

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL CLAIMS DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1652/2018

**CATCHWORDS**

Contract interpretation – additional works – damage caused by other trades – cost of rectification works  
– Deed of release – cost of additional safety measures

<b>APPLICANT</b>	Lin Tiger Plastering Pty Ltd (ACN 131 564 494)
<b>RESPONDENT</b>	Platinum Constructions (VIC) Pty Ltd (ACN 095 739 012)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	H Nash, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	6 June 2019
<b>DATE OF FINAL SUBMISSIONS</b>	11 July 2019
<b>DATE OF ORDER AND REASONS</b>	22 August 2019
<b>CITATION</b>	Lin Tiger Plastering Pty Ltd v Platinum Constructions (VIC) Pty Ltd (Building and Property) [2019] VCAT 1273

**ORDER**

- 1 The respondent must pay the applicant \$39,785.41.
- 2 Costs reserved.
- 3 The issue of interest is reserved. Any application for interest must be made by 23 September 2019.
- 4 Costs are reserved. Any application for costs must be made by 23 September 2019.

- 5 The Principal Registrar is directed to refer any application for interest or costs to Member Nash, who will make orders regarding further conduct of such application.

H Nash  
**Member**

**APPEARANCES:**

For Applicant	Mr A. J. Laird of Counsel
For Respondent	Mr N. Gallina of Counsel

## REASONS

- 1 The Respondent (**Platinum**) is a building company which undertakes building and construction works for residential and commercial projects. The applicant (**Tiger**) is a plastering company which has performed various subcontracting works for Platinum since approximately 2012.
- 2 Relevant to this proceeding are three projects where Tiger undertook work for Platinum, a property situated at High Street Preston (the **Preston property**); a property situated in Bridge Road Richmond (the **Richmond property**); and a property located in Montrose Street Hawthorn East (the **Hawthorn East property**).
- 3 The total claim brought by Tiger against Platinum is for \$39,785.41. This is made up of an invoice for the rectification work done at the Preston property for \$26,235.00, the cost of rectification work at the Richmond property in the sum of \$9,680.00, and the safety equipment hire charges paid by Tiger on behalf of Platinum totalling \$3,870.41.
- 4 The questions for determination by the Tribunal relate to the construction of two Deeds of Release relating to two different premises and the construction of a contract relating to a third premises with respect to the liability for the cost of safety equipment used by Tiger at the premises.

## BACKGROUND

- 5 In April 2018 the parties became involved in adjudication proceedings between them concerning some recent construction projects. There was an application to the Supreme Court of Victoria regarding whether the adjudicator had jurisdiction to determine the dispute and interim awards were made. In reliance on those interim awards in its favour, Platinum served a Creditor's statutory demand dated 24 August 2018 on Tiger which was withdrawn on 12 September 2018.
- 6 Subsequently, Platinum sought to enforce its judgment for costs by way of a warrant of seizure and sale which on 5 October 2018 was returned unsatisfied. Winding up proceedings were then commenced on 31 October 2018 in the Supreme Court of Victoria.
- 7 Those proceedings appear to have been the trigger in the breakdown in the relationship between Tiger and Platinum which has ultimately led them to this proceeding.
- 8 The relevant invoices in this proceeding are all dated 22 September 2018.
- 9 Mr Lin says that the reason he hadn't sent the invoices for the rectification works earlier was because Platinum had promised that Tiger would be able to 'make up' the money lost on these jobs on other jobs Tiger did for Platinum. But this had not happened before the relationship broke down, so Tiger invoiced Platinum for the outstanding monies it says are owed for additional works done at the request and direction of Platinum which Tiger

says are not within the scope of the Subcontracts. Mr Pinto and Mr Verblun dispute this was ever intimated to Mr Lin.

- 10 At the hearing before me on 6 June 2019, Mr Bo Lin, the director of Tiger gave evidence for Tiger. Both Jose Pinto and Elliott Verblun gave evidence on behalf of Platinum. Mr Verblun is the director of Platinum and Mr Pinto was the Project Manager for both the Richmond and Preston projects.

