VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP518/2017

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building work – project management agreement – nature and terms of agreement – interpretation of agreement when terms are unambiguous – use of extrinsic evidence to interpret agreement if terms are ambiguous – *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 – claim for refund of monies paid for works allegedly not carried out – claim for compensation for damage to property – the jurisdiction of the Tribunal under the *Domestic Building Contracts Act* 1995 and the *Australian Consumer Law and Fair Trading Act* 2012 – effect of deregistration and reregistration of the first respondent – section 601AD(1) and section 601AH(5) *Corporations Act* 2001 (Cth) – liability of the director of the first respondent under the *Australian Consumer Law and Fair Trading Act* 2012 when the company was deregistered

APPLICANTS	Stephen O'Brien & Juan David Echeverry
FIRST RESPONDENT	American Home Designs Pty Ltd (ACN: 137 904 673)
SECOND RESPONDENT	Ms Jacinta Toomey
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	17, 18, 19 and 20 April 2018
DATE OF RECEIPT OF WRITTEN SUBMISSIONS	11, 15 and 25 May 2018
DATE OF ORDER	20 July 2018
CITATION	O'Brien v American Home Designs Pty Ltd (Building and Property) [2018] VCAT 1081

ORDERS

1. The first respondent must pay to the applicants the sum of $109,411.91.
2. The second respondent must pay to the applicants the sum of $53,097.03.
3. Costs and reimbursement of fees reserved with liberty to apply.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr S. O’Brien and Mr J.D. Echeverry in person
For the Respondents	Mr A. Baker of counsel

REASONS

BACKGROUND

1. The applicants ("the owners") own a residential home set in the bush in Panton Hill. In or about 2012, they decided to renovate and extend the home and carry out some landscaping works. The first respondent ("AHD") is a company which specialises in American building products, especially windows, doors, cabinetry and roofing. They are the local supplier of products made in America as well as operating as a building company constructing homes in the American style. The second respondent ("Ms Toomey") is a director of AHD.

2. The second applicant came across AHD's products through the internet and was particularly interested in the cabinetry and the windows[1] they could supply. He commenced discussions with them in 2012. The evidence from Mr Echeverry, Mr Toomey and Ms Toomey was that at that time they were all excited by the project and were keen to work together.

3. Between 2012 and 2014, the owners considered various options for the progression of the renovations. Their preferred option was to engage a builder to carry out the whole job, with specific materials to be supplied by AHD. Mr Toomey assisted them by suggesting names of builders and he communicated with at least three quoting builders to provide costings for the American materials. However, the owners had difficulty finding a builder within their budget and Mr Toomey suggested to them that he, through AHD, could act as project manager if one of them became an owner-builder[2].

4. Ultimately, the parties entered into a project management agreement under which Mr Toomey on behalf of AHD would act as project manager, while the first applicant, Mr O'Brien, would take on the role of owner-builder. Works commenced on this basis in 2015, but were not completed and disputes arose. In October 2016 the owners became aware that AHD had been deregistered and they terminated the agreement on the basis that the deregistration constituted a repudiation by AHD. The owners accepted that repudiation by letter dated 7 October 2016[3]. Counsel for AHD advised that it subsequently became re-registered. It did not challenge the termination of the agreement.

5. These background facts were agreed.

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[1] In this decision I will use the word "windows" to mean the glass windows and doors supplied by Sierra Pacific from America

[2] TB 64, TB 89

[3] Letter from owners' then solicitors, Russell Kennedy, dated 7 October 2016 TB 580

6. The parties also agreed (at least to a limited extent[4]) that the project management work carried out by AHD was domestic building work within the meaning of the *Domestic Building Contracts Act* 1995 ("the DBC Act"). A project manager is required to provide the warranties implied into every domestic building contract by section 8 of the DBC Act, insofar as they relate to its work managing or arranging the domestic building work being carried out by others[5].

7. In opening, Counsel for AHD referred to the limited nature of these warranties (insofar as they apply in a project management arrangement) as a defence to many of the owners' claims, saying that the owners "considered being an owner-builder to save money but they failed to consider the consequences and risks of being owner-builders. That is why we are here". These arguments will be considered in detail below, but it seemed to me that this statement showed that AHD had largely misunderstood the nature of many of the claims brought against it. This is not a case where the issue is the overlap between the respective roles and responsibilities of an owner-builder and a project manager (as is commonly found in this Tribunal). Instead, in this case the majority of the owners' claims arise from allegations that AHD did not carry out the works for which it was paid.

THE HEARING

8. The proceeding came before me for hearing on 17 April 2018 and evidence was given over four days. At the conclusion of the evidence, the parties agreed on a timetable to file and serve written submissions and submissions in reply. The last of these was filed with the Tribunal on 29 May 2018.

9. The owners represented themselves at the hearing and are to be commended on the level of organisation and attention to detail which they brought to this task. The respondents had instructed solicitors just a few days before the hearing commenced and were represented by Mr Adam Baker of counsel at the hearing. They too are to be commended for being in a position to proceed with the hearing despite having minimal preparation time.

10. Each of the owners gave evidence. They also tendered a written report by quantity surveyor David Austin of Dastin Construction Consulting[6] and a written statement from Joseph Wells, director of Wells Roofing[7]. Counsel for the respondents objected to these statements being admitted into evidence on grounds that neither Mr Austin nor Mr Wells were called to give evidence. I allowed the statements to be tendered[8] but advised the

[4] The respondents' proviso to this concession was that its supply of materials was not domestic building work; this issue will be discussed further below
[5] *Mrocki v Mountview Prestige Homes Pty Ltd* [2010] VSC 624 at [114]
[6] TB A84
[7] TB A135
[8] In accordance with section 78 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act)

parties that when I came to consider the matters contained in them, I would assess if they were relevant, and if so, would give them such weight as I determined appropriate given its contents had not been tested. As it turns out, I have had no regard to Mr Wells' statement. I will discuss Mr Austin's evidence further below, in relation to the window hardware and gate damage claims.

11. For the respondents, evidence was given by Mr Ritchie Toomey, who was the project manager on behalf of AHD, and by the second respondent Ms Jacinta Toomey, who is a director of AHD and in charge of design.

12. As well, I have read and taken into consideration the written submissions, filed by the parties.

THE OWNERS' CLAIM

13. The owners' claim against AHD is for loss and damage allegedly incurred as a result of AHD's breach of contract[9]. Specifically, they seek a reimbursement of payments made to AHD for six items carried out (or in some cases, not carried out) by it under the project management agreement (these are items a-f below). Further, they seek the cost to repair two items (g-h below) which were allegedly damaged by subcontractors engaged by AHD. There are also claims for interest and costs (items i-j below). The claims are as follows:

    a. AHD overcharged project management fees $14,000

    b. AHD wrongly charged for shipping costs in respect of the windows $12,790

    c. AHD accepted payment for the cabinetry but has not supplied the goods $43,348.60

    d. AHD overcharged for cost of skip bin $5727

    e. AHD overcharged for cost of scaffolding $15,535

    f. AHD failed to provide the specified window and door hardware AUD$16,968.36[10]

    g. Cost of repairing damage to front gate stone pillar caused by excavator engaged by AHD $13,500

    h. Cost of repairing damage to pool retaining wall caused by excavator engaged by AHD $3370[11]

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[9] Applicants Further Amended Points Of Claim dated 12 February 2018, TB 1 ("FAPOC")

[10] The amount stated in the FAPOC is US$13,559. By their Closing Summation, the owners converted this amount to AUD$16,968.36.

i. Interest on the kitchen cabinetry monies only[12] $4869.29

j. Legal costs in respect of the kitchen cabinetry claim only[13] $4132

14. The owners' claim against Ms Toomey is a claim for contravention of the Australian Consumer Law ("ACL")[14], on the grounds that:

    a. she represented to them that the cabinetry had been designed by and would be supplied directly by Kraftmaid Cabinetry (being the US manufacturer), and that upon receipt of the owners' payment in full, that the order for the cabinetry had been placed with Kraftmaid;

    b. these representations were misleading or deceptive, and

    c. she was the person who procured the contravention of the ACL by AHD.

