VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP877/2016

CATCHWORDS

Domestic building contract. Architect appointed as administrator under the contract. Builder issued claim for final payment (save for 50% of retention sum) and subsequently stopped works and issued proceedings for recovery of the payment. Finding that builder not entitled to payment of the claim because the architect had not certified the payment claim and no occupancy permit was issued at that time. Finding that builder breached contract and wrongfully suspended the works, resulting in delay of 130 weeks to completion of the works. Builder returned to complete works after the delay period. Practical completion certified, Occupancy Permit issued and architect certified payment to builder. Owner's claim for delay damages arising from breach of contract unsuccessful on the *Baltic Shipping* principle. Nominal damages awarded. Owner ordered to pay final sum certified by architect.

APPLICANT	Leeda Projects Pty Ltd (ACN 072 077 171)
RESPONDENT	Yun Zeng
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	January 29, 30, February 1,2, 5, 6, 7, 9, 12, March 16, 2018
DATE OF ORDER	4 May 2018
CITATION	Leeda Projects Pty Ltd v Zeng (Building and Property) [2018] VCAT 679

ORDERS

1. On the applicant's claim, the respondent must pay the applicant $211,844.20.
2. On the respondent's counterclaim, the applicant must pay the respondent nominal damages in the sum of $100.
3. Costs reserved with liberty to apply. Any application for costs to be referred to Senior Member M. Farrelly for orders in chambers as to the conduct of such application.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:	Mr D. Deller of Counsel for the first 9 days; Mr Fah, solicitor, for the final day, 16 March 2018
For Respondent	Mr R. Andrew of Counsel

REASONS

1 In March 2011, Mrs Zeng, the respondent in this proceeding**,** and her husband Mr Dong, purchased an apartment, the entire 87th floor of the Eureka Tower in Melbourne (save for the lift and lobby areas which constituted common property) together with 8 allotted car parks situated on a lower floor in the building. Mrs Zeng and Mr Dong are collectors of contemporary Chinese art and it was their intention to fit out the Eureka apartment as part private art gallery and part residential apartment.

2 Mrs Zeng and Mr Dong are citizens of China with permanent resident status in Australia. For some years they have resided partly in Australia, where they own apartments in Melbourne city and one apartment in the Yarra Valley, and partly in their home in Shanghai. Neither of them speaks, reads or writes English.

3 Mrs Zeng ("**the owner**") engaged SGA Design Pty Ltd ("**SGA**") to prepare the design drawings for the fit out of the Eureka apartment. Mr Shu Guo, a draftsman with SGA, prepared the design. Mr Guo also acted as the owner's agent in negotiating the contract price and terms.

4 By contract dated 24 September 2013, the applicant, Leeda Projects Pty Ltd ("**the builder**"), was engaged by the owner to fit out the Eureka apartment at a cost of $1,168,558.24 (inclusive of GST) ("**the contract**"). Under the contract, SGA, with Mr Guo as its nominated contact, was nominated as "the architect" appointed to administer the contract. (SGA/Mr Guo hereinafter collectively referred to as "**the architect**")

5 Building Works commenced in late 2013. In August 2014, the parties fell into dispute. The builder claimed the works had reached "practical completion" and submitted a payment claim. The architect, being of the view that the works had not reached practical completion, did not certify the payment claim. The builder ceased works and, soon after, commenced a proceeding in the County Court seeking payment of its payment claim as an alleged debt. As discussed later in these reasons, in April 2016 the County Court proceeding was stayed, and in its place, this proceeding commenced in July 2016.

6 Despite the ongoing litigation, the builder returned to complete further works in December 2016. A new architect, Mr Ng, was appointed as the architect to administer the contract. In May 2017, Mr Ng certified *practical completion* of the works. In June 2017, Mr Ng certified for payment to the builder in the sum of $211,944.20.

7 In this proceeding, the builder brings a claim for the sum certified by Mr Ng. The owner brings a counterclaim for damages, primarily damages alleged to have arisen by reason of the delay in completion of the building works, in the sum of approximately $1,118,000.

THE HEARING

8 The hearing was conducted over 9 days in the period 29 January to 12 February 2018, with one further day for closing submissions on 16 March 2018. The builder was represented by Mr Deller of Counsel for the first nine days of the hearing, and by Mr Fah, solicitor, on the final day, 16 March 2018. The owner was represented by Mr Andrew of Counsel.

9 A view of the Eureka apartment was conducted in the afternoon of the first day of the hearing

10 The builder called evidence from:

- Mr Lazzaro, employee of the respondent (up until approximately September 2016) assigned as project manager for the contract;
- Ms Rossi, Finance manager for the builder;
- Mr Privitelli, director of the builder.

11 The owner called evidence from:

- Mrs Zeng, whose evidence was given with the assistance of an interpreter;
- Mr Dong, whose evidence was also given with the assistance of an interpreter;
- Mr Leonard, the relevant building surveyor throughout the project.
- Mr Ng;
- Ms Johnson, operations manager for the Eureka Tower;
- Mr Barnett, a principal of the builder 'Vault Corporate' which has provided a quotation to the owner for, amongst other things, the cost to rectify an alleged default in the air conditioning system.
- Mr Manie, a building consultant first engaged by the owner in September 2016 to inspect and provide opinion as to the status of the building works, in particular as to whether the works had reached *practical completion*. Mr Manie also produced two written reports.

12 Concurrent expert evidence was given by Mr Sutherland (called by the builder) and Mr Tomaino (called by the respondent). Both gentlemen are certified property valuers. They gave evidence as to the residential rental value of the Eureka apartment. They also produced written reports.

CHRONOLOGY, DISCUSSION

13 The contract document is a standard form simple works contract, edition ABIC SW-2008, published by Master Builders Australia and the Australian Institute of Architects.

14 The contract works are described in the contract as "*Fitout of Private Art Gallery*". The contract schedule prescribes the date for *practical completion* of the works as "*TBA*", and the rate for liquidated damages for delay as *"$0 per calendar day*".

15 As part of its administrative duties, the architect assesses progress claims submitted by the builder and certifies the sum to be paid by the owner. The owner is obliged to pay sums certified by the architect within seven days. The contract specifies an interest rate of 10% in respect of overdue amounts. A party may dispute a certification issued by the architect by providing to the architect written notification of the dispute within 20 working days of their receipt of the certification. The architect must assess the dispute notice and provide a written decision to both parties within 10 working days.[1]

16 On 1 October 2013, the builder issued a tax invoice for its first progress claim, a deposit of $350,567.43 representing 30% of the contract price. The owner promptly paid this invoice in full.

17 Architectural and engineering drawings were subsequently finalised.

18 Mr Shane Leonard of 'Philip Chun Consulting' ("**the RBS**") issued a building permit for "stage 1 services works" on 13 December 2013, and a further building permit for "stage 2 architectural works" on 6 February 2014.

19 Building works, including numerous agreed variations to the works, were carried out without any significant disagreements up to June 2014. Within that period, progress claims two, three and four totalling $1,004,070.70 were issued by the builder, certified by the architect and paid by the owner.

20 The contract allows for the builder to provide a security for performance in the form of unconditional guarantees, or a cash retention sum ("**retention sum**") to be withheld by the owner. Where a retention sum is held, 50% of it is to be released to the builder when the architect issues the notice of *practical completion* of the works, with the remaining 50% to be released when the architect issues the *final certificate*. The final certificate is issued by the architect after receipt of the builder's final claim, and the builder can only submit the final claim at the end of the defects liability period. The contract prescribes a six month defects liability period commencing on the date of practical completion.[2]

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[1] Clause N in the contract deals with assessment and payment of progress claims. Clause A8 provides the procedure by which the parties may, by written notification, dispute a certificate, notice, written decision or assessment of the architect, or the architect's failure to issue something. The notice must be provided to the architect within 20 working days of the disputed certificate, notice, decision or assessment. In the case of alleged failure of the architect to issue something, the notice must be provided within 20 working days of the party becoming aware of the architects failure.

[2] Clause C in the contract in respect of the retention sum and its release; clause M for *practical completion* and *defects liability period*; clause N for *final claim* and *final certificate*

21 The contract provides for the parties to nominate, in item 7 in the schedule in the contract, the type of security agreed upon, that is unconditional guarantees or a retention sum. Although the letters "N/A" have been written in item 7, it is now common ground that the builder provided security in the form of a retention sum. Save for the first progress claim for the deposit, the progress payment claims issued by the builder allowed for a sum of around 5% of the sum claimed as the retention sum portion.

22 On 21 July 2014, the builder issued its fifth payment claim and invoice for the remaining balance of the contract price (inclusive of variations) in the sum of $178,896.72. The claim allowed for 5% as the retention sum portion. The builder claimed that the works had reached *practical completion* and, as such, the builder also claimed an entitlement to release of 50% of the retention sum. On 21 July 2014, the builder issued a second claim /invoice for $39,894.80 for release of 50% of the retention sum.

23 The architect declined to certify the fifth progress claim and the claim for release of 50% of the retention sum because he considered some works had not been satisfactorily carried out and *practical completion* had not been reached. The owner had concerns with some of the works, in particular the quality of the carpet and the noise of the air-conditioning system.

24 On 11 August 2014, the architect carried out an inspection and prepared a report. His report, dated 13 August 2014, lists 29 items of work requiring attention, some of them being works which the Eureka Tower management, through its consultants Norman Disney Young ("**NDY**"), required, such as the addition of a fire sprinkler. The architect's report concludes with the comment: "*Occupancy may be affected by some items. Further information required*."

25 As discussed later in these reasons, the requirement to install a laundry floor waste became an issue of dispute, and subsequent resolution, in late 2016. The architect's report of 13 August 2014 makes no mention of the laundry floor waste.