## **THE PRESTON PROPERTY**

- 11 Platinum approached Tiger requesting it to quote for the installation of plaster at the Preston property.
- 12 Tiger prepared quote number 534 for \$611,599.00 for the works. The quote was accepted by Platinum and a Subcontract was entered into dated 23 August 2012 (the **Preston Subcontract**).
- 13 Tiger commenced the work of installation of plaster board at the Preston property in about September 2012 and the work was completed in January 2013.
- 14 In late January or early February 2013 Mr Lin, on behalf of Tiger, was contacted by Platinum's site foreman regarding damaged plasterboard which required repair and replacement.
- 15 The repair work involved replacing damaged plaster on ceilings and around windows in numerous apartments.
- 16 Mr Lin says he told Steve from Platinum that Tiger's work had been completed and that Tiger would have to give them a new quote for the rectification works. Tiger says that the damage was caused by other subcontractors of Platinum after the plasterboard had been installed by Tiger in accordance with the Preston Subcontract.
- 17 Mr Lin gave evidence that he personally attended at the Preston property because Joe Pinto from Platinum had called him the night before and said to him "we have to meet on site tomorrow, I can't describe to you how bad it is". So, Mr Lin attended, but Mr Pinto didn't turn up. Mr Pinto called Mr Lin and said he was busy with other work and that Tiger should just proceed with the work to get the job completed (**rectification works**).
- 18 Platinum says that the rectification works are required because Tiger installed the plaster without reference to the plans and therefore the window installers and electricians had to cut out the plaster in order to finish off their works.
- 19 After attending the site, on 6 February 2013 at 5.23pm Tiger sent an email attaching quote number 651(update) for \$26,235.00 outlining the scope of the rectification works (the **Preston second quote**). The email was sent to Marty and copied to Joe Pinto and Elliot and stated

Hi Marty

Please have look this price for the job at Preston. mechanical cuts and window installer smashed plaster.

I am looking forward to hear you soon.

- 20 There was no email response from Platinum to this email and the Preston second quote.
- 21 Tiger then arranged for its employees to attend the site to do the rectification works. The rectification works took approximately 2 to 3 weeks to do and was completed in late February or early March 2013.
- 22 Nothing further was discussed between Platinum and Tiger with respect to the Preston property until December 2014 when Tiger sought the release of the retention monies held by Platinum in relation to this project.
- 23 No reference was made by either party to the rectification works nor had an invoice been sent to Platinum for these works.
- 24 The retention monies are held by way of security for the subcontractor's performance of the Subcontract. Clause 8.2.8 states that
- The Builder shall continue to hold the balance (if any) then remaining in the Retention Fund until the occurrence of the event specified in Clause 1.11; at which time that balance (or such part of it as may remain) must be released to the Sub-Contractor.
- 25 The Release of the Balance of Retention at Clause 1.11 is defined as being the date on "Defects liability period".
- 26 As part of the Release of the Retention sum held, Platinum required Tiger to execute a Deed of Release. This was presented to Tiger to execute before the retention monies would be released.
- 27 On 4 March 2015 Tiger executed a Deed of Release for the Preston project (the **Preston Deed**). The Preston Deed referred to the Preston Subcontract, the subcontract sum of \$565,839.00 plus GST, the value of variations to the subcontract of \$9840.00 plus GST, and the amounts already paid to Tiger. There is no reference in the Preston Deed to the rectification works.
- 28 Tiger executed the Preston Deed and was paid the retention sum (defined as the Balance Due under the Preston Deed) in March 2015.
- 29 More than three years later, on 22 September 2018, Tiger sent invoice number INV-12128 in the amount of \$26,235.00 to Platinum for the rectification works (the **Preston Invoice**).
- 30 Platinum has refused to pay the Preston Invoice and has raised two defences to the claim.
- 31 It says that the rectification works were undertaken pursuant to Tiger's obligation under the Preston Subcontract for defects which is described as follows:

- 14.1 The Sub-Contractor is responsible and liable, at no cost to the Builder or Principal, or to any beneficiary of the Sub-Contractor's warranties under Clause 5.1.6 and 14.3 (where either or both of these apply), for
- the rectification of all defective materials and all defective work provided by the Sub-Contractor under this Sub-Contract; and
  - the rectification of all consequential damage caused by or arising from any such defective materials and/or defective work.
- 14.2 Subject to 14.3, the Sub-Contractor's obligations in this respect apply to all defects notified to it by the Builder in writing on or before the expiry of the Defects Liability Period specified in Clause 1,14; until those defects have been effectively and satisfactorily rectified.