15. The total amount claimed against AHD is $134,240.25[15]. Of that, $52,349.89 is claimed in the alternative against Ms Toomey.

THE CLAIM BY AHD

16. In response, AHD agrees that it was engaged as a project manager. It defends the claims on a number of grounds, including two new grounds raised for the first time in its closing submissions:

    a. In general terms, it did carry out the work or incur the costs for which it charged the owners.

    b. Alternatively, its obligations under the project management agreement did not extend to the matters alleged. It said that the applicants became owner-builders in order to save money but they failed to consider the consequences and risks of being an owner-builder.

    c. The Tribunal lacks jurisdiction to hear a dispute in relation to the supply of the cabinetry, windows and doors, bin hire and scaffolding, as the supply agreements were not domestic building work within the meaning of the DBC Act;

    d. AHD was deregistered on 22 November 2015 and although it was subsequently reregistered, any contractual obligations it purportedly took on, or payments it received during that time were invalid.

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[11] The amount stated in the FAPOC was an estimate of $5210. By their Closing Summation, the Applicants adjusted this claim to $3370, being the actual cost.
[12] Closing Summation
[13] Closing Summation
[14] FAPOC Part 2 and Closing Summation
[15] Closing Summation

17. By its counterclaim, AHD seeks payment of $4666 per month for each of the 10 months from January to September 2016. This claim is on top of the $28,000 already paid to it under the project management agreement.

18. In her defence, Ms Toomey said that she was at all times acting as a director of AHD.

QUESTIONS TO BE ANSWERED

19. In order to determine these claims, I must consider the following questions:

    a. What were the nature and terms of the agreement between the parties?

    b. Does the Tribunal have jurisdiction to hear the claims?

    c. What is the effect of the deregistration of AHD?

    d. Is AHD liable to repay monies and/or for damages claimed by the owners?

    e. Is Ms Toomey liable to the owners under the ACL?

    f. Is AHD entitled to be paid for the months of January to September 2016?

A. What was the agreement between the parties?

20. Both parties agree that the owners engaged AHD to be the project manager for the redevelopment of their home. They both say that at least some of the terms of the project management agreement were set out in a letter sent from AHD to them dated 6 August 2014 ("the Letter"). This Letter lists the roles and responsibilities of each party, the services that are to be provided by AHD and the obligations of the owners under the agreement.

21. Where the parties differ is that the owners say that the Letter is the sole record of the agreement between them, while the respondents say that clause 4.2 of the Letter was not agreed, that further or other terms should be implied in respect of AHD's role and obligations, how much AHD was to be paid, and whether there was a nominated time for completion of the works. They also disagree on whether the supply of the windows, cabinetry, scaffold and bin hire was made under a separate agreement or was part of the project management services.

22. In its points of defence, AHD appears to accept that the Letter had some relevance to the agreement between them, although it is not clear as to how far that admission extends[16]. Mr Toomey said in cross-examination that the Letter contains the agreed terms in respect of the roles and responsibilities

[16] see paragraphs 5, 8, 10 of the points of defence and Closing Submission paragraph 28

of the parties, but the time for the project and the payment parts were not agreed.

The Letter

23. The Letter consists of a number of sections. The first page is an introduction and overview of how AHD sees itself and the advantages of its operating methods and procedures. Pages 2 - 5 contain four sections, each of which contain numbered clauses. The section headings are:

    1. Responsibilities of Project manager
    2. Responsibilities of the client
    3. The services
    4. Fee(s) for service(s)

24. The wording of the relevant parts of the Letter is as follows:

3. The Services

3.1 Contract Administration

- plan development (as required) and appropriate permit documents
- obtain and assess prices of each particular sub trade
- engage and coordinate trades after consultation with the Client
- undertake periodic site inspections, check work in progress, quality control, materials selections and subcontractor performance
- provide supplementary details, information and instruction to clarify the documents as required
- assess variations and obtain client approval
- arrange and attend site meetings when required
- provide the clients with regular reports to indicate progress, time and costs
- assess progress and final payment claims before submission to the client
- prepare defects list and inspect rectification work at practical completion
- quantifying and order of materials

4. Fee(s) for service(s)

The fees for the services described in this agreement may be: a) a percentage of the completed cost of the work, b) a lump sum, or c) by hourly rates for additional work, or d) a combination of these.

4.1 a percentage fee of 6% of the total cost of the clients project. This shall be applied to agreed periodical intervals – payable on invoice.

4.2 a lump sum fee based on the agreed scope of work and services to be applied. This shall be applied at agreed periodical intervals – payable on invoice. The amounts shall reflect the level of overall work and client servicing per the original brief. Should the scope of works vary the fee will be amended.
The lump sum fee shall be $28,000.

4.3 The hourly rate for agreed services shall be $65.00 per hour. The fee will be invoiced fortnightly, payable on receipt, for a set period of 5 months. Project management services for 16 hours per week (i.e.4 x 4 hr periods per week). A 'bonus' incentive fee will be due and payable upon practical completion of the project equivalent to 50% of the savings made. The fee will be determined by the variance to 'actual to budget' figures agreed to at the commencement of the project. A further 'bonus' fee will be due and payable upon practical completion of the project of $100 per day for the total sum of days deemed as 'early completion' as determined by the variance to 'actual to budget' schedule agreed to at the commencement of the project.

4.4 reimbursable expenses will be paid by the client to the project manager for the following related project expenses:

- direct project costs
- ……

The evidence about the formation of the agreement

25. Mr O'Brien and Mr Echeverry both gave evidence and said that the Letter contains the terms of the agreement reached between them and AHD. They rely on the following clauses:

    a. clause 4.2 sets out the agreed amount to be paid to AHD and the method in which it is to be paid,

    b. clauses 3.1 and 4.4 as being the terms describing AHD's role in the supply of materials, and

c. to describe the extent of the project that AHD is to manage, they refer to the description of the project in the reference line "Re: American Home Designs' Project Management of proposed Extension/Renovation" and the first paragraph on page 1 of the Letter which states "Thank you for your interest in American Home Designs assisting you with development of your Panton Hill home", and the Services at clause 3 which include all stages from initial plan development to assessing final claims on practical completion.