26 The builder attended to some, but not all, of the items in the architect's report. The builder contended that some of the items constituted variation works, and that the builder was not obligated to attend to them unless and until the owner approved the variation works and the extra cost of such works. The variation works were set out in a number of variation notices prepared by the builder. The above-mentioned works required by NDY, modest in nature and cost, were set out in a variation notice number 46 prepared by the builder and dated 21 August 2014. The proposed extra cost of these works was $6785, not a sum that should cause any significant dispute having regard to the history of numerous variations to the works which had caused no disagreement between the parties.

27 By email of 26 August 2014, the architect notified the builder that he was "aiming" to have the owner prepare a bank cheque in readiness for a proposed handover of the works on Friday, 29 August 2014. In the same

email the architect asked the builder when the NDY required items of work would be completed.

28 By email dated 27 August 2014 from Mr Lazzaro, for the builder, to the architect, the builder stated:

> 1. We have achieved practical completion on the 17th July '14 therefore we are owed full payment of the contract amount plus the 2.5% retention held.
> 2. You have not responded to pending variations 41, 42, 43, 44, 45 & 46- without your written approval/rejection of these variations, an occupancy certificate will not be issued as the 'NDY' works are included in these variations.
> 3. We will not do a final clean until you respond to the above-mentioned variations as these works will produce rubbish/dust.
> 4. Please advise where we can collect the bank cheque on Friday.

29 On 27 August 2014 there were further communications between Mr Lazzaro and the architect discussing the variations, works that required attention and the builder's claim for payment. No resolution was reached.

30 The architect's final communication with the builder[3] was an email to the builder dated 4 September 2014 wherein the architect says:

> As per our phone call conversation on Tuesday, I was to suggest the client [the owner] to make the 5th claim [payment] without the 2.5% retention money. Unfortunately the suggestion was not taken by the client and they insist all major problem solved [sic] before the 5th claim paid.
>
> I'm therefore not able to represent the client to solve this issue about the payment time of the 5th claim. The client will contact you directly shortly.

31 No payment was made and the owner did not contact the builder directly.

32 The builder did not provide any notification under clause A8 in the contract in respect of the architect's failure to certify the fifth payment claim.

33 By letter dated 29 September 2014 from the builder's lawyer to the owner, the builder demanded payment of the two invoices issued on 21 July 2014, totalling $218,791.52, within seven days, failing which proceedings would be issued in the County Court to seek recovery of "*the Debt*".

34 By email dated 14 October 2014 from the owner's lawyer to the builder's lawyer, the owner asserted that practical completion had not been reached for a number of reasons, including because occupancy approval had not been provided by the relevant authority [the relevant authority being the RBS].

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[3] This was Mr Guo's final communication on behalf of SGA in its capacity as architect appointed under the contract. SGA, through Mr Guo, had further brief communications with the builder's lawyers in September 2017 to arrange the transfer of the retention sum held in SGA's account to an independent account created by agreement between the parties' lawyers.

35 By email dated 20 November 2014 from the builder's lawyer to the owner's lawyer, the builder suggested that the parties consider the joint appointment of an expert consultant to investigate and report on the building works, with the parties to agree on the issues to be the subject of the investigation. By response email from the owner's lawyer dated 1 December 2014, the owner indicated agreement to the proposal, subject to the parties reaching agreement on the apportionment of costs of the consultant according to each party's responsibility. Although it is not clear in the communication, the owner's lawyer was presumably suggesting that the costs of the expert be borne by the parties in proportions to be determined by the expert. Although the parties made subsequent enquiries as to the identity and cost of a consultant, and they communicated with each other in this regard into early December 2014, no final agreement was reached and no expert consultant was jointly appointed.

36 On about 19 December 2014, the builder commenced a proceeding in the County Court of Victoria against the owner claiming payment of $218,791.52, the sum of the two claims it had issued on 21 July 2014, plus interest, plus costs.

37 The County Court proceeding proceeded throughout 2015. I understand that:

- the owner filed a Defence and Counterclaim;
- mediation was ordered;
- by third party notice issued by the owner, NJM Design Pty Ltd ("**NJM**"), the engineer engaged by the owner to prepare documentation necessary for the issue of the building permit, was joined as a party to the proceeding;
- after some discussion, the mediator was selected and the mediation was set for 22 December 2016;
- on 16 December 2015, the builder's lawyer notified the mediator that the mediation would need to be adjourned as *"this matter is not at a stage where any meaningful discussions can occur to resolve this matter in the short term… The parties do however wish to participate in mediation by the end of February 2016, and wish to retain you as the mediator."*[4]

38 The mediation in the County Court proceeding never occurred. As I understand it, NJM, the joined third-party, made application to the Court pursuant to section 57 of the *Domestic Building Contracts Act* 1995 ("**the DBC Act**"), for the proceeding to be stayed on the basis that this Tribunal was the appropriate forum. By consent orders made on or about 20 April 2016, the County Court proceeding was stayed pursuant to section 57 (2) of the DBC Act.

39 The builder commenced this proceeding in the Tribunal on 5 July 2016.

[4] Tribunal book page 2480

40 Despite the halt in building works since late August 2014, and the ongoing legal proceedings, neither party purported to terminate the contract.

41 On 2 August 2016, the owner appointed new lawyers. She says she did this because she was very frustrated with the delays in the matter and she had lost confidence in her previous lawyers.[5]

42 On 1 September 2016, orders were made, on the application of the owner, requiring the builder to provide to the owner access cards to allow access to the Eureka apartment for the purpose of inspection. The builder claims that, by reason of these orders, having been made on the application of the owner, and the owner's conduct in accessing the premises on and after 5 September 2016 in a manner and for a purpose outside that prescribed in the orders, the owner took 'possession' of the building works. The contract provides that if the owner takes possession of the works before the architect has issued the notice of practical completion, the works are to be treated as having reached practical completion[6]. The builder now relies on this provision in asserting deemed *practical completion* of the works on 5 September 2016.

43 In September 2016, the owner engaged a consultant, Mr Manie, to inspect the Eureka apartment and prepare a report on the status of the works. Mr Manie inspected the Eureka apartment on 22 September 2016 and produced a report dated 14 October 2016. When giving evidence, Mr Manie confirmed his opinion, as set out in his report, that at the time of his inspection the building works had not reached *practical completion*. Mr Manie was not cross-examined by the builder.

44 In October 2016, the owner nominated a new architect, Mr Ng, to carry out the functions of the architect under the contract. The owner's lawyer notified the builder's lawyer of the nomination of Mr Ng. Although there appears to have been no formal acceptance of the nomination of Mr Ng, it is common ground that Mr Ng became the new architect under the contract in October 2016. Mr Ng's appointment was acknowledged in a letter dated 25 October 2016 from the builder's lawyer to the owner's lawyer.

45 By letter to the builder dated 21 October 2016, Mr Ng instructed the builder to attend to further works as set out in schedules attached to the letter. The schedules had been prepared by reference to Mr Manie's report of 14 October 2016.

46 Initially, the builder declined to carry out further works, and the owner responded with an application seeking to vary the orders made 1 September 2016 so that the owner could access the site and proceed to complete the building works. However, before that application came on for hearing, the builder agreed to return to site and carry out further works. The builder recommenced works on about 9 December 2016.

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[5] paragraph 39 in the owner's amended witness statement
[6] clause M8 in the contract

47 One particular item of work, installation of floor waste in the laundry, was the subject of a number of communications involving the builder, Mr Ng and the RBS. This item of work was identified in the stamped drawings accompanying the stage 1 building permit issued by the RBS. As at the recommencement of work in December 2016, this item of work had not been carried out by the builder. The builder initially believed that the RBS had identified this item of work as being not required. When it subsequently became clear to the builder that it was mistaken in this regard, and that the RBS did require this work to be carried out as it was a mandatory requirement under the Building Code of Australia, the builder set about considering and designing alternative methods to achieve an outcome acceptable to the RBS. Ultimately, Mr Ng and the RBS approved an alternative methodology that would achieve the desired result of draining potential water waste/overflow from the washing machine.[7] This item of work was amongst the last to be completed, in May 2017.

48 In his witness statements filed in this proceeding, the RBS, Mr Leonard, confirms that he had never agreed to, nor authorised, dispensing with the laundry floor waste, and that as the floor waste was a requirement of the Building Code of Australia, he would not issue a certificate of final inspection unless the floor waste was installed. Mr Leonard also confirmed that, ultimately, he authorised the alternative method proposed by the builder and carried out in May 2017.[8] Mr Leonard confirmed the truth and accuracy of his witness statements when giving evidence. Mr Leonard was not cross-examined by the builder.

49 After an inspection of the works on 21 May 2017, the RBS issued an Occupancy Permit on 22 May 2017.

50 On 25 May 2017, Mr Ng certified *practical completion* of the works.

51 After attending to some further minor works at the direction of Mr Ng, on 2 June 2017 the builder issued its progress payment claim number 6 for payment of $240,049.57. The builder also issued a claim for release of 50% of the retention sum.

52 Also on 2 June 2017, the builder returned the keys to the Eureka apartment in its possession to the owner's lawyer.

53 By letter from the owner's lawyer to Mr Ng dated 13 June 2017, the owner requested that Mr Ng take into account, when assessing the builder's progress claim, the owner's claim for set-off in respect of substantial alleged damages incurred by the owner by reason of the delay in completion of the works.

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[7] The alternative method was to place the washing machine on a pedestal and to run a drain from the base of the washing machine to the existing sink drain outlet. This alternative method meant that the builder was not required to raise the entire laundry floor to create fall.

[8] See paragraphs15-20 of Mr Leonard's primary witness statement, page 875-876 in the Tribunal book.

