as for materials paid by him.

## **THE CONTRACT FOR THE INSTALLATION OF THE WINDOWS**

### **What were the terms of the contract?**

- 61 Mr Khrapko said that after working on the plaster works, Bashir from Southern Cross, gave him specifications for the windows and asked him to provide a quotation for the installation of the windows. He said he was not given written specifications. He said in December 2014 he prepared quotation no 120 for Southern Cross based on Bashir's specifications and after taking the necessary measurements (**Quotation 120**).
- 62 Southern Cross claimed Quotation 120 set out the agreement between the parties. Mr Khrapko disputed Southern Cross' claim. He said Quotation 120 was changed a number of times. He said Quotation 120 did not include the white aluminium angles and the safety glass that he later agreed to supply and install.
- 63 Mr Khrapko said invoice 159 dated 9 February 2015, set out the agreement between the parties. He said that after providing Quotation 120, he attended a site meeting at the Property with Bashir to confirm the material specifications. He said that at the meeting he agreed with Bashir to install white aluminium angles around the windows. He said he was asked by Bashir to provide the cheapest possible price for the installation of the windows.
- 64 Mr Khrapko said while at the site meeting Bashir called Southern Cross' site engineer who discussed the glass to be installed. Mr Khrapko said the engineer told him to install 4mm clear toughened glass in the windows above the car park. He said he agreed to apply special safety film to clear glass where required. He said he also intended to install 4 mm clear glass

with a safety film but did not complete the work because he was not paid. He said items 17 and 18 in the Barton Glass order confirmation dated 30 January 2015, were an example of the toughened glass that he agreed to supply and install.<sup>10</sup>

- 65 Mr Rahaman said that he was overseas from Christmas 2014 to about mid-February 2015 and did not deal directly with Mr Khrapko. Mr Moiz said that he was away from 15 December 2014 to about 28 or 29 January 2015 and did not deal with Mr Khrapko about the windows. He said the glass was installed when he was overseas and that Bashir was involved with the installation of the glass at the Property during that time.
- 66 Mr Rahaman and Mr Moiz said that Bashir was not Southern Cross' site manager nor employed by Southern Cross. They said Bashir's duties involved opening and closing the Property each day to allow various contractors access to the Property. Again Mr Rahaman and Mr Moiz said Bashir had no authority to make any agreement, or vary any agreement with contractors, on behalf of Southern Cross.
- 67 Mr Rahaman and Mr Moiz said Quotation 120 comprised the agreement with Mr Khrapko. They said contrary to that quotation Mr Khrapko supplied and installed 4mm glass instead of 6mm glass set out in Quotation 120. They continued to assert that Mr Khrapko installed glass which did not comply with the Australian Standards referred to in building plans.
- 68 At the hearing Mr Moiz produced plans of the proposed works at the Property (**Plans**)<sup>11</sup> which had the words "Issued for Building Permit" typed in capitals on each page. Mr Moiz said the Plans required Mr Khrapko to install windows that complied with AS1288 of 2006, details of which were referred to in the plans. Mr Moiz said the Plans were the only ones he had seen on site and that he had not seen the building permit or the construction program for the works.
- 69 Mr Moiz said it was standard practice to give contractors the plans and specifications and that they were available on site. However he could not recall whether Mr Khrapko asked him for the plans and specifications or whether he gave them to Mr Khrapko. Mr Khrapko said that he asked for the plans and specifications but was never given them. He said the first time he had seen the plans and specifications was at the hearing.

## Findings

- 70 Having heard the evidence of the parties and having examined the documents in evidence, I find that Mr Khrapko was not given and did not see the Plans or any stamped plans approved for building. I find that the Plans, and the specifications for the windows set out in the Plans, did not form part of the window installation contract. I find that the terms of the

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<sup>10</sup> Exhibit A2

<sup>11</sup> Exhibit R3 plans issued by WestCAD Design and Drafting Service dated 20 October 2014 A 101 to A 117 no

contract did not include supplying windows which complied with the standards set out in the Plans.