26. In my view, the meaning of the terms set out in the Letter are unambiguous. Applying the test (recently set out by the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*[17]) of what a reasonable businessperson would have understood those terms to mean, and considering the language used by the parties, the circumstances addressed by the contract and the commercial purposes to be secured by the contract, I am satisfied that the meaning of the terms set out in the Letter are not susceptible of more than one meaning. Accordingly, evidence of surrounding circumstances cannot be adduced to contradict its plain meaning[18]. This approach was recently applied by the Victorian Court of Appeal in *Eureka Operations Pty Ltd v Viva Energy Australia Ltd*[19] and *Melbourne Linh Son Buddhist Society Inc v Gippsreal Ltd*[20].

27. Based on the wording of the Letter, I find that the relevant terms of the agreement were that:

a. Mr Toomey of AHD would act as the project manager (clause 1),

b. the agreed scope of work and services to be applied was set out at clause 3.1 of the Letter, in summary to administer the building works from the plan development stage (i.e. before any permits had been issued or any physical works had commenced),

c. there was a requirement to provide the services until the project was completed, unless terminated (description of the services at clause 3),

d. AHD's services would be provided for a lump sum fee of $28,000 (clause 4.2),

e. the lump sum fee would be paid at periodic intervals, which would be determined by the timing of AHD's invoices (clause 4.2),

f. the owners would engage and pay trades directly based on Mr Toomey's recommendations, but

[17] (2015) 256 CLR 104 at [47] – [49]
[18] Ibid at [47] – [48]
[19] [2016] VSCA 95
[20] [2017] VSCA 161

g. AHD would also on occasion engage trades (clause 3.1) and quantify and order materials (clause 3.1),

h. for which the owners would reimburse AHD as a "direct project cost" (clause 4.4).

28. However, in case I am wrong about the ambiguity of these clauses, I have considered the evidence led by each of the parties about the surrounding circumstances, which was as follows.

29. The owners said that they had at all times stressed to Mr Toomey that the project management agreement must be a fixed price agreement, so they would have "peace of mind there are no additional charges down the track"[21]. Mr Toomey had given them the Letter in August 2014, but they did not act on it until April 2015. In the meantime, they had continued to try to find a builder to complete the work within their budget[22].

30. In late April or early May 2015, they met with Mr Toomey at the Rivers Café in Yarrambat, to further discuss the proposal contained in the Letter. Mr O'Brien said that they told Mr Toomey that the plans and specifications had not changed since 2014 and he told them that he was willing to proceed on the basis of the terms and price set out in the Letter, being $28,000. Mr Echeverry said that they had the Letter on the table at the café and that he told Mr Toomey that their budget was $600,000. He said that he was very clear that they needed a fixed fee agreement with him, in order to meet that budget.

31. Mr Toomey in his evidence said that he sent the owners the Letter in August 2014, at their request, because they wanted to see how it could look if he were to project manage the job. He said that at the Rivers Café meeting, they worked through his proposal set out in the Letter and he reiterated the roles and responsibilities in running the project. He said that they did not agree on the amount of the fee to be paid to AHD, because Mr O'Brien was not happy with the options provided in the Letter nor with a lump sum.

32. Mr Toomey's evidence was somewhat confused about whether the payment arrangements were actually agreed. At one point he said that they had agreed on an hourly rate, which would be billed on a monthly basis. Further to this, he said they had the calculator on the table and divided the monthly amount of $4666 by 18 hours per week, which he said resulted in $65 per hour. However, Mr Toomey also said that Mr O'Brien was not happy with a rate of $65 per hour and so Mr Toomey agreed to a monthly payment of $4666, even though he actually spent more than 18 hours per week on the job. Despite all those calculations, and contradicting his earlier

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[21] TB B93

[22] TB B109-110

evidence, Mr Toomey then said that they had not finally agreed on the amount at the end of the meeting.

33. As to whether the agreement required AHD to complete the project, Mr Toomey was shown his email of 28 July 2014[23], in which he said to Mr Echeverry "I'll give you a call in the morning to discuss … how we can work together to eliminate the uncertainties. Based on the level of involvement required, I can certainly provide you with a fixed price for agreed services". In cross-examination, Mr Toomey agreed that he had offered a fixed price for agreed services, but said there were no agreed services at that time.

34. One week later, he sent the owners the Letter, in which he had filled in clause 4.2 with a lump sum of $28,000. Mr Toomey attempted to explain that clause by saying it referred to "the agreed scope of work and services to be applied" and that meant the plans and specifications, which at that time had not been finalised, so the amount of $28,000 was not referable to any concluded scope of work. I do not accept Mr Toomey's interpretation of that clause. The "agreed scope of work and services" referred to in clause 4.2 is the project management work and services to be provided by AHD set out at clause 3 of the Letter, not the scope of the building works.

35. Mr Toomey also disputed that the owners had told him their budget was $600,000. He said that the owners had not finalised their specification at that time. However, that evidence was contradicted by the email he sent on 9 June 2015 in which he stated he was very pleased to have come up with the all inclusive cost of the project of $572,000[24].

36. As for the extent of the works to be provided by AHD under the agreement, and its timing, Mr Toomey's evidence was confused. In AHD's points of defence, it said that the agreement commenced on 29 April 2015[25]. However, Mr Toomey gave the following evidence during the hearing:

    a. After the River Café meeting, he did not think they had reached an agreement. He was surprised to receive Mr O'Brien's email in June 2016 that he had lodged his owner-builder application form[26].

    b. AHD then advised the details of a building surveyor[27], but Mr Toomey said he did this even though AHD had not been engaged by then.

    c. On 3 July Mr Toomey sent an email stating "I will commence invoicing you this month per our discussion re project management

[23] TB B92-93
[24] TB B135
[25] Points of Defence and Counterclaim paragraph 5
[26] TB B147
[27] TB B148

services and will forward you our initial invoice shortly"[28], which he did, on 23 July 2015[29].

d. He said this was the date he commenced providing the project management services, but then said that the 23 July invoice for $4666 reflected services he had provided earlier, but which were not project management services. When challenged as to why he had claimed them under the monthly project management agreement, he was unable to give a clear answer.

e. He said that although the agreement to carry out the project management services started in July 2015, that was not the commencement date of the project "for the purposes of determining when time should start to run as the proposal was not executed in July".

f. When asked if the services prior to 23 July were provided under the agreement, he said the terms of the agreement concerning the roles and responsibilities of the parties commenced then, but the rest of the agreement did not.

g. He distinguished between the design services and the construction services he was to manage, saying that although both were covered by the scope of work in the Letter, he could not start the construction stage until after the building permit was issued, which was in September. Prior to that he was project managing in respect of the design phase. When he was asked to explain why he said that, when one of his obligations under the project management agreement was to "plan development and appropriate permit documents" (clause 3 of the Letter), he changed his evidence and agreed that he had performed project management services prior to "turning the first sod".

<u>My findings as to the terms of the agreement</u>

37. I did not find Mr Toomey to be a credible witness. His answers were self-serving and seemed to me to be an attempt to reconstruct what had been said and done in order to fit his current arguments. For example, this can be seen in his attempt to make an hourly rate for his services fit within the express written clause of the Letter which stipulates a lump sum of $28,000, with no reference to monthly or hourly rates. There is no reason why the phrase "periodical intervals" written in the Letter should relate to monthly intervals, other than that Mr Toomey was trying to justify his counterclaim for payments per month. Similarly, his oral evidence often did not match the contemporaneous documents.