54 On 16 June 2017, Mr Ng certified for payment to the builder, not for the full amount of the progress claim, but for a sum of $211,944.20, such sum including the release of 50% of the retention sum.

55 On 20 June 2017, the builder issued a tax invoice to the owner ("**the final invoice**") seeking payment of the sum certified by Mr Ng, $211,944.20. Under the contract,[9] payment of the invoiced sum was due by 27 June 2017.

56 By letter dated 26 June 2017, the owner's lawyer provided written notification to Mr Ng pursuant to clause A8 of the contract that the owner disputed the 16 June 2017 payment certification issued by Mr Ng. It appears that Mr Ng has never responded to this notification.

57 Under clause Q in the contract, the builder may provide written notification to the owner to remedy a default within 10 working days. If the default is not remedied, the builder may immediately suspend the works. After notice of suspension has been provided, the builder "*may terminate its engagement under this contract*" by written notice to the owner.[10]

58 By letter of 28 June 2017 from the builder's lawyer to the owner's lawyer, the builder provided written notification that if the owner failed to pay the final invoice within 10 working days, the builder would be entitled to suspend any further necessary works and subsequently terminate the contract.

59 By email of 6 July 2017 from the owner's lawyer to the builder's lawyer, the owner asserted that the builder had no entitlement to take the threatened action under clause Q when the owner had, on 26 June 2017, exercised its entitlement under clause A.8 seeking a review of the disputed payment certification. The owner asserted that if the builder took the threatened action, the builder would be acting unreasonably and in breach of the contract.

60 The owner did not pay the final invoice and, by letter of 13 July 2017 from the builder's lawyer to the owner's lawyer, the builder gave notice of suspension of works.

61 By letter of 18 July 2017 from the builder's lawyer to the owner's lawyer, the builder gave notice, pursuant to clause Q in the contract, that its engagement under the contract was terminated.

THE PARTIES' CLAIMS IN THE PROCEEDING

62 Both parties have, several times during the course of the proceeding, amended their claims. This is partly due to the fact that events in relation to completion of the building works were continuing during the course of the proceeding.

[9] Clause N6 and item 10 in the schedule in the contract prescribe the period for payment of claims as certified by the architect to be seven calendar days after delivery of the architect's certification.
[10] Clause Q 13 in the contract.

63 During the course of the hearing before me, both parties made further applications to amend their claims. I allowed some, but not all, of the requested amendments.

The Builder's Claims

64 In its Points of Claim, as it stood at the commencement of the hearing, the builder pleaded three alternative dates of *practical completion* of the works:

- July/August 2014;
- alternatively, 5 September 2016 when the respondent allegedly took 'possession' of the Eureka apartment;
- alternatively, 25 May 2017 when the architect Mr Ng certified practical completion.

65 By its latest pleading, its Further Amended Points of Claim dated 6 February 2018, the builder has removed the first alternative, July/August 2014. That is, the builder now claims that the works reached practical completion on around 5 September 2016 as a consequence of the respondent taking possession of the Eureka apartment, or alternatively on 25 May 2017 when the architect Mr Ng certified practical completion.

66 Prior to the commencement of the hearing, the builder made alternative claims for sums alleged to be owing. The alternative claims had been linked to the alternative dates for practical completion and the differing "completion" claim invoices it issued, the first invoice issued on 21 July 2014 (the fifth payment claim), and the second issued on 20 June 2017 (the sixth payment claim).

67 By its latest pleading, the builder's claim is confined to a claim for payment of $211,944.20, the sum certified by Mr Ng on 16 June 2017 and claimed by the builder in its final invoice, plus interest on this sum at the contract specified rate of 10%.

68 The builder also asserted an entitlement to release of the whole retention sum, in reliance upon clause Q 15 in the contract. That clause provides that where the builder has terminated its engagement under clause Q, which the builder purported to do by its letter of 18 July 2017, the owner must pay the builder the amount the owner would have had to pay if the owner had wrongfully repudiated the contract.

69 However, in closing submissions the builder confirmed that it no longer pursues, in this proceeding, a claim for release of the whole of the retention sum. It simply seeks the sum certified by Mr Ng on 16 June 2017, plus interest on that sum. Although not addressed by the builder in closing submissions, I presume that, subject to the outcome of this proceeding, the builder might in the future assert an entitlement to the balance of the retention sum after a *final certificate* is issued.

The Owner's Claims

70 The owner says that the builder wrongfully suspended the building works from on or around 27 August 2014, when it stopped works, until 9 December 2016, when it recommenced works. The owner says also that practical completion of the works was not reached until 25 May 2017, when Mr Ng certified practical completion.

71 The owner says she is entitled to withhold payment in respect of the final sum certified by Mr Ng on 16 June 2017 because:

- by letter dated 26 June 2017, the owner has disputed Mr Ng's certification, and to date there has been no response from Mr Ng;
- in any event, the owner claims an entitlement to set-off against any sum that might be owed to the builder her own loss and damage caused by the builder, namely delay damages and the estimated cost to rectify the alleged defect in the air conditioning system installed by the builder.

72 The sum claimed to rectify the alleged faulty air conditioning system is $29,178.

73 In respect of delay damages, by her counterclaim as it was at the commencement of the hearing, the damages were said to have arisen as a result of the builder's breach of the contract in wrongfully suspending the building works from 27 August 2014.

74 The owner says also that 27 August 2014 is a reasonable date, in the absence of any date specified in the contract, by which the building works should have been completed. The owner says 27 August 2014 is reasonable having regard to the fact that on 21 July 2014, the builder itself asserted that the works had reached practical completion and, as such, the builder had issued progress claims for the whole balance owed under the contract, save for half the retention sum.

75 Delay damages are claimed for the period 27 August 2014 to 25 May 2017, the latter date being the date of Mr Ng's certification of practical completion of the works.

76 In her counterclaim, as it was at the commencement of the hearing, the owner claimed the following delay damages:

- loss of income the respondent would have made from lease agreements in place, for rental of art gallery space in the Eureka apartment, to several Chinese art dealers;
- alternatively, loss of use and enjoyment of the premises, quantified as:
  1. $785,912.33 being the residential rental value of the Eureka apartment for the period of delay, and
  2. fees, rates and utility charges incurred and paid by the owner for the period of delay, namely:

- Owners Corporation fees, $259,490.64;
- Council rates, $37,908.64;
- electricity charges $3449.30;
- water charges $2063.27

77 By her latest pleading, her Second Further Amended Points of Counterclaim dated 2 February 2018, the claim for loss of income related to leases of art gallery space has been removed.

78 The owner's Defence and Counterclaim included, for some time prior to the commencement of the hearing, an allegation that the contract includes a term, implied by law, that the builder must complete the building works within a reasonable time. However, prior to the commencement of the hearing, there was no express allegation pleaded that the builder had breached that implied term.

79 In her latest pleading, dated 2 February 2018, the owner pleads:

> Wrongfully and in breach of the contract, *and in breach of the implied term to complete the works within a reasonable time*…Leeda [the builder] suspended the works from on or about 27 August 2014 until 9 December 2016 and did not achieve practical completion until 25 May 2017.[11]
>
> [italics added]

80 Finally, the owner also claims unspecified damages for disappointment, inconvenience and vexation.

81 I note for completeness that on the ninth day of the hearing, 12 February 2018, after the completion of evidence, the owner sought to further amend her counterclaim for delay damages. The owner sought to claim, as an alternative method of quantifying delay damages, interest (for the period of delay claimed) on the capital value of the Eureka apartment, such capital value put as the purchase price of the apartment plus the cost of the building works carried out. Although the owner's Counsel had, on 11 February 2018, foreshadowed the possibility of an application being brought in respect of this proposed amendment, the application was not actually made until after the conclusion of evidence on 12 February 2018. In my view, it would have been unfair to the builder to allow the proposed amendment, which I considered amounted to a significant amendment to the owner's counterclaim, after the completion of evidence. For this reason, I did not allow the proposed amendment.

82 The builder disputes that there is a defect in the air conditioning system as alleged. The builder also disputes that the owner has any entitlement to delay damages, and in this regard the builder asserts:

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11 paragraph 27 in the respondent's Amended Points of Defence and Second Further Amended Points of Counterclaim dated 2 February 2018

- The contract does not nominate any date for practical completion, or final completion, of the building works.
- The owner's entitlement to delay damages, if any, is limited to liquidated damages as identified in the contract, and the contract expressly provides for '*$0 per calendar day'* for liquidated damages for delay;
- The builder denies that it suspended the building works, wrongfully or at all. The builder says that, following the architect's last communication to the builder on 4 September 2014, wherein the architect says that the owner will contact the builder shortly, the owner failed to contact the builder;
- If there is an implied term in the contract that the building works were to be completed within a reasonable time, which the builder does not admit, such reasonable time must take into account the variations to the works.
- The owner has no provable "loss". Alternatively, if the owner has any loss and damage caused by delay in completion of the building works, the owner has failed to mitigate her loss;

THE CONTRACT AND THE DOMESTIC BUILDING CONTRACTS ACT 1995

83 The contract document is a standard form simple works contract, edition ABIC SW-2008, published by Master Builders Australia and the Australian Institute of Architects. Ms Rossi, the finance manager employed by the builder, selected and purchased the document. She also filled out portions of the schedule in the contract, such as the names of the parties, a brief description of the works, applicable interest rates and other matters. She did this on instructions from Mr Lazarro, the builder's project manager for this project, and Mr Privitelli, a director of the builder.

84 As well as the fit out of a private art gallery, the works to be carried out under the contract also included fit out of part of the apartment as a private residence including two bedrooms with ensuites, lounge, kitchen and laundry. As such, the contract works constitute *domestic building works* under the DBC Act, and the contract constitutes a *major domestic building contract* under the DBC Act.