The Defects Liability Period is described in Clause 1.13 not 1.14 and states:

- (a) Start [if nothing stated, on the date of actual (practical) completion of the Sub-Contract].
- (b) Finish [if nothing stated, on the date of final completion of the Head Contract]

- 32 Platinum says the rectification works were undertaken as part of Tiger's responsibility to rectify defects during the defect liability period (**Defects defence**).
- 33 Alternatively, Platinum says it was, by reason of the Preston Deed, released from any obligation to pay for any works done at the Preston Property other than the payment required under the Preston Deed (**Deed defence**).

### **The Defects Defence**

- 34 Tiger submits that the rectification works were new work rectifying damage caused to the plaster by other subcontractors engaged by Platinum.
- 35 Platinum concedes that if its other subcontractors damaged the plaster, it is not a defect for Tiger to remedy pursuant to its obligations under Clause 14 of the Preston Subcontract, but a cost for Platinum to bear.
- 36 The Tribunal was provided with photos of the damage. Platinum submits that the damage was caused because Tiger had not complied with the plans regarding the ceiling grid and window installations. The evidence of Mr Pinto and Mr Verblun was to this effect although Mr Verblun did not visit the site, he relied on what Mr Pinto had told him.
- 37 There is no evidence of any contemporaneous documentation setting out any complaints about the installation of the plasterboard or from other trades complaining about the impact on their ability to undertake their works.
- 38 Mr Pinto was very defensive when being cross-examined about these matters. While giving evidence can be stressful, Mr Pinto's

argumentativeness and refusal to directly answer some questions, did not assist Platinum's case.

- 39 In my view, it is significant that Platinum did not respond to the Preston Second quote with any assertion that the works were defects under the terms of the Preston Subcontract and therefore within the scope of the subcontract. Rather, Platinum kept silent save for arranging with Mr Lin for Tiger to do the rectification works, after having received the Preston Second quote.
- 40 On all of the evidence, I find that the rectification works were required, not because of any action or failing of Tiger but because of the actions of other subcontractors of Platinum. I find also that Platinum authorised the rectification works with knowledge of Tiger's quote and without any objection or assertion that Tiger was obligated to carry out the rectification works pursuant to its contractual obligation in respect of defects liability. In such circumstances, I find that the defects defence must fail.

### **The Deed Defence**

- 41 With respect to the Deed defence, Platinum submits that even if the Preston Rectification Work was additional work for which Tiger is entitled to be paid, its liability for payment was released under the terms of the Preston Deed.
- 42 The dispute between the parties is a question of construction of the Preston Deed which is a question of law. A deed or a contract is to be construed objectively<sup>1</sup>, and while evidence of the surrounding circumstances of the origin of the contract is admissible to assist in construing a contract, the inquiry is an objective one not to be influenced by the parties' subjective intentions<sup>2</sup>.
- 43 The Preston Deed states as follows

Contractor: PLATINUM CONSTRUCTION (VIC) PTY LTD (ABN 18 095 739 012)

Subcontractor: Lin Tiger Plastering Pty Ltd

Project: 1 High St, Preston

Subcontract Date: August 10<sup>th</sup> 2012

Subcontract No: 1006019

Original Subcontract Sum: \$555,999.00 + gst

Variations to Subcontract: \$9,840.00 + gst

Revised Subcontract Sum: \$565,839.00 + gst

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<sup>1</sup> See *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165

<sup>2</sup> *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 and *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151

Less amounts received by the Subcontractor: \$551,940.00 + gst

Less security held: \$0.00

Balance Due: \$13,899.00 + gst = \$15,288.90

The Deed is made on the 4<sup>th</sup> day of March 2015

In relation to the above Subcontract between Platinum Construction (VIC) Pty Ltd and the Subcontractor, the Subcontractor acknowledges:

1. The Subcontractor is entitled to receive the Balance Due as calculated above, from Platinum Construction (VIC) Pty Ltd as full and final payment for any works performed by the Subcontractor **pursuant to the Subcontract**, save for any security which Platinum Construction (VIC) Pty Ltd are entitled to withhold.
2. The Subcontractor confirms the provisions for warranties and guarantees of the Subcontract and that payment made under the Deed will not in any manner be or constitute an acceptance of defective or improper materials or workmanship.
3. Subject to paragraph 1 above, on the payment of the Balance Due, the Subcontractor unconditionally waives, releases and forever discharges Platinum Construction (VIC) Pty Ltd and its employees, officers, servants and agents from all claims, demands, debts, accounts, costs, liens, actions and proceedings of any and every kind, name and nature and description whether known or unknown which the Subcontractor has or might have or might assert against Platinum Construction (VIC) Pty Ltd or its employees, officers, servants and agents **for payment under the Subcontract**.
4. The Subcontractor indemnifies Platinum Construction (VIC) Pty Ltd, its employees, officers, servants and agents, from and against all claims, demands, debts, accounts, expenses, costs, liens, actions and proceedings of any and every kind, name and nature and description, whether known or unknown, by any person, corporation or firm arising from, **incidental to, or by virtue of the Subcontract or out of its performance**.
5. The Subcontractor's liability to indemnify Platinum Construction (VIC) Pty Ltd shall be reduced to the extent that such claims, demands, debts, accounts, expenses, costs, liens, actions and proceedings was caused or contributed to by the act, omission, direction or negligence of Platinum Construction (VIC) Pty Ltd, its employees, officers, servants and agents.
6. In relation to the above Subcontract between Platinum Construction (VIC) Pty Ltd and the Subcontractor, the Subcontractor certifies that:
  - (a) all wages and allowances which become due and payable to all employees of the Subcontractor and its subcontractors who were at any time engaged on the Project have been paid in full;
  - (b) all subcontractors engaged by the Subcontractor on the Project and suppliers to the Subcontractor of plant, equipment and material for the Project have been paid in full; and
  - (c) all statutory requirements, including but not limited to taxation requirements; workers compensation, public liability insurance premiums; and long service leave, superannuation and redundancy provision requirements have been paid in full.

[my emphasis added]



- 44 Paragraph 3 provides a release for any claim for payment which Tiger (the Subcontractor) may have against Platinum under the Subcontract. Paragraph 4 is an indemnity to Platinum from any claim arising from, incidental to, or by virtue of the Preston Subcontract or its performance.
- 45 In my view, the rectification works are covered by the Preston Deed only if the rectification works are works performed pursuant to, or incidental to, the Preston Subcontract works.
- 46 In my view they are not. As discussed above, I find that the rectification works are works which are required to be done by reason of the actions of other subcontractors engaged by Platinum, not by any action or failing of Tiger's work.
- 47 Platinum's alternative argument was that Tiger had delayed issuing the invoice for this work because it knew that it was not entitled to payment, and that it had only issued the invoice after the Creditor's statutory demand was served, in order to create a claim for an offsetting amount.
- 48 As the creditor's statutory demand was withdrawn before the invoices were issued, I do not accept this argument. The same argument was made by Platinum in the winding up proceedings and I rely upon the reasons articulated by his Honour AsJ Efthim *Platinum Construction (VIC) Pty Ltd v Lin Tiger Plastering Pty Ltd*<sup>3</sup> who stated at paragraph 39
- The defendant's intention may have been to bring an offsetting claim to stifle the plaintiff's enforcement proceeding but that does not mean that the claim is not capable of succeeding. It is not statute barred. There is a valid claim on foot which has not been struck out by the plaintiff. If it was not genuine and had no merit, there should have been an application to have it struck out VCAT. Instead the plaintiff will oppose the application at the trial which is listed for hearing in June.
- 49 For the above reasons, I find that the Preston Deed does not operate to release Platinum from liability for payment of the Preston Invoice.
- 50 I find that Platinum is liable to pay to Tiger the amount of \$26,235.00 for the Preston Invoice.