[28] TB B150
[29] TB B156

38. On the other hand, Mr O'Brien was a competent and believable witness. He was clear and thorough in his evidence, without exaggeration or hyperbole. He was able to recall dates and times, and his recollection of events matched the contemporaneous written documents, where they existed. Mr Echeverry had very clear recollection of certain events, particularly in relation to design choices and meetings with people. He struggled to remember some dates and times in his evidence, but he advised me that he had had some health issues and I accept that he was not deliberately obfuscating. I found him to be a genuine and truthful witness, especially when it involved recollections of the design details of his home and his interactions with the people he had asked to deliver that design.

39. Accordingly, based on the wording of the Letter, and (insofar as is necessary) the owners' evidence, I accept that the agreement between them and AHD was finalised at the River Café meeting, and its terms are set out in the Letter, as set out at paragraph 27 above.

Were there separate agreements for the supply of the cabinetry, windows, scaffold, bin hire?

40. As a result of the findings above, I find that there were no separate agreements for the supply of the cabinetry, windows, scaffold or bin hire. These items were supplied by AHD as "direct project costs", for which the owners would reimburse AHD in accordance with clause 4.4 in the Letter.

B. Whether the Tribunal has jurisdiction to hear the claims

41. In their closing submissions, the respondents submitted that the Tribunal has no jurisdiction to hear claims in respect of the supply of the windows, doors and hardware, the cabinetry, the bin hire and the scaffolding services, because these were supplied pursuant to agreements separate to the agreement for the provision of project management services.

42. It was suggested that the supply of these items was not domestic building work within the meaning of the DBC Act, the supplier of those goods and services was not a builder within the meaning of the DBC Act, and the supply agreements were not domestic building contracts.

43. As a result of my findings that AHD's obligations were contained in one agreement only, and that there were no separate supply agreements, the respondents' submission must fail. Moreover, if I am wrong about that, I note that the Tribunal has jurisdiction to hear claims brought under the *Australian Consumer Law & Fair Trading Act* 2012 ("ACLFTA"), and it is unarguable that the supply agreements as alleged would be goods and/or services supplied in trade or commerce by a supplier to a consumer, within the meaning of section 182 of the ACLFTA. Accordingly, the Tribunal has jurisdiction to hear all claims in this proceeding.

C. The effect of the deregistration of AHD

44. The respondents closing submission also argued (for the first time) that because AHD was deregistered for a period of time during this job, the claims relating to the cabinetry and scaffolding must fail. These claims are considered in detail below, but for the purposes of this issue, it is sufficient to say that the claims are that:

    a. AHD accepted payment for the cabinetry but has not supplied the goods, and

    b. AHD overcharged for cost of scaffolding.

45. The respondents said that the relevant events in those two claims occurred during the period of AHD's deregistration, and as a result AHD is not the appropriate respondent, because the company had ceased to exist pursuant to section 601AD(1) of the *Corporations Act* 2001 (Cth).

46. The submission is that AHD's re-registration does not necessarily validate acts purported to be done on behalf of the company during the period of deregistration (section 601AH(5)). They relied on a number of authorities, set out at paragraphs 14 - 16 of their closing submission, in support of the proposition that subsection (5) creates only a limited form of retrospectivity, and that:

    a. AHD had no power to enter into any contract during the period of deregistration, and

    b. reinstatement did not validate any acts which purported to contractually bind AHD during the period of deregistration.

47. In my view, this submission is misconceived. As a result of my finding that AHD's obligations were contained in one agreement only, and that there were no separate supply agreements for the cabinetry or the scaffolding (or any other items), it follows that AHD did not enter into any contracts (at least with the owners), nor were there any acts which purported to contractually bind AHD during the period of deregistration. AHD's contractual obligations arose at the time of the acceptance of the Letter. From that time on, the owners were making payments pursuant to that agreement.

48. Tellingly, the respondents have failed to advise me as to the date AHD was re-registered, despite me having asked for an updated company search to be provided. In their submissions, they have deliberately used noncommittal phrases such as "It was de-registered on 22 November 2015 due to an administrative oversight and reinstated by the Australian Securities and

Investment Commission."[30] Given my findings above, nothing turns on this date, but I note AHD's reluctance to provide this information to me.

49. Further, I question AHD's decision to make this submission. If it had succeeded, the logical corollary is that the second respondent and Mr Toomey, would have been receiving money and acting without authority, potentially leaving them open to sanctions outside this proceeding. Further, it would not have been possible for AHD to bring its counterclaim and the second respondent would not be able to argue that she was acting as a director of AHD in defending the claims made against her personally.

D. The items claimed by the owners

Overcharging of project management fees

50. AHD rendered six invoices of $4666 each in July, September, October, November, December 2015 and January 2016[31] for its project management services. The owners paid these in full, making a total of $28,000.

51. In this proceeding they seek a refund of half of that amount, on the grounds that AHD completed only (approximately) half of the works it was required to do. They say that at the time of termination of the contract, the works were not at 60% of lock-up stage[32].

52. The respondents deny this claim and say that there was no term, express or implied, that AHD was to manage the project up to lock up. It appears that AHD has misunderstood the owners' submission: they were not suggesting that the works specified in the plans and specifications were to be completed to lock-up stage only; instead they were submitting that was the stage the works had reached at the time the contract was terminated (approaching 60% of lock-up stage). Accordingly, I have read AHD's closing submissions at section C as if they refer to completion of the works in accordance with the plans and specifications, rather than to lock-up stage.

53. As set out above, I have found that it was a term of the agreement that AHD would manage the project until it was complete, for the sum of $28,000. Completion meant in accordance with the plans and specifications which were in the possession of AHD as at May 2015, when the project management agreement was entered into.

54. I was shown photographs taken on 4 August 2016[33] which indicate that the external works were not complete by that date. The owners gave evidence that no further works were carried out on site between those photographs being taken and the contract being terminated in October 2016. That

[30] at paragraph 9
[31] TB A110, 111, 112, 114, 117, 118
[32] points of claim at [13] A8
[33] TB A74-77

evidence is consistent with AHD's invoices[34], which do not indicate any activity on site in those months. I was not provided with any detailed evidence of the works that were outstanding, although I note an email from Mr Toomey to the owners dated 27 October 2016[35] in which he stated "… I was shocked to learn that you have contacted many of our trades directly and had engaged them to carry out works. We were still of the understanding that you were reviewing your #'s and wanted to meet to discuss how we were going to move forward with the works". Based on that evidence, I accept that the works were not complete at the time the contract was terminated.

55. However, I do not allow the owners' claim, because, as was submitted by AHD[36], the owners provided no evidence of any costs actually incurred by them resulting from AHD's failure to continue to provide project management services. Further, as there was only limited evidence as to what stage the renovations had reached, I do not have enough information to be able to assess what amount is required to put the owners in the position they would have been in had the contract been performed (which is the established remedy for a breach of contract claim). It is possible that the owners were able to manage the completion of the project themselves, without any further expense for a project manager, and so they have not suffered any loss as a result of AHD's failure to compete its role.

Charging for shipping costs for windows and doors

56. As well as the cost of the windows themselves, AHD had charged the owners for shipping, freight, customs, fees, storage costs and unloading and handling costs following their importation from America. Although the owners paid AHD's invoices, they now claimed that the monies should be refunded on the following grounds:

    a. AHD had quoted a fixed price for the windows, including supply and delivery, and was not entitled to claim any extra costs or any margin on top of the fixed price quoted; and/or

    b. AHD had failed to provide any invoice or receipts to support its claims that it actually incurred these costs.