- 71 Based on the evidence available to me at the hearing I accept Mr Khrapko's evidence that he agreed to supply 4mm and not 6mm glass as set out in Quotation 120. I accept that he was instructed by Southern Cross to supply the glass at the cheapest price. I also accept Mr Khrapko's evidence that he discussed with Southern Cross' engineer a safe and satisfactory alternative solution to the 6mm glass, based on a reduction in the cost of the glass. I accept Mr Khrapko's evidence that he agreed to supply 4mm toughened glass in the windows above the car park and clear glass elsewhere with a safety film.
- 72 I find that Mr Rahaman and Mr Moiz were not involved in any of the discussions with Mr Khrapko about agreement reached for the windows installation and the changes to Quotation 120. I make this finding as both Mr Rahaman and Mr Moiz were overseas at the time that Mr Khrapko reached agreement with Southern Cross. I find that Mr Rahaman's and Mr Moiz's evidence does not support Southern Cross' claim that the terms of the agreement reached by the parties were set out in Quotation 120.

#### **Were the window works defective?**

- 73 Mr Khrapko said that he was not approached about any defects while on site. He said he was told about the alleged defects in late February 2015. Mr Khrapko said that when he stopped work he had completed the work listed in invoices 151/159, with the exception of the supply and installation of the safety film to the windows above the car park. He said that at the time he stopped work he had about 5% of the window installation to complete.
- 74 Mr Moiz did not dispute the fact that Mr Khrapko had carried out window installation work set out in invoices 151/159. However, he claimed that the window installation work was incomplete and defective. He relied on a series of photographs which he said showed the defective work.<sup>12</sup> Mr Moiz said the defects related to the application of the silicon and gaps between the aluminium and the windows. He said the photographs also showed paint on the top of the anodised aluminium U Channels and black silicone on the glass.
- 75 Mr Khrapko examined the photographs on which Southern Cross relied. He said that he had not finished the window installation which required a further one to two days of work. He agreed that the silicone needed to be removed from the glass and that the gaps needed to be filled. He said he told Southern Cross he would complete the work after he had been paid the balance outstanding on his invoices.
- 76 I have already found that the contract did not include the Plans which referred to the Australian standards. I have found that Mr Khrapko was not given a copy of the Plans and that the first time he saw them was at the

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<sup>12</sup> By way of examples he relied on photographs 49, 60, 61, 64, 80 and 93.

hearing. I have also found that there was no agreement to install windows that complied with these standards.

- 77 Mr Rahaman and Mr Moiz said that in February 2015 one of the workmen broke a window in a classroom on level 1. Mr Rahaman said Mr Moiz was directly involved in arranging for the replacement of the glass which needed to be done immediately. He said he asked Mr Moiz to arrange for Mr Khrapko to replace the window but was told he would not return to the site. Mr Rahaman said he was told that the glazier who replaced the window said the glass needed to be 6 mm in thickness and laminated on both sides.
- 78 Mr Moiz said that he had discussions with another contractor who he identified as Sash from Oxrid-Sirula Pty Ltd. who said he called Barclays Glass in Footscray to replace the broken panel. He said as far as he could remember they said that safety glass had not been installed and would cost \$600 to replace.
- 79 Southern Cross did not remove and replace the remainder of the windows until at least the end of June 2015. The invoices on which Southern Cross relied evidenced Southern Cross' purchase of 6.38 mm clear laminated glass from Barton Glass for \$2,233.61 in June 2015.<sup>13</sup> Southern Cross also purchased materials amounting to \$2,031 from Bowen and Pomeroy Pty Ltd.<sup>14</sup>
- 80 In or around July 2015 Southern Cross engaged Sash from Oxrid-Sirula Pty Ltd to remove and replace the 4mm glass with 6.38mm laminated glass and surrounding timber for \$4,906.50.<sup>15</sup> Mr Rahaman and Mr Moiz relied on the invoices as evidence of the removal and replacement of the windows which they alleged to be defective.
- 81 I reject the evidence of Mr Rahaman and Mr Moiz that Mr Khrapko agreed to install 6mm toughened clear glass as set out in Quotation 120 and windows which complied with AS 1288 of 2006. The glass that Southern Cross purchased and installed in June 2015 was 6.38 mm clear laminated glass as set out in the invoice dated 30 June 2015. It was not 6mm toughened glass as set out in Quotation 120 which they said comprised the agreement with Mr Khrapko.
- 82 Further, the amount claimed by Southern Cross was for timber framing purchased from Bowen and Pomeroy when the agreement with Mr Khrapko was for the supply of anodised aluminium white angles.<sup>16</sup> Mr Moiz agreed that this material was more expensive than the aluminium framing that Mr Khrapko agreed to install.