## THE RICHMOND PROPERTY

- 51 On 23 April 2013, Tiger and Platinum entered into Subcontract number 1011025 for plaster works at the Richmond property for a price of \$458,663.00 (the **First Richmond Subcontract**).
- 52 The Richmond property involved work being done in two stages. The second stage was a refurbishment stage and Subcontract number 1014010 was entered into on 27 September 2013. The cost of those works was \$61,500.00 plus GST (the **Second Richmond Subcontract**).
- 53 In May 2013 Tiger commenced the works at the Richmond property and the works were completed in early August 2013. On 6 August 2013, Mr Lin

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<sup>3</sup> [2019] VSC 274

suffered a family tragedy when his young daughter passed away which caused him to be away from the Richmond property for a period of time. He recalls that the work on the 6 levels of the building at the Richmond Property was complete at the time his daughter died.

54 At the time Mr Lin was away from the Richmond Property for his daughter's funeral, he was contacted by a representative of Platinum to urgently come down to the site to look at the work. Mr Lin states that when he attended at Richmond property there were lots of cuts in the ceilings, some water damage, and in one particular apartment, the ceiling had collapsed.

55 As he did in the case of the Preston Property, Mr Lin says he told Platinum that this was not the fault of Tiger. It had finished its job and that if Platinum wanted Tiger to rectify the damage, Tiger would give Platinum a new quote for the rectification work.

56 Tiger sent Platinum quote number 738 dated 8 August 2013 in the amount of \$8,800.00 plus GST. The quote was sent by email to Marty Page at Platinum on 8 August 2013. The email stated

Hi Marty,

Please have look the price for fix up water damaged ceiling and electrical holes been cut ceiling and wall.

Let me know if that is ok for me to go ahead with next week.

57 No response was received, and Mr Lin followed up by forwarding the email and quote to Mr Pinto at Platinum asking for him to approve the extra work on 27 August 2013. The email stated

Hi Joe,

Can you approve this extra work please?

Thanks

58 Mr Lin says he then had a telephone call with Mr Pinto to the effect that they needed "to sort this out. The quote is not approved, I can't approve it and Elliott doesn't want to pay for this as he says he's given you enough work and it's up to you to fix it". Mr Pinto said to Mr Lin that he should sort out with the other trades on site who had caused the damage and get them to pay Tiger directly. Tiger refused to do this saying that this was Platinum's role as head builder.

59 In a reply email, Mr Pinto stated

Hi tiger as discussed we will not approve any variation or extra works until we. Verify back chargers [sic]

Please complete all works as directed on site. ASAP. Thanks

60 Mr Lin replied to this email

Hi Joe,

I split the cost for the electrical holes and waterdamaged [sic] ceiling in bathroom which caused by penetration holes a month ago ! Those holes cant be done with my own cost ! Please re-consider this matter !

Thanks

61 To which Mr Pinto replied

Lin we are currently going thru electrical holes,

Sort that with electrician

We don't want delays need works complete please .

62 Nothing in this email chain suggests that Platinum considered the rectification works were defects caused by actions or failings of Tiger. Rather, it states that at that time, Platinum was aware of the further quote by Tiger, but did not want to approve any extra costs until back charges and variations with all trades were verified. Despite this and in full knowledge of the price quoted by Tiger, Platinum directed Tiger to proceed with the work.

63 As directed by Platinum, Tiger carried out the repair work within two weeks of being directed to do it.

64 As with the Preston property, the parties entered into a Deed of Release on 14 December 2015 (the **Richmond Deed**). The Deed was in the same terms as the Preston Deed.