57. I pause here to note that in their points of claim, the owners alleged that AHD charged $9833.92 for the shipping and storage costs[37]. Having perused the invoice (no.190) it appears that part of this sum includes shipping and import costs for copper finials. There was no mention of copper finials by the owners as part of this claim and so I will proceed on

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[34] TB A132-133
[35] TB B587
[36] closing submission paragraph 37
[37] TB A6

the basis that the amount in dispute is the amount related to the windows only. AHD's invoices for these extra costs are as follows:

a. invoice 27 July 2016, no. 190, for $8431.92 as "Reimbursement for freight and import costs for windows/doors inc. Port service charges, Cartage and overseas freight FCL, distributors handling charges, Wharf Storage/Detention, Customs Clearance, Attention to Quarantine, Cmr fees"[38]; and

b. invoice 28 July 2016, no.191, for $880, as "40ft container FCL hand unload of windows and doors"[39].

58. As well as claiming reimbursement of the payments of $8431.92 and $880, the owners also claimed for the amount they spent to transport the windows from AHD's warehouse in Bayswater to the site, of $2079[40]. The total for the claim is therefore $11,390.92.

59. The selection of the windows was one of the most important aspects of the renovation project, from the owners' point of view. Mr Echeverry spent a significant amount of time working with AHD to finalise the order, which they did in late October or early November 2015[41]. The final window schedule no. 737497 was provided 29 October 2015[42], although details of the five caming windows were not finalised until later[43].

60. AHD provided an invoice dated 11 November 2015, no.132, for "H3 Windows & Doors as per quote 737497 & 737635 (excluding W19 - W22 & add on w/caming)" in the amount of $79,560. They provided a further invoice dated 22 June 2016, no.185, for the additional windows in the amount of $2576. The owners have paid these amounts.

61. Eight months later, AHD issued the invoices for the extra charges. The owners said in their evidence that they were not informed that there would be any extra charges until after the windows had already arrived in Australia. They rely on the following evidence:

a. Email from Mr Toomey dated 10 November 2015[44] in which he advised "… We've calculated the cost of the windows based on the latest schedule and the current exchange rate and the cost has obviously increased… Whilst we have discussed in the past that we'd require a 90% deposit to cover the cost of the windows (as we have to pay on order) & the balance on delivery (which is essentially our

[38] TB A131
[39] TB A132
[40] TB A90
[41] TB B225
[42] TB B593-609
[43] TB B222
[44] TB B218

overhead/margin), due to the increasing costs and our keenness for you guys to have the best windows and doors in your home, we are literally charging you 'our cost' so we'd require the full amount with the order as we have to pay for the order when we upload it. The total amount… is $79,560".

b. AHD's cost plan issued 17 March 2016 which showed the windows and doors as $72,327.27 and freight costs as $4699.91[45].

c. AHD's cost plan issued 15 July 2016 which showed the windows and doors as $72,327.27 and freight costs as $900 in one column and $0 in another [46].

d. AHD's invoice no.190 sent 12 days later claiming $8431.92 as "Reimbursement for freight and import costs for windows/doors…"

e. The owners said that AHD refused to release the windows to them until they had paid the 27 July invoice and made threats to sell the goods or charge storage costs[47]; which is why they paid the invoice but under duress.

f. Sierra Pacific's quote to supply replacement hardware includes shipping to Australia[48]. The owners say that the onus is on AHD to show that the same did not apply to the windows.

62. In his evidence, Mr Toomey said that he had explained to the owners that the cost of the windows invoiced in November 2015 was just for the product but included transport within the USA. He said that during their early discussions about the windows, he told Mr Echeverry that the cost did not include shipping, and then again when he emailed them the supply cost.

63. In cross examination, he agreed that AHD had charged a margin on the window order, albeit a very small one. He said that the window supply had a slim margin of profit but that once the overheads of delivery were factored in, there was a net loss.

64. He acknowledged that the owners had asked for invoices to substantiate the claims and said that he had complied by providing a list on 29 July 2016[49]. He said that the owners had accepted that breakdown; whereas the owners said that they were not satisfied with that list and had told Mr Toomey that, including by email on 31 July 2016[50], where Mr O'Brien said "The email below is not supporting documents, it does not provide the certainty that all

[45] TB B336
[46] TB B453
[47] TB B475, 476, 487,
[48] TB B96
[49] TB B479
[50] TB B485

materials have been cleared through customs and picked up by you. Please provide copies of those documents…”.

65. AHD did not produce any documents to the owners at that time, or to the Tribunal in support of its claim for these expenses. Mr Toomey said that he had the invoices for the delivery of the windows, but would not provide them because they are “commercial in confidence”. As a result of that choice, AHD was not able to establish the amount it actually paid for the windows, nor the amounts it allegedly paid for shipping, freight, storage, customs fees, or taxes.

66. Further, Mr O’Brien put to Mr Toomey that when the owners had asked him about freight costs for the cabinetry, he had told them it was all inclusive. He agreed with that proposition. Mr O’Brien then suggested to Mr Toomey that around the time of that exchange, AHD provided them with the March cost plan summary which showed an amount for freight and delivery of the windows of $4699.91. Then they received the July cost plan summary which showed freight at $0. He suggested to Mr Toomey that the owners were quite entitled to think there would be no extra costs for the windows based on that information. Mr Toomey disagreed and said that because they were different suppliers no such assumption should have been made. Further, he repeated that he had told the owners there would be extra costs.

67. As for the $880 claim for unloading the container at the AHD warehouse, Mr Toomey said that that is their usual practice, for reasons of safety and access. He said it is not easy to get a 40 foot shipping container to a home site and so they usually unload the windows at the warehouse and owner-builders can choose whether to come and collect them or have them delivered. He said that the owners in this matter elected to collect them.

68. Based on the evidence provided, I find that AHD was to supply the windows at a cost of $79,560, as claimed by AHD in its 11 November 2015 invoice. This amount is higher than the amounts in either of the cost plan summaries (which factor in shipping costs) and the difference was not explained. However, no claim was made for this discrepancy.

69. The owners are entitled to a refund of the amount they have paid on top of the $79,560, being $11,390.92, as the respondents have failed to provide any evidence to support the charge.

Accepting payment for cabinetry and not supplying the goods

70. One of the major factors in the owners’ choice of AHD for their renovations was AHD’s ability to import and supply cabinetry made by an American company called Kraftmaid. It is not disputed that the owners and AHD agreed on the cabinetry to be ordered, that the owners have paid AHD in full for the cabinetry, nor that it has not been supplied to the owners. The

amount paid by the owners to AHD was $43,348.60. They say that AHD should refund that amount to them, plus legal fees and interest payments, on the basis that the goods for which the funds were paid were never delivered.

71. The owners gave further evidence that in September 2016, before the contract was terminated, they contacted Kraftmaid in America to enquire about their order. They provided Kraftmaid with a copy of the quote and drawings that Ms Toomey had provided to them[51], which included the in-house design reference number apparently provided by Kraftmaid on the design drawings, and which name Kraftmaid as the supplier. The response from America was that Kraftmaid had no record of the order based on that information[52].