85 The ABIC SW-2008 standard form contract document selected by the builder was a poor choice. It does not make provision for matters required, under the DBC Act, to be included in a *major domestic building contract*, including:

- notice of a five day cooling off period within which an owner may withdraw from the contract[12];
- an approved form of checklist[13];

[12] Sections 34 and 31(n) of the DBC Act

- the mandatory implied warranties in respect of the works under section 8 of the DBC Act[14].

86 Moreover, unlike a standard form contract document suited to a *major domestic building contract,* the contract document selected by the builder does not alert the parties to numerous mandatory requirements under the DBC Act including:

- the requirement for the contract to include a detailed description of the work to be carried out under the contract[15];
- the requirement that the contract include plans and specifications that are sufficient to obtain a building permit[16];
- the requirement to state the date when the works will be finished or, where the starting date is not known, the number of days required to finish the work once it is started[17];
- the limitation on the sum of the deposit to 5% of the contract price,[18];
- the limitations as to progress payments, expressed as a percentage of the contract price for defined stages of the works[19];
- the requirement that the builder must not demand final payment under the contract until the works are completed in accordance with the plans and specifications set out in the contract, and the building owner is given a copy of the occupancy permit[20];

87 Having heard the evidence of Mr Lazzaro, Ms Rossi and Mr Privitelli, I am satisfied that, at the time the parties entered the contract, and at all times before lawyers were engaged by the parties in relation to this dispute, Mr Lazzaro, Ms Rossi and Mr Privitelli knew of the existence of the DBC Act, but it did not occur to them that the works under the contract constituted *domestic building works* attracting the operation of the DBC Act. They also had little knowledge of the provisions in the DBC Act, including many of the matters I have referred to above.

88 I am also satisfied on the evidence of the owner and her husband that neither of them had knowledge of the DBC Act and the provisions thereunder. Although Mr Guo was not called to give evidence, it seems likely, given his apparent acquiescence in the choice of the contract document, that his knowledge and understanding of the DBC Act was similarly limited to that of the builder's representatives.

[13] Section 31(r) of the DBC Act
[14] Section 31(q) of the DBC Act
[15] Section 31(c)
[16] Section 31(d)
[17] Section 31(i)
[18] section 11
[19] section 40
[20] Section 42

89 The parties' lack of knowledge in this regard is unfortunate. Had they selected a standard form contract document suited to a *domestic building contract*, they might have avoided the dispute they now find themselves in. Their lack of knowledge, however, does not excuse non-compliance with applicable mandatory requirements under the DBC Act.

PRACTICAL COMPLETION

90 Clause M1.1 in the contract prescribes that the building works are at *practical completion* when:

> in the reasonable opinion of the architect
>
> a) they are substantially complete and any incomplete necessary work or defects remaining in the works are of a minor nature and number, the completion or rectification of which is not practicable at that time and will not unreasonably affect occupation and use
>
> b) all commissioning tests in relation to the plant and equipment shown in item 23 of schedule 1 have been carried out successfully [the notation "*TBA*" has been inserted in item 23] and
>
> c) any approvals required for occupation have been obtained from the relevant authorities and copies of official documents evidencing the approvals have been provided to the architect.

91 There is no dispute that, in this case, the approval required for occupation under clause M1 .1 (c) is a reference to the Occupancy Permit to be issued by the RBS.

92 As noted above, the RBS issued the occupancy permit on 22 May 2017. Mr Ng issued the certificate of practical completion three days later, on 25 May 2017.

93 As discussed earlier, clause M8 .1 in the contract provides that if the owner takes possession of the works before the architect issues the notice of practical completion, the works are to be treated as having reached practical completion.

94 The builder submits that the owner took possession of the works on and from around 5 September 2016. The builder relies upon the orders made by the Tribunal on 1 September 2016, the relevant orders being:

> 1. The applicant must, by not later than 4:00 p.m. Monday 5 September 2016, deliver to the respondent's lawyers such access cards, keys, security codes and other information or devices required to allow the respondent access to the subject premises, Lot S28, Level 87 Eureka Towers, 7 Riverside Quay, Southbank, Vic ("the apartment") and the relevant car park for the apartment ("the car park").

2. Subject to orders 2(a) and (b) below, the respondent may, for the purpose of inspection only, attend the apartment with her representative and consultants:

   a. the respondent must provide to the applicant's lawyers at least 2 business days prior notice of the date and time of any proposed inspection; and

   b. a representative of the applicant may attend the apartment at any such inspection, however the respondent's representative must not interfere with the inspection/s.

3. The applicant may access the car park without any requirement to provide any notification to the respondent.

95 The orders permit access to the Eureka apartment by the owner and her consultants for the purpose of inspection only, and upon notice to the builder.

96 The builder says that the owner accessed the Eureka apartment on various occasions, not in accordance with the orders made 1 September 2016, and that by so doing the owner took "possession" of the works.

97 I do not accept the submission.

98 First, I am not satisfied on the evidence that the owner accessed the Eureka apartment otherwise than as permitted by the orders made 1 September 2016.

99 Elevator records of the Eureka Tower management were produced in evidence. They indicate that the elevators were used by someone, with access cards connected to the Eureka apartment, on various occasions for unknown purpose, both prior to and after September 2016. The records are limited to confirming elevator access, the elevators falling within the common property in the building. The records do not record access into private apartments. As such, the records can do no more than suggest that somebody, with access cards to the 87th floor, used the elevators on a number of occasions. The records cannot establish actual access into the Eureka apartment on the 87th floor.

100 Mr Ng confirmed in evidence that he inspected the Eureka apartment on one occasion prior to his appointment, the purpose of the inspection being to assist him in providing a fee proposal for his services. To his recollection he attended that inspection with a representative of the builder. Mr Ng confirmed also that, after his appointment as architect under the contract, he attended the Eureka apartment to inspect works on a number of occasions throughout the course of works. He says the owner did not accompany him at those inspections.

101 The owner's recollection as to when she accessed the Eureka apartment after the contract was signed is vague. She recalls inspecting the apartment with Mr Guo in around July/August 2014 and being concerned about the state of the carpet and the air-conditioning noise. Otherwise she has no clear

recollection of any occasions when she may have accessed the Eureka apartment, or the car parks allotted to the Eureka apartment, between 2014 and May 2017.

102 In my view, the evidence as to access to the Eureka apartment is, at best, equivocal. It suggests a little more than random occasions of access to the Eureka building during the course of the building works by a person or persons other than the builder or the architect.

103 On all the evidence, I am not satisfied that the owner accessed the Eureka apartment otherwise than as permitted by the orders of 1 September 2016.

104 In any event, even if there was unequivocal evidence that the owner had, contrary to the orders of 1 September 2016, accessed the Eureka apartment on a number of occasions, such evidence would not lead me to conclude that the owner had taken "possession" of the works.

105 The contract provides that the owner must give the builder possession of the site after the contract is signed.[21] The contract does not say that the builder's possession is exclusive. The contract does not define "possession", and in my view its meaning must be construed with reference to section 17 of the DBC Act which provides that a domestic building contract does not give a builder a greater right to occupy a building site than that of a contractual licensee. The contract does not say that a visit to site uninvited and without notice on the part of the owner constitutes the re-taking of possession of the site by the owner.

106 For the above reasons, I find that the owner did not take possession of the works prior to the issue of the certificate of practical completion on 25 May 2017.

107 With practical completion being, otherwise, dependant on certification by the administering architect, I find that practical completion of the works was reached on 25 May 2017 when Mr NG issued the certificate of practical completion.

IMPLIED TERM THAT WORKS MUST BE COMPLETED WITHIN A REASONABLE TIME

108 As noted earlier, the contract prescribes the date for practical completion of the works as "*TBA*". The builder says that it is no oversight that no construction period was prescribed. The builder says that, given the unusual nature of the works – fit out of private art gallery/residence- and the fact that the construction plans were not finalised, a construction period could not be accurately estimated at the time the contract was signed. The builder says also that this is why contract specified zero liquidated damages.[22] I accept the builder's evidence in this regard. It is not contested. Mr Guo,

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[21] clause F1 in the contract

[22] Paragraph 14 in the Further Amended Witness Statement of Andrew Privitelli.

who negotiated the contract on behalf of the owner, was not called to give evidence, and the owner gives no contrary evidence.

109 The question remains, however, as to whether the contract includes a condition, implied by law, that the building works must be completed within a reasonable period of time.

110 Against the existence of such implied condition, the builder submits:

a) the contrary intention of the parties, reflected in the express terms of the contract as referred to above,

b) the fact that the owner could have, under the contract, required the architect to issue a notice to the builder to proceed diligently with the works

c) clause R4 in the contract, headed "Entire contract" which provides:

> this contract contains everything the owner or the architect has agreed to with the contractor [builder] in relation to the matters it deals with …

d) The proposed implied term does not meet the general requirements at law, as stated by Justice Mason in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR at 337, for a term to be implied into a written contract, namely that the term must:

i. be reasonable and equitable;

ii. be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

iii. be so obvious that "*it goes without saying*";

iv. be capable of clear expression; and

v. not contradict any express term of the contract.

111 The submission appears to be at odds with the comment of the builder's Counsel in opening submissions when, in answer to my question as to whether Counsel accepted that the contract included an implied term to complete the works within a reasonable time, Counsel replied:

> I accept that in the position where the contract says TBA for the date for practical completion that it needs to be therefore implied that there will be completion within a reasonable time…[23]

112 In any event, I take it that the builder's position is as put in closing submissions, namely that in this case there should be no implied term that the building works must be completed within a reasonable time.

113 I do not accept the builder submission. In my view the contract includes an implied term that the works must be completed within a reasonable time.