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<sup>13</sup> Exhibit R4 Barton Glass Pty Ltd invoice dated 30 June 2015.

<sup>14</sup> Exhibit R4 Cash receipt from Bowen and Pomeroy Pty Ltd and remittance advice.

<sup>15</sup> Exhibit R4 undated tax invoice from Oxrid-Sirula Pty Ltd.

<sup>16</sup> Exhibit R4 Cash receipt from Bowen and Pomeroy Pty Ltd and remittance advice and Exhibit A4 invoices 151/159.

## Findings

- 83 Having heard the oral evidence and having examined the photographs I find that Mr Khrapko had not completed the window installation at the time when he stopped work. I find that Mr Khrapko stopped work because he had not been paid the outstanding balance of invoice 159 amounting to \$11,460. I find that Mr Khrapko would have completed the window installation on being paid the amount outstanding.
- 84 I find that that Mr Khrapko installed the windows that he agreed to install as set out in invoices 151/159. I find that Mr Khrapko was not required to install windows that complied with AS1288 of 2006 as this requirement was not a term of the contract and that the Plans did not form part of the contract.

### **Is Mr Khrapko entitled to the balance of the invoices for the window installation?**

- 85 At the hearing both parties agreed that the balance outstanding on the contract for the installation of the windows was \$12,060. That amount was stated as being the amount outstanding in both Mr Khrapko's Final Cost Breakdown<sup>17</sup> and Southern Cross' summary of outstanding amounts.<sup>18</sup> I find that this amount incorrectly includes a part of the plastering costs set out in invoices 151 and 159.
- 86 In his written submissions Mr Khrapko claims \$9,440 for the balance of monies owed under the contract for the installation of windows.<sup>19</sup>
- 87 I have found that Southern Cross is liable to pay Mr Khrapko for the balance outstanding for the window installation (less \$600 for work not carried out). As Mr Khrapko submits that the amount of \$9,440 remains outstanding, as calculated by him, I find that Mr Khrapko is entitled to the amount of \$9,440 for the window installation work.

### **Did Mr Khrapko lawfully terminate the window installation contract?**

- 88 I have found that Mr Khrapko did not breach any term of the contract in installing the glass set out in invoices 151/159. I have found that Mr Khrapko would have installed safety film if he had been paid. I have found that Mr Khrapko did not breach the terms of the contract in not installing 6mm toughened clear glass as set out in Quotation 120.
- 89 I find that Southern Cross, in failing to pay Mr Khrapko's outstanding amounts for the installation of the glass evinced an intention not to be bound by the term of the contract and in doing so repudiated the contract.
- 90 I find that Mr Khrapko accepted Southern Cross' repudiation of the contract and lawfully terminated the contract. I find that Mr Khrapko was not under an obligation to complete the installation of the windows. I find that

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<sup>17</sup> Exhibit A5 page 2

<sup>18</sup> Exhibit A6

<sup>19</sup> Mr Khrapko's written submissions dated 16 June 2017 at [21(b)]

Southern Cross is liable to pay Mr Khrapko the outstanding amount of \$9,440.

- 91 I find that the outstanding balances under the contracts are \$6,998 and \$9,440.

### **ORDERS**

- 92 In the light of my findings, I will make the following orders:
1. The respondent must pay the applicant \$16,438.
  2. The respondent must reimburse the applicant the applicant's filing fee of \$575.30.
  3. The respondent's counterclaim is dismissed.

F. Marks  
**Member**