72. Mr Toomey explained that response by giving evidence that AHD had not placed its order with Kraftmaid, but had placed it with their supplier, Bill Shorr. He said that he had paid Mr Shorr a deposit of US $12,500, and given him a direction to produce the cabinets, but to not ship them until they were ready to be accepted on site. AHD did not provide any receipts or other documents to the Tribunal in relation to this transaction. He then said that the cabinetry was not due to be delivered to site until after October 2016 and as the contract was terminated at that time, the cabinetry order was never delivered to Australia.

73. The owners relied on a number of emails and letters sent to AHD in August and September[53] in which they requested the cabinetry be supplied. The responses from Mr Toomey included "As per the schedule I provided you, the cabinetry will arrive prior to it being required to install on site"[54] and "The cabinetry hasn't been delivered yet. I'll let you know when it's in transit so you'll have a few weeks notice before it arrives here"[55].

74. On 7 October 2016 the owners then solicitors wrote to Mr Toomey and Ms Toomey, setting out details of the owners concerns about the job[56]. Included in that letter was the demand "that you immediately confirm whether the cabinetry has been ordered and, if so, from whom. We also demand that you provide to our office a copy of the quotes referred in AHD invoice 166 dated 24 March 2016 relating to the cabinetry. In the event the cabinets have not been ordered, our clients demand reimbursement from you of all monies paid on account of that cabinetry."[57] No response was received to that letter.

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[51] TB B257, 259, 541-572
[52] TB B575
[53] TB B526, 531, 532
[54] TB B528
[55] TB B531
[56] They sent a second letter of the same date accepting AHD's repudiation of the contract based on AHD's deregistration
[57] TB B581

75. Ms Toomey said that she was only involved in the design of the cabinetry and left the ordering and delivery to Mr Toomey. She believed that Rheanna in her office would have placed the order with Mr Shorr but had no documentation to support that. She was also unaware of whether Mr Shorr actually placed any order with Kraftmaid or why Mr Toomey failed to respond to the solicitors' letter. She said she was not aware of what had happened to the cabinetry.

76. Based on the evidence, I am satisfied that the owners have paid AHD for cabinetry which they have not received. AHD has not been able to provide any evidence as to whether the cabinetry was actually ever ordered from Kraftmaid, and no documents to support its claim that it was ordered from Mr Shorr. Further, AHD has failed to explain where the cabinetry currently is, or why it did not respond to the owners and their solicitors in September and October 2016.

77. In those circumstances, I think it is more likely than not that AHD never ordered the cabinetry. If they had, they would almost certainly have been receiving requests from Mr Shorr as to what he should do with the cabinetry, given it must have been ready to be shipped since at least October 2016. They provided no evidence of any such conversations with Mr Shorr.

78. Accordingly, I find that AHD is liable to repay the owners the sum of $43,348.60. The owners also claim interest on that amount of money. They have referred to section 60 of the *Supreme Court Act* 1986. That section of that Act has no bearing on matters in this Tribunal. However, as I said in my decision of *Douglas v Kelso*[58] the Tribunal has jurisdiction to make an order for interest pursuant to section 53(2)(b)(ii) of the DBC Act.

79. Senior Member Walker considered the circumstances in which interest may be awarded pursuant to this section in *Quinlan v Sinclair*[59]:

> … There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be "fair" to do so.
>
> It cannot be "fair" to make any order that is not in accordance with the evidence and established legal principles. The tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party's breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of

[58] [2018] VCAT 680
[59] [2006] VCAT 1063 at [10]-[11]

> the money but whether an award of such damages is "fair" must be determined in each case.

80. As Senior Member Walker held in *Khan v Kimitsis trading as Quest Building*[60]:

> Interest is awarded to compensate the aggrieved party for having been deprived of the amount awarded from the date that it should have been paid until the date of judgement.

81. I am satisfied that the owners have been deprived of the amount of $43,348.60 since they paid that amount to AHD. Further, in circumstances where AHD has demanded and accepted payment of a significant sum of money and has not applied it to the purchase of the cabinetry for which it was paid, I am satisfied that it would be fair to compensate the owners for the loss of the use of that money.

82. I accept that the owners had paid AHD for the cabinetry by 28 March 2016. Mr Echeverry gave evidence that he thought the payment had been made around 24 March. There is an email from Mr O'Brien of the same date in which he said that payment will be spread over three days and will be completed over the weekend[61]. Accordingly, I will allow interest from that date. I will use the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983 in accordance with section 53(3) of the DBCA. On that basis, the total interest is $9582.16[62].

<u>Charging for skip bin</u>

83. AHD invoiced the owners a total of $9197 for the hiring and disposing of a skip bin or bins throughout the project, which they have paid. AHD's relevant invoices[63] are as follows:

Date	Inv. No.	Description	Amount
26.02.16	157	Bobcat hire & Bin hire inc rubbish removal & site clean	$3470
22.06.16	185	Bin hire inc rubbish removal	$2977
28.07.16	191	Bin hire inc rubbish removal & disposal	$2750

84. The owners were content to pay the first invoice, but dispute the other two, on the grounds that AHD did not actually incur the costs invoiced. Mr

[60] [2009] VCAT 912 at [41]
[61] TB B348
[62] The interest calculation is included at the end of this decision
[63] TB A121, A129, A132

O'Brien's evidence was that from March 2016, no bins were removed from site, and accordingly AHD's invoices in June and July 2016 are for works which did not occur. The bin was finally removed in or after September 2016, when the owners paid $1650 directly to the hirer to have it taken away. I accept Mr O'Brien's evidence that the bin was not removed from site after March 2016, as that is consistent with the invoices from the bin hirer (details of which are set out below).

85. At the end of the job, the owners tracked down where the bin had come from and found the hirer was a company related to AHD's carpenter, called Sam Marchese & Sons Pty Ltd ("Marchese). Mr O'Brien said that he was told by Marchese that there was no monthly charge for bin hire, that Marchese only charge on collection of each bin, and that AHD had not actually paid Marchese for any bin hire (at that time).

86. Mr Toomey gave evidence that AHD engaged Marchese to provide bin hire, as a service which AHD supplied to the owners. He said that AHD paid Marchese and then invoiced the owners for the service provided, rather than having Marchese directly invoice the owners. He failed to produce any receipts, bank statements or other evidence of payments to Marchese.

87. In respect of AHD's invoice no. 185, Mr Toomey said that the claim of $2977 was the cost of disposing of the rubbish and AHD's labour and bobcat used to fill and empty the bin. In respect of its invoice no. 191, the claim for $2750 was also for the bin disposal and labour and the bobcat. Mr Toomey said that the amount was different because the volume of rubbish may have been different.

88. In cross examination, it was put to Mr Toomey that AHD had added a mark-up on the bin hire costs, with no justification or agreement. Mr Toomey said that the owners had agreed to the mark-up by paying the invoices. He was unable to locate any term of the contract which entitled AHD to charge a margin or mark-up.

89. It was put to him that invoice no. 157 specifically itemised bobcat use with the bin hire and disposal, while the later invoices did not, and so his explanation that those later invoices included a mark-up for AHD's labour and bobcat was an invention. Further, in the covering email sent with invoice no. 191, AHD describes the claim as being for "the cost to remove bin and dispose of rubbish"[64]; there is no mention of AHD's labour or bobcat use or other clean up costs.