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[23] Transcript, Page 50, line 20

114 On the evidence before me, I accept that the nature of the works, part art gallery and part private residence, together with the fact that the plans for the works had not been finalised at the time the parties entered the contract, meant that the builder was unable to accurately estimate, at the time the parties entered the contract, the construction period for the proposed works. At the time the parties entered the contract, the proposed works had not been finalised, and a building permit was yet to be issued.

115 In my view, the letters *"TBA"* inserted in item 22 in the schedule in the contract, as the date for practical completion of the building works, indicates the parties' intention that the date for practical completion was *to be advised* at a future date when the plans were finalised, such that the full scope of works was known and a construction period could be accurately estimated.

116 I accept the builder's evidence that, after the plans were approved and stamped by the RBS, there were further subsequent numerous variations to the works, at the owner's request, during the progress of the works which necessarily lengthened the construction period. This is not contested by the owner.

117 As it turned out, no construction period or date for practical completion was ever prescribed. The builder first advised the owner of the date for practical completion when it claimed that practical completion had been reached and issued its fifth payment claim on 21 July 2014.

118 But the fact that the contract does not expressly prescribe a construction period, together with the fact that the time actually taken to carry out works was partly affected by variations to the works as requested by the owners, does not mean that the builder was at liberty to complete the contract works at any time.

119 In my view, it is essentially a matter of common sense that, in the absence of an express term in a building contract as to when the contract works are to be completed, the law will impose an implied term in the contract that the works must be completed within a reasonable time. Without such implied term, a builder could come and go as he pleased and an owner would have no recourse despite having serious financial commitments connected with the construction project and, in the case of the construction of the owner's new home, nowhere to live.

120 Numerous learned authors have recognised the existence the implied term.[24]

121 Under s31(1)(i) of the DBC Act, it is an offence for a builder to enter into a major domestic building contract which does not state when the building

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[24] For examples: Justice David Byrne, 'Implied Terms in Building Contracts: Inference or Imputation?' (1998) 60 Australian construction Law newsletter 18, at 22.
Bailey and Bell, *Construction Law in Australia*, third edition, Thomson Reuters (2011) at 225.

works will be finished, or, if the starting date is not yet known, the number of days that will be required to finish the work once it is started.

122 In my view, the general requirements at law for implication of a term into a written contract, the above-mentioned *Codelfa* requirements, are met.

123 The builder submits that the provisions in the contract by which the architect can issue instruction to the builder to carry out works,[25] and the provision by which the owners might engage alternative contractors to complete works,[26] obviate a need for the implied term. I do not accept the submission.

124 Clauses in the contract empowering the architect, or the owners through the architect, to issue instructions to the builder as to the rectification/progress of works cannot be construed in isolation. The contract document also contemplates that the parties will nominate a due date for practical completion. In this case, the parties failed to do so. In my view, such failing does not mean that the architect, acting independently or as agent for the owners, can simply dictate the due date for practical completion of the works by means of an instruction, or multiple instructions, to carry out works.

125 And it should also be borne in mind that, under clause A8 in the contract, the parties may dispute a notice issued by the architect, and if a party remains dissatisfied with the architect's decision on the disputed notice, the party may invoke the dispute resolution clause, clause P in the contract. Under the dispute resolution clause, the parties might proceed to mediation, but in the meantime, the parties are required to continue to perform their obligations under the contract.[27] One can appreciate the stalemate that might ensue in the circumstance where, under the contract, the builder has no obligation, express or implied, to complete the works within any timeframe.

126 In my view, the provisions in the contract by which instructions may be given to the builder do not overcome the fundamental deficit in having no term, express or implied, as to the timeframe for completion of the contract works.

127 For the above reasons, I am satisfied that the contract includes an implied term that the contract works are to be completed within a reasonable time. The issue is, what is a reasonable time?

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25 Clause A6.3 in the contract provides that the architect is the owner's agent for giving instructions to the builder, and by clause A7 the architect may issue an instruction in writing at any time.

26 Under clauses M11 and M12, if the builder fails to rectify defective works or complete necessary works within 10 working days after receiving a written instruction from the architect, or otherwise fails to show reasonable cause for the failure to rectify/complete the works, the owner may use another person to correct the problem at the cost of the builder.

27 Clause P1 in the contract

Reasonable time for completion of the works

128 The owner accepts that the progress of the works, after the contract was signed, was delayed because of the time taken to finalise construction plans for approval of the RBS, and the issue of the building permit. The owner accepts also that there were further delays in the works, particularly in early 2014, caused by further variations to the works at the request of the owner.

129 The owner submits that a fair method to assess the reasonable time by which the works should have been completed is to adopt the date which the builder itself claimed as the date when the works had reached practical completion, approximately 21 July 2014, and then add several weeks for the remaining items of work to bring the works to completion. Using this simple methodology, the owners submit 27 August 2014 as the reasonable date by which the contract works should have been completed.

130 The builder submits that the owner has failed to present satisfactory evidence as to the reasonable time for completion of the works. The builder says the owner could have, for example, brought evidence, presumably expert evidence, as to construction programming for completion of the works having regard to the numerous variations to the works. In my view, the builder could have brought such evidence itself.

131 In my view, the owner's suggested methodology has merit. Save that, as discussed below, I allow more time for final completion of the works after the works stopped in August 2014, I consider the method is fair. It acknowledges the builder's stated position as to the status of works as at July/August 2014, and it requires no explanation or justification from the builder as to the progress of works up to August 2014.

132 The evidence of the builder is that as at mid July 2014, the project was nearing completion. Mr Lazzaro says in his witness statement:

> Towards the middle of July 2014, the Project was, in my opinion, practically complete. By this, I mean that I considered the Project had reached a stage where a person could live at the Site. Of course, there was still some work to do, and I was still at the Site regularly, but that work was fairly minor, such as cleaning, minor touch-ups and things of that nature.[28]

133 When giving evidence, Mr Lazzaro stated that he considered the works were, in mid-July 2014, around 90% or 95% complete.[29]

134 Whatever the precise status of the works, in terms of whether *practical completion* had been reached, it is clear that the builder considered the works were close to completion, such that it was entitled to issue a progress claim for the remaining unpaid balance of the contract price, save for 50% of the retention sum.

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[28] Paragraph 23 of Mr Lazzaro's primary witness statement. Tribunal book page 842

[29] See transcript of evidence 2 February 2018, page 266, line 29.

135 Although I have found that practical completion, within the meaning of the contract, was not reached until 25 May 2017, I accept on the evidence before me that the works were well advanced towards completion in July/August 2014.

136 There is little evidence before me as to how long it might have taken the builder to complete the remaining works, assuming the exercise of proper skill and care, had it not halted the works in August 2014.

137 After the builder returned to the site on 9 December 2016, it took until 25 May 2017 for the works to reach practical completion, as certified by Mr Ng.

138 In his witness statement, Mr Privitelli says:

> In late October 2016, I was provided with a letter from [Mr Ng] setting out a list of work that needed to be completed in order to achieve Practical Completion (**Remaining Work**) and a separate list of work that needed to be completed at some stage, but did not need to be completed in order for Practical Completion to be certified…
>
> The Remaining Work was commenced at the site on 9 December 2016…
>
> By January 2017, the only issue that remained outstanding from the Remaining Work was the installation of the [laundry] floor waste.[30]

139 On the above evidence, I find that, not including the laundry floor waste, the builder required approximately seven weeks (9 December 2016 to late January 2017) to bring the works to practical completion.

140 As discussed above, there was dispute between the parties, eventually resolved, as to the laundry floor waste. It appears from Mr Privitelli's evidence that resolution of the laundry floor waste issue was the primary reason for the delay, in the period February 2017 to 25 May 2017, in reaching practical completion.

141 In my view, the builder bears responsibility for most of the delay caused by the laundry floor waste issue. This is because the builder was in error in initially believing that the floor waste was no longer required by the RBS. I accept that, without such erroneous initial belief, there may still have been some delay while a workable solution to the problem was reached. Doing the best I can, I think an allowance of 3 weeks for such delay is fair and reasonable.

142 For the above reasons, I consider a total of 10 weeks to be a reasonable allowance for the time it ought to have taken the builder to bring the works to practical completion after 9 December 2016.

143 Doing the best I can, I consider also that four weeks is a reasonable further allowance for the time it would have taken the builder, after certified

[30] Further amended witness statement of Mr Privitelli, at paragraphs 25 to 28

practical completion, to complete the remaining minor items of work and bring the contract works to completion.

144 Accordingly, I consider 14 weeks as a reasonable allowance for the time it ought to have taken the builder to bring the works to completion after it returned to site on 9 December 2016.

145 The status of the works as at 9 December 2016 was the same as the status of the works when the builder halted works in August 2014. The actual date that the builder halted works in August 2014 is not clear. As discussed earlier in these reasons, the builder attended to some of the items of work set out in the architect's report dated 13 August 2014. For the purpose of calculating a reasonable timeframe for works, I nominate 27 August 2014 as the date when the builder halted works. As also discussed earlier in these reasons, 27 August 2014 is the date of the email from the builder to the architect wherein the builder confirms, amongst other things, that it has reached practical completion and requires payment.

146 Accordingly, doing the best I can do be fair, I find that the reasonable date by which the contract works should have been completed is 3 December 2014, calculated as follows:

- 27 August 2014, the date when the builder halted works;
- plus 14 weeks as a reasonable allowance for time it should have taken the builder to bring the contract works to completion after 27 August 2014, had it not halted works on 27 August 2014.

Breach of the implied term / suspension of works

147 In my view, responsibility for the builder's failure to bring the works to completion within a reasonable time, that is, by 3 December 2014, rests with the builder.