65 It states as follows:

Contractor: PLATINUM CONSTRUCTION (VIC) PTY LTD (ABN 18 095 739 012)

Subcontractor: Lin Tiger Plastering Pty Ltd

Project: 231 Bridge Road, Richmond (New)

Subcontract Date: April 12<sup>th</sup> 2013

Subcontract No: 1011025

Original Subcontract Sum: \$416,966.50 + gst

Variations to Subcontract: \$1,519.20 + gst

Revised Subcontract Sum: \$418,485.70 + gst

Less amounts received by the Subcontractor: \$408,811.53 + gst

Less security held: \$0.00

Balance Due: \$9,674.17 + gst = \$10,641.59

The Deed is made on the 14<sup>th</sup> day of December 2015

In relation to the above Subcontract between Platinum Construction (VIC) Pty Ltd and the Subcontractor, the Subcontractor acknowledges:

1. The Subcontractor is entitled to receive the Balance Due as calculated above, from Platinum Construction (VIC) Pty Ltd as full and final payment for any works performed by the Subcontractor pursuant to the Subcontract, save for any security which Platinum Construction (VIC) Pty Ltd are entitled to withhold.
2. The Subcontractor confirms the provisions for warranties and guarantees of the Subcontract and that payment made under the Deed will not in any manner be or constitute an acceptance of defective or improper materials or workmanship.
3. Subject to paragraph 1 above, on the payment of the Balance Due, the Subcontractor unconditionally waives, releases and forever discharges Platinum Construction (VIC) Pty Ltd and its employees, officers, servants and agents from all claims, demands, debts, accounts, costs, liens, actions and proceedings of any and every kind, name and nature and description whether known or unknown which the Subcontractor has or might have or might assert against Platinum Construction (VIC) Pty Ltd or its employees, officers, servants and agents for payment under the Subcontract.
4. The Subcontractor indemnifies Platinum Construction (VIC) Pty Ltd, its employees, officers, servants and agents, from and against all claims, demands, debts, accounts, expenses, costs, liens, actions and proceedings of any and every kind, name and nature and description, whether known or unknown, by any person, corporation or firm arising from, incidental to, or by virtue of the Subcontract or out of its performance.
5. The Subcontractor's liability to indemnify Platinum Construction (VIC) Pty Ltd shall be reduced to the extent that such claims, demands, debts, accounts, expenses, costs, liens, actions and proceedings was caused or contributed to by the act, omission, direction or negligence of Platinum Construction (VIC) Pty Ltd, its employees, officers, servants and agents.
6. In relation to the above Subcontract between Platinum Construction (VIC) Pty Ltd and the Subcontractor, the Subcontractor certifies that:
  - (a) all wages and allowances which become due and payable to all employees of the Subcontractor and its subcontractors who were at any time engaged on the Project have been paid in full;
  - (b) all subcontractors engaged by the Subcontractor on the Project and suppliers to the Subcontractor of plant, equipment and material for the Project have been paid in full; and
  - (c) all statutory requirements, including but not limited to taxation requirements; workers compensation, public liability insurance premiums; and long service leave, superannuation and redundancy provision requirements have been paid in full.

- 66 On 22 September 2018, Tiger sent to Platinum invoice number INV-12126 for the works undertaken to rectify the Richmond property for \$9,680.00 (the **Richmond Invoice**).
- 67 These works are only released under the Richmond Deed if they are works pursuant to, or incidental to, the Richmond Subcontract works. I consider that they are not.
- 68 I find that the rectification works undertaken by Tiger at the Richmond property are not works rectifying defects of work done by Tiger. Rather

they are works rectifying damage caused by Platinum's other subcontractors. The email correspondence between the parties at the time, supports this position in that it does not direct Tiger to rectify its own defective work but to return to site to rectify the works caused by water damage and electrical holes being cut into the plaster.

- 69 For these reasons, I find that Platinum is not released from liability for the rectification works by the Richmond Deed.
- 70 Accordingly, I find that Platinum is liable to pay to Tiger the amount of \$9,680.00 for the Richmond Invoice.