90. No-one from Marchese was called to give evidence, but copies of their invoices and emails were tendered by both parties. Marchese provided the owners with copies of two invoices (no.568 and 610). Mr O'Brien said Marchese told him that these were the only two invoices rendered by them

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[64] TB B477

for this job. During the cross examination of Mr O'Brien, AHD produced two further invoices from Marchese. One was for site clean[65], so is not relevant, but the other appears to be a third bin hire invoice (no.583). The owners say that they cannot explain why Marchese did not give them a copy of that invoice earlier.

91. The three Marchese invoices[66] were as follows:

Date	Inv. No.	Description	Amount
21.12.15	568	bin of waste supply	$2200
5.3.16	583	bin of waste supply	$1850
22.09.16	610	bin of waste supply	$1650

92. Without having the benefit of evidence from Marchese, it is impossible to understand the detail of these invoices. From my perusal of them, it appears that the first invoice was for a bin which was charged in December 2015 but shipped on 5 March 2016 (described as the 'ship date' on the invoice). The second invoice is dated 5 March 2016, but has no 'ship date'. Had the amounts not been different, I would have concluded that the two invoices related to the same supply. However, because the amounts are different, I accept that Marchese sent two separate invoices. The third invoice was for the bin that was still on site after AHD's contract was terminated, and was taken away after the owners paid the $1650 to Marchese directly.

93. On the basis of the first and third invoices from Marchese, the owners say that they have overpaid AHD $5727. They were not aware of the second invoice at the time of making their claim.

94. Based on the above evidence and the documents provided by the parties, I am satisfied that AHD hired the bins from Marchese and has either paid or incurred a liability to pay Marchese for bin hire for the amounts set out in Marchese's first two invoices, no. 568 and 583 which total $4050. It may be that AHD has not actually paid these invoices, however that is a matter between Marchese and AHD (Marchese may bring a claim to recover that debt, if it has not been paid). AHD has no liability in respect of Marchese's third invoice no. 610, as the owners have paid this directly.

95. I also accept that AHD's invoice no.157, for $3470 for "Bobcat hire & Bin hire inc rubbish removal & site clean", incorporates $2200 due to Marchese

[65] TB B579b

[66] TB B577 – 579, TB B579d

per its invoice no.568, plus $1270 to AHD for its labour costs and bobcat use. Under the contract (clause 4.4), the owners must reimburse AHD for "direct project costs", and so I accept that the owners must reimburse AHD for the costs of Marchese, being $2200. I also accept that AHD did incur bobcat hire and use costs and some labour (described as "site clean") for the rubbish costs as set out in the invoice. I also note that the owners did not dispute this invoice.

96. However, in respect of AHD's next two invoices, no. 185 and 191, which total $5727, I am not satisfied that AHD is entitled to recover from the owners anything more than the charges imposed by Marchese for that period of time. This was Marchese's second invoice for $1850. AHD was unable to provide any evidence of what works it actually carried out to justify the extra $3877 claimed. No details or documents were provided to support Mr Toomey's allegations of labour costs and bobcat use, and, unlike its invoice no.157, nor were these expenses even claimed in AHD's invoices.

97. Further, Mr Toomey was unable to give precise evidence about when the bobcat was hired, when it was used, what labour was involved and the dates relative to the filling of the skip bin. While I accept that such works may have been carried out, I am satisfied that the $1270 allowed in invoice no.157 covers this work.

98. Accordingly, I will allow the owners a refund of $3877.

<u>Charging for scaffolding</u>

99. Mr O'Brien said that AHD had estimated the cost for scaffolding would be $9800 plus GST, making a total of $10,780. This estimate was contained in AHD's cost plan summary[67]. However, in total, AHD had invoiced the owners $21,037, which they have paid[68]. In addition, the owners had to pay a further $5351.60 to other scaffolding suppliers to complete the works after AHD's contract was terminated.

100. The owners say that AHD had not actually incurred the claimed scaffolding hire costs, or if it has, the amount was due to delays in the progress of the building works, caused by AHD, meaning the scaffold was on site for a longer time than estimated. Their claim is that in those circumstances, they should only be liable to pay AHD the estimated amount, resulting in a refund to them of the difference between $10,780 and the amounts actually paid, being $26,388.60. They have claimed $15,535, but arithmetically the correct sum would be $15,608.60.

101. AHD's response was that the scaffold was on site between February and July 2016. It was originally required for the works to the render, windows,

[67] TB B335-338

[68] TB A121, 125, 126, 127, 129, 130, 131

guttering and roofing, which were to take place in February. However, the progress of the works was delayed by the owners or their contractors, including:

a. The owners asked for extra works to be carried out to the porch roof[69] and that required the scaffold to be kept longer on site. Mr O'Brien denied that scaffold was required for the porch roof.

b. The roof slate was damaged by other workers[70], and required the scaffold to repair it in June 2016.

c. The roof slate was delayed in May 2016 because the owners wanted electrical wiring in the roof moved for lighting[71].

102. In cross examination, it was put to Mr Toomey that there were no changes to the electrical plan, and that it had been set out in the Beacon lighting plan[72] which was part of the specification given to AHD at the beginning of the job. If AHD had not looked at that plan, or had not provided it to the electrician, then that was not the fault of the owners.

103. In respect of the porch roof, Mr Toomey was shown a photo of areas of incomplete roof on the single-storey area of the home adjacent to the porch. He said that the porch scaffold was required to access that roof, but when challenged by Mr O'Brien that there had been no scaffold set up in that area, Mr Toomey changed his evidence and said that he had used a mobile scaffold around the front of the home.

104. Mr Toomey then said there were many other changes to the scope of works, but could not provide details.

105. I prefer the evidence of Mr O'Brien to that of Mr Toomey in respect of the time and the reasons for which the scaffolding was on site. Mr O'Brien was clear and detailed in his evidence, and was supported by documents such as the lighting plan to contradict Mr Toomey. On the other hand, Mr Toomey was vague and made generalised statements such as "there were many other changes", but could not be precise about them.

106. Accordingly, I accept that the scaffolding was on site for a longer period than had been estimated, and that the extra time was due to the actions (or inaction) of AHD. I allow the owners' claim.

107. Further, and if I am wrong about that, AHD has failed to prove that it incurred the costs for the scaffolding in any event. Mr Toomey in his evidence said several times that he supplied the scaffolding as a supplier,

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[69] TB B355
[70] TB B413
[71] TB B592
[72] TB A26

not as project manager. For example, the following evidence was given by Mr Toomey during his cross-examination:

Q: “When you are engaging subcontractors what are you – project manager or supplier?”

A: “As a project manager we are supplying a service… I supplied scaffolding as a supplier, not as project manager… We were taking responsibility for scaffolding and paying the invoices and directing them.… With the landscaper and electrician the owner was telling them what to do so we were not the supplier.”

108. In order to be entitled to be paid by the owners, it must show that the scaffolding was a direct cost under clause 4.4 of the contract. It has failed to produce any evidence of the direct costs incurred by it.

109. Accordingly I will allow the owners a refund of $15,608.60 for the scaffolding costs.

<u>Failing to provide specified window and door hardware</u>

110. As noted above, one of the major reasons the owners gave for working with AHD was its ability to supply windows from America. They put a significant amount of time into the choice of the windows, including the hardware that went with them. They said that, with the assistance of Mr Toomey, they chose the hardware to be a bronze colour, but what was supplied was not that colour.