148 It is clear that, as at 27 August 2014, the builder refused to carry out further works until it received payment of its claims issued on 21 July 2014. The claims issued on 21 July 2014, and the builder's subsequent demand for payment of them, constituted demand for final payment of the contract price, save for 50% of the retention sum. The builder was not entitled to adopt such stance.

149 The architect had not certified the payment claims, and the builder had not issued a notice of dispute in respect of the architect's refusal to certify the claims. In such circumstance, the builder had no justification for demanding payment, and the owner had no obligation to make the payment.

150 The builder's demand for payment constituted a breach of section 42 of the DBC Act which provides that a builder must not demand final payment under a major domestic building contract until the works under the contract have been completed and an occupancy permit has been provided to the owner.

151 The builder submits that it was entitled to stop works when it did in August 2014 until such time as the owner authorised variation works as set out in the builder's variation notice dated 21 August 2014. I do not accept that submission. In my view, the submission is an attempt at justification in hindsight. As noted above, on the evidence it is clear that the builder stopped works because the invoices dated 21 July 2014 were not paid. The builder's stance in this regard is apparent from the letter dated 29 September 2014 from the builder's lawyer to the owner.[31] In that letter, the builder's lawyer states, amongst other things:

> …Our client notified the architect … on 21 July 2014 that practical completion had been reached.
>
> On 21 July 2014 our client rendered the following invoices [the two invoices issued 21 July 2014]
>
> The invoices have been provided to SGA [the architect] for payment, however despite repeated demands for payment, the total amount of $218,791.52 remains outstanding.
>
> SGA has made various allegations in support of a refusal to accommodate our client's requests for payment. In short compass the allegations are that our client is somehow responsible for the shedding of the carpet and the noise emitted by the air-conditioning unit. SGA also say that practical completion has not been reached. (*Allegations*).
>
> Our client rejects the allegations as entirely baseless…
>
> The ongoing refusal to pay our client by reason of the allegations is unacceptable, and we have now been retained to enforce our client's rights to receive payment.
>
> Unless our client receives payment of $218,791.52 (*Debt*) within seven (7) days of the date of this letter we are instructed to issue proceedings in the County Court to seek recovery of the debt without further notice to you…

152 On all the evidence, I find that the builder wrongfully, and in breach of the contract, suspended the works from 27 August 2014 until it returned to site on 9 December 2016.

153 In find also that the builder breached the implied term in the contract to complete the works within a reasonable time, that is, by 3 December 2014.

DAMAGES FOR BREACH

154 The owner claims damages for the loss of use and enjoyment of the Eureka apartment for the period of delay from 27 August 2014 to the date of practical completion, 25 May 2007. A period of 144 weeks.

155 In my view, the delay attributable to the builder's breach of contract is the period from 3 December 2014, that being my assessment of the reasonable date by which the contract works ought to have been completed, to 2 June

[31] Tribunal book page 1418

2017, that being the date the builder returned the keys, and thereby possession, of the Eureka apartment to the owners. A period of 130 weeks (“**the delay period**”).

Zero liquidated damages

156 Clause M9 in the contract provides an entitlement to the owner for liquidated damages, at the rate prescribed in the schedule in the contract, if the contract works have not reached practical completion by the due date. As discussed earlier, the schedule prescribes a rate of *“$0 per calendar day”.*

157 As discussed earlier, I accept the evidence of the builder that the contract prescribed no date for practical completion, and zero liquidated damages, because a construction period and could not be accurately estimated at the time the contract was signed.

158 The builder submits that the express provision in the contract for zero liquidated damages for delay indicates a clear intention of the parties, at the time the contract was entered, that the owner would have no entitlement to any delay damages.

159 The owner submits that she is entitled to claim general law damages for delay, notwithstanding the express provision in the contract for zero liquidated damages.

160 I agree with the owner.

161 It is important to recognise the difference between *liquidated damages* for delay prescribed in a contract, and general law damages for delay. Contract prescribed liquidated damages for delay is the agreed assessment of the parties, at the time the contract is entered, of the damages the owner will suffer, and for which the builder will be liable, if the builder does not bring the works to completion by the due date under the contract. Delay damages for breach of contract at general law is the loss actually suffered by the owner as a result of the breach. An owner is not entitled to both prescribed liquidated damages for delay, and general law damages for delay, for the same period of delay.

162 But the fact that a contract includes a provision for liquidated damages for delay, that is, the parties have turned their mind to, and reached and recorded their agreement in respect of liquidated damages for delay, does not of itself mean that the parties agreed that the liquidated damages clause constitutes the entirety of the owner’s rights to delay damages. I accept the submission of the owner that, in construing the contract, one starts with the presumption that neither party intends to abandon remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.[32]

[32] The owner’s submission cites the statement of Lord Diplock in Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 at 717-718

163 In my view, the language of the contract does not lead to the conclusion that the parties agreed to abandon any entitlement to general law delay damages.

164 As noted by the owner in closing submissions, the language of the liquidated damages clause in the contract, clause M9 set out below, supports such construction:

> .1 If the *works* have not reached *practical completion* by the date for *practical completion* as adjusted, the architect must *promptly* notify the contractor [builder] and the owner in writing of the owner's entitlement to liquidated damages.
>
> .2 Up to 20 *working days* after the date of issue of the notice of *practical completion*, the owner **may** notify the architect in writing whether it will enforce its entitlement to liquidated damages against the contactor.
>
> .3 the contractor is liable to pay or allow to the owner liquidated damages at the rate shown in item 24 of schedule one

(bold emphasis, underlining added)

165 Having regard also to the express provision in the schedule in the contract to a liquidated damages rate of *$0 per calendar day,* in my view the language of the contract reveals the intention of the parties to effectively remove any real entitlement to the owner to *liquidated damages* for delay, but the contract does no more than that.

166 For the above reasons, I find that the contract does not bar a claim by the owner for delay damages at general law.

LOSS OF BENEFIT OF USE

167 As confirmed in the express terms of the contract, the owner intended to use the Eureka apartment as a private art gallery.[33] The owner says that, as well as being a private art gallery, the apartment was intended as a potential residence for her and her husband.[34] As apparent from the construction drawings, the fit out of the Eureka apartment was to include ordinary residential components including two bedrooms with ensuites, laundry, lounge and kitchen.

168 On the evidence, I am satisfied that at the time the contract was entered, the builder was aware that the Eureka apartment, upon completion of the contract works, was to be used partly as a private art gallery and partly as a residence. Or to put it another way, I am satisfied that at the time the parties entered the contract, it may reasonably be supposed to have been in the contemplation of both parties that breach of contract on the part of the builder may result in loss and damage to the owner in the form of loss of benefit of use of the private art gallery/residence.

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[33] Item 5 in the schedule to the contract describes the contract works as "Fit out of Private Art Gallery"
[34] paragraph 3 and paragraph 43 in Amended witness statement of the owner, Ms Zeng.

169 Having heard evidence from the owner and her husband, Mr Dong, I make the following findings as to their living arrangements:

a. The owner and her husband own multiple properties in China, with their primary residential address being in Shanghai.

b. At all relevant times, the owner and her husband have had access to a number of residential premises in Victoria namely:

i. a three-bedroom apartment in Exhibition Street, Melbourne owned by the owner;

ii. another two-bedroom apartment in the same building in Exhibition Street, owned by the owner. This apartment is primarily made available for the three children of the owner and Mr Dong;

iii. a residential apartment at a winery in the Yarra Valley, owned by the family trust of the owner and Mr Dong.

c. In the years 2014, 2015 and 2016 and 2017, the owner and her husband resided predominately in Australia for approximately the first half of the year, in the three-bedroom Exhibition Street apartment and/or the Tarra Warra apartment. In the second half of those years, they resided in Shanghai when not travelling elsewhere in the world.

d. Since around 18 December 2017, Mr Dong has resided primarily in the Eureka apartment.

e. The owner has never resided in the Eureka apartment. She has never intended to reside permanently in the Eureka apartment. She has never stayed one night in the Eureka apartment. Since returning to reside in Shanghai in mid-2017, the owner has continued to reside in Shanghai.

170 As stated above, the owner and Mr Dong intended to use the Eureka apartment as a private art gallery and potential residential premises for themselves. There is no evidence that they intended to use the apartment as a residential rental investment property.

Owners Corporation fees, rates and utility charges

171 At all relevant times, and in particular during the delay period, the owner has incurred the cost of Owners Corporation fees, Council rates, electricity and water charges associated with the Eureka apartment. The builder concedes that the owner has incurred these charges in the sense that accounts are addressed to the owner. The builder says, however, that the owner has failed to prove that she has paid all the charges because the bank records she has produced as substantiating documentary evidence are not complete, thus leaving doubt as to who paid some of the charges. I accept the owner's evidence that she has paid all of the incurred charges.

172 In the annexure to the owner's Amended Points of Counterclaim, the owner summarises the charges incurred for Owners Corporation fees, Council rates, electricity and water for the period 27 August 2014 to 25 May 2016.