## **THE HAWTHORN EAST PROPERTY**

- 71 The claim by Tiger for the payment of \$3870.41 with respect to the Hawthorn East property relates to the cost of safety mesh. The cost is the amount charged by Rapid Height Safety (**RHS**) the supplier of the safety mesh.
- 72 On 22 September 2015, Platinum and Tiger entered into Subcontract number 2015027 for plaster works at the Hawthorn East property with a contract price of \$1,083,090.80 (**Hawthorn East Subcontract**).
- 73 The Hawthorn East property is a 7-storey building. There were some Juliet balconies which required plaster to be applied to the external ceilings. Tiger's employees were using safety straps connected to the balconies to provide a harness for them while they were installing the plaster. The site safety officer said that this was not a safe method of work and that safety mesh was also required.
- 74 The Tiger employees on site said they did not know where or how to get safety mesh to site in order to complete the works as they had never used it before. Mr Jackson, the Platinum site safety officer, said he would organise the safety mesh for Tiger to be on site for the next day.
- 75 The safety mesh was on site from 7 April 2016 to 23 May 2016. RHS invoiced Platinum fortnightly for the supply of the safety mesh. Platinum did not pay those invoices.
- 76 On 4 July 2016 Platinum was sent a follow up email by RHS seeking payment of the outstanding invoices for the costs of the safety mesh.
- 77 On 9 August 2016, Platinum replied to RHS's email stating that Lin Tiger was to pay the invoices directly and asking for the invoices to be re-issued to Lin Tiger. Tiger was copied in to this email.
- 78 On 26 October 2016, Platinum's accountant sent an email to RHS, copied to Tiger stating as follows

Hi Regina

Refer to Tiger previous emails requesting for the invoices to be change over and address to his company for payment.

Hi Tiger,

Please provide the information to Regina as requested.

79 On 26 October 2016, RHS then emailed Tiger directly

Good Morning Lin,

Manjula [from Platinum] has advised you require the attached invoices to be reissued with your company details, can you please provide the below details we require to complete the request.

**Company Full Name**

**Address**

**ABN**

**Name of Contact person: Lin Tiger**

**Contact Phone number**

80 Tiger responded to this email stating

Hi Regina,

My company is Lin Tiger Plastering pP/L

73 Kellerman dr point cook Vic 3030

ABN 54 131 565 494

81 On 31 October 2016, the reissued invoices were sent by email to Tiger for payment and were paid by Tiger on 4 November 2016. Tiger is now seeking reimbursement from Platinum.

82 Tiger says that it is not liable for the cost of the safety mesh because it did not specify scaffold or safety mesh in the Hawthorn East Subcontract and, as such, the Subcontract made no allowance for the safety mesh costs.

83 Further, Tiger says that it is not responsible for the costs of the safety mesh at the Hawthorn East property because it did not enter into the contract for the supply of the safety mesh with the supplier.

84 Mr Lin says he provided his company details to RHS and paid the invoices issued to Tiger because Platinum had intimated to him that he wouldn't have his retention for the Hawthorn East property released if he didn't pay the invoices.

85 Clause 24 of the Hawthorn East Subcontract covers the safety obligations of the parties on the building site. It states

24.1 The Sub-Contractor shall carry out the Sub-Contract Works in a safe and satisfactory manner and without limiting the generality of the foregoing shall:

(a) strictly conform to all applicable provisions of all laws relating to Occupational Health and Safety (OHS); and

(b) strictly conform to all OHS and other safety and security measures practices and procedures put in place by the Builder; and

...

(d) immediately discontinue any practice or remove any equipment considered by the Builder to be dangerous notwithstanding that the

Builder may have previously approved such practice or equipment;  
and

...

- (f) provide, at its own cost, all requisite personal safety clothing and other protective gear and equipment for all persons for whom it is responsible whenever those persons enter the site and as long as they remain there;

...

24.2 Unless otherwise agreed,

- (a) the Sub-Contractor must immediately and unconditionally comply with all directions and instructions properly given by the Builder respecting safety and/or security matters.
- (b) such compliance is without prejudice to any of the rights of the Sub-Contractor or of the Sub-Contractor's employees and Sub-Contractors.
- (c) if the Sub-Contractor disagrees with the lawfulness or appropriateness of any such direction or instruction (or any aspect of same), or is of the opinion that compliance involves varying the Sub-Contract Price, the Date for Completion or both, this must be dealt with as a separate issue, to be resolved between the parties independently of the obligation to comply.
- (d) *subject to subclause (e) the Builder hereby indemnifies the Sub-Contractor with respect to all adverse consequences arising from, connected with and with respect to the Sub-Contractor's unconditional compliance with such directions or instructions.*
- (e) despite subclause (d) the Builder's liability to the Sub-Contractor shall be limited to the extent that the adverse consequences referred to are not attributable to any unreasonableness, unlawfulness or negligence of the Builder's.