The builder accepts that the summary accurately records the charges incurred for that period. Using that summary, I calculate charges for the delay period, that is the delay period as assessed by me, 3 December 2014 to 2 June 2017, as $283,802.17 as set out below:

Owners Corporation fees

- 4 December 2014 to 31 January 2015 (pro rata basis, 59 days)	$9932.08
- 1 February 2015 to 30 April 2017 -	$228,628.22
- 1 May 2017 to 2 June 2017 (pro rata basis, 33 days)	$5630.39
Total	**$244,190.69**

Council rates

- 4 December 2014 to 30 June 2015 (pro rata basis 209 days)	$7472.68
- 14 August 2015 $	13,635.50
- 8 August 2016	$13,260.76
Total	**$34,368.94**

Electricity charges

- 15 April 2015 to 12 May 2017	$3,311.11
- 10 May 2017 to 2 June 2017 (pro rata basis 24 days)	$177.28
Total	**$3,488.39**

Water charges

- invoices for the period 15 February 2015 (the first invoice after 3 December 2014) to 14 February 2017	$1,737.40
- invoice dated 16 May 2017 (pro rata from 1 April 2017 to 2 June 2017, 63 days)	$16.75
o **Total**	**$1,754.15**

TOTAL ALL FEES AND CHARGES **$283,802.17**

Residential retail value

173 Concurrent expert evidence as to the residential rental value of the Eureka apartment was given by certified property valuers, Mr Tomaino, called by the owner, and Mr Sutherland, called by the builder. As discussed later in these reasons, I do not accept that the owner is entitled to damages measured as the residential rental value of the Eureka apartment for the delay period. For completeness, however, I set out briefly my finding on the evidence given by the experts.

174 Mr Tomaino assesses the residential rental value of the Eureka apartment for the delay period as approximately $286,000 per annum, or $5500 per

week. The valuation assumes that the apartment would not be furnished. If the apartment was fully furnished, his estimate increases to $7500 per week.

175 Mr Sutherland estimates a sum of $2500 to $3000 per week.

176 A major reason for the difference between their estimates is that Mr Tomaino has made his assessment on the assumption that the Eureka apartment, instead of being substantially fitted out as an art gallery, would have been fully fitted out as a luxury penthouse residential apartment.[35] Mr Sutherland makes no such assumption. His assessment is based on the apartment as actually fitted out.

177 I viewed the Eureka apartment on the first day of the hearing. When one enters the apartment, it is immediately apparent that one has entered a space designed for displaying artwork, and it is not immediately apparent that one has entered a residence. There are substantial areas of the apartment which are dedicated solely to displaying artwork in a professional manner. The kitchen and lounge area form part of the open space that connects to art display areas. The kitchen appears to be more of an entertainment bar than a residential kitchen. The two bedrooms, ensuite and laundry are secluded from the rest of the apartment. In my view, the apartment is more art gallery than private residence.

178 Having viewed the apartment, I accept Mr Sutherland's opinion that, from a residential rental point of view, it may be quite difficult, and take some time, to locate an interested lessee.

179 Having viewed the apartment, I am also satisfied that substantial building works would be required to convert the apartment from its current configuration into a dedicated luxury residential apartment.

180 I prefer Mr Sutherland's assessment as to the residential retail value of the apartment because he has valued the apartment as it is, and as it was intended to be upon completion of the contract works.

DISCUSSION

181 When construction of a home is delayed beyond its due date for completion, and the owner of the home intends to reside in the home upon its completion, and liquidated damages are not applicable for the period of delay, the owner might well seek compensation for the delay in the form of the alternative accommodation cost, the cost to store goods and other costs associated with the delay. In this case, the owner has not sought such compensation because she has not incurred such loss. The owner never intended to reside permanently in the Eureka apartment, and in any event, at all times the owner had access to suitable alternative accommodation owned by her.

[35] The assumption is confirmed at paragraph 'g' on page 2 of Mr Tomaino's report dated 13 October 2017, at page 651 of the Tribunal book. Mr Tomaino also confirmed the assumption when giving evidence.

182 When construction of a home is delayed beyond its due date for completion, and the home is intended, not as the residence for the owner under the contract, but as an investment residential rental property, the owner might well seek compensation for the delay in the form of lost rental income.

183 In this case, it is clear, on the evidence, that at all relevant times the owner did not intend to lease the Eureka apartment as a residential rental property.

184 The owner seeks compensation for the loss of use and enjoyment of the Eureka apartment for the delay period, such loss measured as:

- a sum equivalent to the residential rental value of the property for the period of delay;
- a sum equivalent to the costs associated with her ownership of the Eureka apartment during the delay period, namely the Owners Corporation fees, Council rates and utility charges.

185 The builder says that the owner has no loss in the form of foregone residential rental income because she never intended to lease the apartment as a residential rental property. The builder says also that the owner has no loss in respect of the fees and charges incurred during the delay period because the owner would have incurred these costs in any event.

186 The owner does not claim loss of residential rental income arising as a direct result of the builder's breach of contract. Rather, the owner says that the residential rental value of the apartment, for the delay period, is a reasonable measure of the loss of the benefit of the use of the apartment for the delay period.

187 The owner does not claim that the fees and charges incurred by her during the delay period constitute loss and damage arising as a direct result of the builder's breach of contract. Rather, the owner says that the sum of such fees and charges represents reasonable compensation for the loss of the benefit of use of the apartment for the delay period, having regard to the fact that the owner incurred the fees and charges but was denied use of the apartment.

188 Although the owner pleads both measures of damage, in closing oral submissions counsel for the owner conceded the logic in assessing the owner's damages on one or the other measure, not both.

189 The owner refers to a number of English authorities which the owner submits support the proposition that a breach of contract sounds in damages, and the common law adopts a pragmatic approach to measurement of such damages. For example, the owner refers to the following passage of Lord Nicholls in *A-G v Blake* [2001] AC 268, at 278:

> So I turned to established, basic principles. I shall first set the scene by noting how the court approaches the question of financial recompense for interference with rights of property. As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that,

in the oft quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong... Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user…

The same principle is applied to the wrongful detention of goods... Earl of Halsbury L.C. famously asked in *The Mediana* [1900] A.C. 113,117, that if a person took away a chair from his room and kept it for 12 months, would anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? To the same effect was Lord Shaw's telling example in *Watson, Laidlaw & Co v Pott, Cassels and Williamson* (1914) 31 RPC 104,119. It bears repetition:

> " If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wishes or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.' "

Lord Shaw pre-faced this observation with a statement of general principle:

"wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principal… either of price or hirer."

That was a patent infringement case. The House of Lords held that damages should be assessed on the footing of a royalty for every infringing article.

This principle is established and not controversial. More difficult is the alignment of this measure of damages within the basic compensatory measure. Recently there has been a move towards applying the label of restitution towards of this character… However that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to

> award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule.

190 The builder submits that the law in Australia in relation to damages for loss of use and enjoyment arising from a breach of contract is clearly established by the High Court in *Baltic Shipping Company v Dillon* (1993) 176 CLR 344.

191 Recently, McLeish JA, in the Court of Appeal, has provided helpful commentary in respect of the *Baltic Shipping* principle:

> The general rule is that damages for anxiety, disappointment and distress are not recoverable in an action for breach of contract.[36] The principal exceptions to that rule are where the contract is one whose object is to provide enjoyment, relaxation or freedom from molestation,[37] and where the damages proceed from physical inconvenience caused by the breach.[38]…
>
> The respondent pointed to several cases in which damages for anxiety, distress and disappointment have been awarded following breach of a building contract giving rise to physical discomfort or inconvenience… However, all these cases involved physical imposition upon the plaintiff, whether by virtue of having to live with offensive odours or a leaking roof, or in unsanitary or dirty conditions, or being obliged to vacate the defective premises… Nothing of this kind was alleged in the present case, where the respondent's premises were intended for the conduct of a business rather than her own occupation.
>
> The respondent also relied on cases in which damages were awarded for inconvenience or discomfort as a distinct head of damage... All of the cases relied upon were claims in tort, rather than contract. However, damages may also be recovered for inconvenience flowing from a breach of contract…
>
> ... the issue arose for consideration by the Court of Appeal in *Boncristiano v Lohmann.*[39] In that case, general damages were awarded for 'inconvenience' occasioned by a builder's breach of contract. The Court took this to include damages for deleterious consequences to health flowing from the physical inconvenience.[40] Winneke P, with whom Charles and Batt JJA agreed, said:
>
> It now appears to be accepted, both in England and Australia, that awards of general damages of the type to which I have referred can be made to building owners who have suffered physical inconvenience, anxiety and distress as a result of the builders' breach of contract, but only for the physical inconveniences and mental distress directly

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[36] McLeish JA references *Baltic Shipping*, 361-3 and 365 (MasonCJ), 380-1 and 383 (Dean and Dawson JJ), 387 (Gaudron J), 405 (McHugh J)

[37] Ibid

[38] Ibid 365 (Mason CJ), 383 (Dean and Dawson JJ), 387 (Gaudron J), 405 (McHugh J)

[39] [1998] 4 VR 82

[40] Ibid 94

> related to those inconveniences which have been caused by the breach of contract.[41]
>
> The case illustrates the difficulty in separating a claim for inconvenience from one for distress and anxiety. But in any event, the respondent's case did not justify the above test. The 'inconveniences which have been caused by the breach of contract' for these purposes are not the time and trouble inevitably spent as a result of dealing with the consequences of any breach of contract… They are the actual disruption and physical imposition resulting from the building and construction works not having been performed as agreed.

192 The builders says that the owner's claim for loss of the benefit use of the Eureka apartment is caught by the *Baltic Shipping* principle, and that the claim does not fall within the exceptions to the general rule that precludes damages for anxiety, disappointment and distress for breach of contract.

193 The owner submits that if her damages claim falls within the ambit of the *Baltic Shipping* principle, then it falls within the exception to the general rule in that the object of the contract was to provide pleasure and enjoyment in the form of the private art gallery. Although I accept that, upon completion of the contract works, the owner would have the pleasure of the private art gallery, I do not accept that the object of the contract was to provide such pleasure. In my view, the object of the contract was to fit out the 87th floor of the Eureka building as part private art gallery and part residence in accordance with the approved construction plans.

194 Also in my view, any inconvenience and related anxiety and distress that the owner may have suffered does not constitute the level of disruption or physical imposition that might attract an award of damages. On the evidence before me, the owner's living arrangements were unaffected by the delay in completion of the Eureka apartment. And since the apartment was completed, the owner has remained residing in Shanghai.

195 There is no evidence that the owner suffered inconvenience and disruption in making alternative arrangements, in respect of a private art gallery, while she was waiting for the Eureka apartment to be completed. I accept that the owner may well have been frustrated and disappointed at being unable to enjoy the private art gallery for a significant period of time, but such frustration and disappointment does not, under the *Baltic Shipping* principle, warrant an award of damages.

196 I note that the owner's husband, Mr Dong, has resided primarily in the Eureka apartment since around 18 December 2017. It may be that the delay period inconvenienced him in terms of his intended living arrangements, however, such inconvenience is not the inconvenience of the owner. There is no evidence before me that a delay in the intended living arrangements of Mr Dong caused inconvenience, anxiety or distress to the owner.

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[41] Ibid

197 Alternatively, as I understand it, the owner submits that her damages claim falls outside the ambit of the *Baltic Shipping* principle. She has been denied use of a valuable asset, acquired for the primary purpose of a private art gallery. She submits that, adopting the reasoning discussed in *A-G v Blake*, referred to above, her loss of use of the asset resulting from the builder's breach of contract warrants an award of compensation, and such claim is not precluded by the *Baltic Shipping* principle.

198 I do not accept the submission.

199 In my view, the claim falls within the ambit of the *Baltic Shipping* principle. It may well be unusual that a lengthy delay in completion of a building project, caused by a builder's breach of contract, does not warrant an award of damages. But such outcome in this case is, in my view, a reflection of the unusual facts in this case.

200 It follows from my discussion above that I consider the owner's separately pleaded claim for damages for disappointment, inconvenience and vexation is indistinguishable from the claim for loss of use and enjoyment of the Eureka apartment.

NOMINAL DAMAGES

201 The owner has proved breach of contract by the builder, but has failed to prove damages resulting from the breach. In my view, it is appropriate in such circumstance to award the owner nominal damages. I will allow nominal damages in the sum of $100.

AIR CONDITIONING

202 The owner claims that the air-conditioning system installed by the builder is faulty in that the fan speed has erroneously been hardwired to operate at high-speed only. That is, when the fan is functioning, it functions at high-speed only and cannot be changed. The owner claims $29,178 as the cost she will incur to rectify this alleged defective item of building work.

203 At the view, my attention was drawn to the sound of the air-conditioning fan which was functioning at the time. The sound was noticeable, but I am unable to say that the fan was operating at high-speed. I noted also that the air-conditioning ducts running along the ceiling of the apartment were intentionally exposed as part of the aesthetic "industrial" design of the apartment.

204 I observed nothing at the view that would lead me to conclude that the air-conditioning fan speed system was defective.

205 The owner relies on the evidence of Mr Barnett. He is a project manager and principal of 'Vault Corporate', a builder. Vault Corporate was engaged by the owner in June 2017 to attend to a number of works including "acoustic attenuation and mitigation work" relating to the air-conditioning units. As I understand it, that means works to lessen the intrusive noise of the air-conditioning system. As I understand it, the works included

constructing bulkheads around the air-conditioning ducts in the area of the kitchen.

206 Mr Barnett says that during the course of the works he discovered that one of the fan speed controls was hardwired to be set at 'high' and could not be adjusted.[42] Mr Barnett does not have special expertise in air-conditioning, and it became apparent from Mr Barnett's evidence at the hearing that he 'discovered' the alleged incorrectly wired fan, not upon his own inspection of the air-conditioning units, but rather upon examining a report prepared by a sub-contractor engaged by Vault Corporate to carry out works to the air-conditioning units.

207 The subcontractor, Building Systems Asia Pacific Pty Ltd ("**BSAP**"), was engaged to carry out a *proportional air and water balance* on the air-conditioning units. As part of their works, BSAP produced a report on tests carried out by it. The report, dated 24 August 2017[43], notes in respect of each air-conditioning unit that the unit was "*locked on high-speed*" and that BSAP was "*unable to reduce the fan speeds on any of the units, currently set on high. Wiring alterations may be required to adjust the fan speeds*". The report includes a number of recommendations, one of which being: *"Access control wiring for fans & reduce speed to low"*.

208 On 2 October 2017, Vault Corporate provided a quotation to the owner in a sum of $29,178 to carry out various works, described in the quotation as:

> All works to complete that is listed & attached in both Defects list & the BSAP Report reduce unit speed & adjust Pac units.
>
> Please note that some of the units are not assessable how [sic] this price allows for the works required to get access to the units. [44]

209 It is the sum of that quotation, $29,178, that the owner now claims as the reasonable cost she will incur in rectifying the alleged faulty air-conditioning units.

210 The "Defects list" referred to in the quotation itemises 10 relatively minor items of work to be carried out including, for example, rectification of a scratched laundry sink.

211 The quotation does not distinguish between the cost of altering the air-conditioning fan speeds, and the cost of attending to the items in the "Defects list". Nor does the quotation provide any detail as to the actual works required to adjust the air-conditioning units fan speeds.

212 When giving evidence, Mr Barnett was unable to provide further detail, save that he was able to say that the cost of the air-conditioning works would, in his opinion, be significantly more than the cost of rectifying the other relatively minor works on the 'Defects list'. In my view, Mr Barnett reached this view having regard to his opinion as to the likely cost to carry

[42] paragraph 4 of Mr Barnett's witness statement, Tribunal book page 907
[43] Tribunal book page 1108
[44] the quotation at page 1113 of the Tribunal book

out the works on the “Defects list”. It was apparent that Mr Barnett has little idea of the works actually required to the air-conditioning units.

213 The builder relies upon a very short report prepared by ‘Vining Air Pty Ltd’, dated 11 July 2014[45]. From the text of the report, it appears that Vining Air Pty Ltd was engaged by ‘Millennium Airconditioning’ to carry out air and water balance testing to the air-conditioning. Presumably, Millennium Airconditioning was a subcontractor engaged by the builder. The report references the Eureka apartment air-conditioning. The report states, amongst other things “*All PAC unit fans wired to low-speed*”. This report was raised by the builder only when Mr Barnett was being cross-examined. No representative from Vining Air Pty Ltd or Millennium Air-conditioning was called to give evidence. None of the witnesses called by the builder gave any evidence in respect of this report.

214 The evidence as to the alleged faulty air-conditioning units is altogether unsatisfactory. What has been presented is two differing reports from contractors engaged by different people at different times to carry out testing of the air-conditioning units. One report, dated 11 July 2014 suggests that the air-conditioning unit fans were wired to low-speed. The other report, dated 24 August 2017, suggests that the air-conditioning unit fans were locked on high-speed. Neither of the contractors who carried out the testing and produced the reports were called to give evidence.

215 No expert witness was called to give evidence as to the status of the fan speeds in the air-conditioning units.

216 The only witness called to give evidence was Mr Barnett, and I consider his evidence to be of little probative value. Mr Barnett himself has no expertise in air-conditioning. He did not himself inspect and diagnose the alleged fault in the wiring of the air-conditioning fans. He relies upon commentary in the BSAP report.

217 On all the evidence I am not satisfied, on the balance of probabilities, that the wiring of the fans in the air-conditioning units is defective, as alleged by the owner. The owner’s claim in respect of the air-conditioning units therefore fails.

BUILDER’S CLAIM FOR PAYMENT

218 As discussed earlier in these reasons, on 16 June 2017, Mr Ng certified for payment to the builder in a sum of $211,944.20, such sum including 50% of the retention sum recoverable upon practical completion of the contract works. On 20 June 2017, the builder issued its tax invoice to the owner for payment of the certified sum.

219 By letter dated 26 June 2017, the owner served notice on Mr Ng under clause A8 in the contract that she disputed Mr Ng’s certification. The basis of the owner’s notice of dispute is the owner’s claimed entitlement as

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[45] Tribunal book page 1288

pursued in this proceeding, namely an entitlement to set off the damages alleged to have arisen from the builder's breach of contract and the resulting delay in completion of the contract works.

220 The owner's claim in this regard has, for the reasons discussed above, failed save for the award of nominal damages.

221 I do not know whether the owner would still seek to pursue the process under the contract in respect of her notice of dispute dated 26 June 2017, which has not yet been addressed by Mr Ng. Having regard to my findings in this proceeding, pursuit of such process would, in my view, be pointless.

222 Having regard to the fact that the owner has, in her defence to the builder's claims in this proceeding, expressly referenced the dispute notice dated 26 June 2017,[46] I am satisfied that the rights and obligations of the parties in respect of the dispute notice form part of the domestic building dispute the subject of this proceeding.

223 Having regard to the Tribunal's powers under s53 in the DBC Act, and in particular the power under s53(1) to make any order the Tribunal considers fair to resolve a domestic building dispute, I will order the owner to pay the sum certified by Mr Ng on 16 June 2017.

224 I will not, however, order payment of interest as claimed by the builder. In my view, the owner was entitled to serve the notice of dispute dated 26 June 2017, and until the dispute was dealt with under the terms of the contract, or alternatively until an order is made, such as the order I will make as noted above, I consider the owner has justifiably withheld payment of the certified sum. As such, and again having regard to s53(1) of the DBC Act, I reject the builder's claimed entitlement to interest on the certified sum.

CONCLUSION

225 For the above reasons, I will order the owner to pay the builder $211,944.20. On the counterclaim, I will order the builder to pay the owner nominated damages in the sum of $100. The effect is that the owner must pay the builder $211,844.20.

226 I will reserve costs with liberty to apply.

SENIOR MEMBER M. FARRELLY

[46] paragraph 15(b) in the amended Points of Defence and Second Further Amended Points of Counterclaim dated 2 February 2018