[my emphasis added]

86 The Second Schedule of the Hawthorn East Subcontract sets out the Scope of Works: Plastering (the **Scope of Works**) for the project as follows:

The following works and services for this project include but are not limited to all, materials, labour, plant and equipment to supply and install works associated with the trade package, generally in accordance with the Subcontract Documentation. For clarity this scope includes but is not limited to:

...

- 19 The Subcontractor acknowledges that there will be **NO Variations** to the works because they have allowed for everything in their scope that any competent contractor experienced in apartment construction would expect to be required. This includes but is not limited to; all necessary plant, materials, permits, payments to authorities, fixings, allowance for delays, movement or materials, and the like. *Note: The change of design is excluded in this item.*

...

68. Allow to supply and install all scaffolding up to **3.4m** high for area's required for you to complete your works YES

- 87 These special conditions have been read and agreed to by Mr Lin on behalf of Tiger and each page of the special conditions has been initialled by Mr Lin at the bottom of the page.
- 88 Platinum's argument in reliance on these clauses is as follows. The direction given to Tiger to use safety mesh was a legitimate direction to be given by the Site safety officer. Clause 24.1(f) provides that the cost of complying with that direction is at Tiger's cost. As Tiger did not know from where to obtain safety mesh and to avoid delays in the works, Platinum assisted Tiger by organising for safety mesh to be delivered and erected on site for the next day to allow work to continue. By doing this, Platinum did not assume responsibility for the cost of the safety mesh.
- 89 Tiger says it didn't allow for the cost of safety mesh when tendering for the work as it has never had to use safety mesh in its works before. It says its method of using harnesses and safety rails was safe and that the requirement to use safety mesh *or other safety measures* to complete the works was unnecessary.
- 90 Further, Tiger says at no time did Platinum tell it that Tiger would be responsible for payment for the safety mesh. It just ordered it to be installed at site.
- 91 In my view, Tiger is not obligated to bear the cost of the safety mesh.
- 92 The Hawthorn East Subcontract price, agreed to by Tiger, included no allowance for the cost of safety mesh. This was not an oversight on the part of Tiger. Tiger simply did not consider that safety mesh was required.
- 93 Under the terms of the Hawthorn East Subcontract, Platinum was entitled to direct the use of safety mesh, and Tiger was obliged to comply with the direction. But, in my view, this does not mean that Tiger was contractually bound to bear the extra cost of the safety mesh.
- 94 The Hawthorn East Subcontract required Tiger to comply with the instruction (clause 24.2(a)). The subcontract goes on to provide that compliance with an instruction is without prejudice to the rights of Tiger (clause 24.2(b)) and that Platinum indemnifies Tiger in respect of adverse consequences arising from or connected with Tiger's compliance with such instruction (clause 24.2 (d)).
- 95 In my view, Tiger's compliance with the direction as to use of safety mesh has not, by reason of clause 24.2 (b), prejudiced Tiger's right to seek fair compensation for the cost of complying with the direction.
- 96 Further, in my view the cost of the safety mesh, to date borne by Tiger, is an 'adverse consequence' attracting indemnity from Platinum under clause 24.2 (d).
- 97 As such, I find that Tiger is entitled to claim, and Platinum is obliged to meet, Tiger's call for reimbursement of the cost of the safety mesh.



98 Accordingly, I allow Tiger's claim for payment of the Hawthorn East Invoice in the sum of \$3,870.41.

**CONCLUSION**

99 For the above reasons, I will order that Platinum pay Tiger a total sum of \$39,785.41. I will reserve the question of interest with liberty to apply and I will reserve costs with liberty to apply. Any application in respect of interest and/or costs must be made by 23 September 2019. If any such application is made, I will make orders in chambers as to the conduct of the application.

H Nash  
**Member**