111. Mr Toomey failed to correct the error and after the contract was terminated, the owners contacted the supplier in America directly. Sierra Pacific provided them with a quote for replacement hardware, including shipping from America, totalling US$11,235 or AUD$15,064.36[73]. Further, the owners claimed the labour cost of 2 men for 2 days to replace the hardware at $1904[74].

112. In response, Mr Toomey said that AHD was supplying the windows and hardware under a supply contract with the owners, not as part of the project manager agreement. He conceded during cross-examination that AHD is responsible to the owners if there is an error in the supply. He said that he contacted the window supplier in America after the hardware was delivered, and was told that the hardware had been supplied as ordered. AHD said that prior to the order being placed, the owners had approved the window schedules, which included the colour of the hardware. Further, AHD submitted that the replacement quote provided by Sierra Pacific is for

[73] TB A91-96 and Closing Summation paragraph 51
[74] They said that their quantity surveyor Mr Austin, had provided this estimate, but I was not shown any supporting document in the Tribunal Book

antique brass hardware, not the bronze which is claimed, and so is not relevant.

113. The following documents were relevant in deciding this question:

a. a chain of emails sent between the owners and Mr Toomey in September and October 2015, in which Mr Toomey suggested that bronze colour hardware would be better than champagne colour, they agreed, and Mr Toomey confirmed (on 2 October 2015) that he had adjusted the order to that colour[75]

b. the draft window schedule no. 737635 [76] provided under cover of a chain of emails dated 15 – 20 October 2015, in which the hardware is described as champagne

c. the chain of emails 15- 20 October 2015 culminating in Mr Toomey's advice to the owners "We can still arrange the window order prior to the exact colour being confirmed to get it 'in the queue" and change to a custom colour or make any other minor mods, we will do so prior to it being 'released'"[77]

d. email dated 29 October 2015[78] in which Mr Toomey said "Hi David, As discussed, please find attached final window schedule for your review. We will receive the 'order acknowledgement' paperwork for sign off prior to the order going through production as discussed."

e. Final window schedule no. 737497 provided 29 October 2015[79], in which the window and door hardware is listed respectively as:

"Shipped with Unit, E-Guard Finish (Beige), Encore, 03 Bronze, Window"

"Standard Hardware Type, Traditional Handle, Antique Brass, Antique Brass Hinge Colour,…

f. The chain of emails 4-10 November 2015[80] in which the parties were discussing the diamond pattern window and custom grilles and the increasing cost due to the current exchange rate. In a series of emails sent on 10 November 2015 Mr Toomey said:

At 12.03pm:"…To keep things moving, they've confirmed we can 'add' to the order either before or during production as I've told them we really need to get the delivery underway as I don't want them

[75] TB B185
[76] TB B195
[77] TB B193
[78] TB B225
[79] TB B593-609
[80] TB B222

holding us up here. Are you guys happy for me to finalise the quote today for you… excluding those four windows, so we can get the order well underway and then we'll add the four windows to it when they confirm the cost of those?"

At 6:38pm: "As per our discussion earlier today, we've calculated the cost of the windows based on the latest schedule and the current exchange rate and the cost has obviously increased…"

At 10:26pm: In response, Mr Echeverry said "Please proceed with the window order. Appreciate that you are honouring your cost to us and that the costs may have changed due to exchange rates etc"

g. The hardware was delivered in August 2016, but was the wrong colour. Mr Toomey told the owners he would follow the issue up with his suppliers[81]. The owners say that they heard nothing more about the hardware despite sending reminders[82].

114. As has already been stated, I accept that AHD supplied the windows and hardware pursuant to the project management agreement. I also accept that AHD was aware of the choice of bronze colour before the final order was placed, particularly in circumstances where it was Mr Toomey who suggested that colour. I do not accept that the owners are liable for the error in what was ultimately supplied. The final window schedule may have been checked by them, but that does not relieve AHD from liability to also check what it, as the supplier, ordered from America. At clause 3 of the Letter, AHD is responsible to "check … material selections". Further, I agree with the owners' characterisation of the window schedule as "not only very technical, but it was inconsistent, unclear and very difficult for a novice to understand"[83]. Moreover, the owners were entitled to rely on Mr Toomey's assurance that "We can still arrange the window order prior to the exact colour being confirmed to get it 'in the queue'".

115. As with the other supply arrangements entered into by AHD, even though it was acting as a project manager, it provided a warranty that it would manage or arrange the building work using reasonable care and skill (section 8(c) of the DBC Act). Further, in respect of the windows and window hardware, I accept that the owners were relying on AHD's skill and judgement, since they deliberately chose AHD for its access to the American products and it was Mr Toomey's advice to use the bronze colour for the hardware. In those circumstances, AHD also provided a warranty pursuant to section 8(f) that the materials it managed or arranged to supply would achieve the result the owners required.

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[81] TB B521
[82] TB B526, 531, 534
[83] Closing Summation paragraph 49

116. I am reinforced in this finding by Mr Toomey's evidence that AHD did not provide copies of any of the invoices or contracts with its subcontractors, saying that they were "commercial in confidence". Such a relationship does not support AHD's contention that the owners' claim should be against Sierra Pacific, not AHD.

117. Accordingly, I find that AHD must pay the owners for the costs of replacing the window hardware, which includes the purchasing of new hardware and its installation. AHD did not provide any alternative costings. I accept the quote from the American supplier, despite AHD's objection to its relevance, since I accept the evidence of Mr O'Brien that he obtained the quote from Sierra Pacific after having explained to them the issue with the hardware. In the absence of any better method of converting the currency from US dollars to Australian dollars, I will accept the owners' calculation[84]. I also accept that there will be a labour cost to install the hardware, and, even though Mr Austin's supposed estimate was not tested, I am entitled to refer to my experience[85], and in doing so I accept that two men for two days is a reasonable allowance for the work required. Accordingly, I will allow $16,968.36 to replace the window hardware.

Damage to front gate stone pillar

118. The stone pillar next to the front gate was damaged during the construction works and needs to be rebuilt[86]. Neither party saw the damage occur but the owners saw it when they returned home on the evening of 10 November 2015. The owners say that it was caused by the bucket of the excavator which had been brought in to do site works for access to the home. They notified Mr Toomey immediately and he said he would "check it out in the morning"[87].

119. AHD had engaged the excavator directly and had charged the owners for this work in its invoices of 26 November 2015 and 12 January 2016[88]. Mr Toomey advised he would follow the issue up with the excavator[89] but failed to do so, despite a series of reminders from the owners[90].

120. During the hearing, Mr Toomey acknowledged that Rob, the landscape contractor, had agreed to fix the front stone pillar and wall after the job was finished, even though he denied it was his responsibility.

121. AHD's defence to the claim is that when it engaged the landscaper, it was acting as the agent of the owners, and so the owners should bring their claim directly against the landscaper. The difficulty with this defence is

[84] which was based on the RBA conversion rate 10 May 2018
[85] Section 98(1)(c) VCAT Act
[86] Photos at TB A69
[87] TB B241-242
[88] TB A116, 119
[89] TB B315
[90] TB B315, 424, 582

that AHD's engagement of the landscaper was no different to its engagement of any of the other suppliers or contractors. The landscaper sent its invoices to AHD and presumably was paid by AHD. AHD passed on the costs to the owners by sending its invoices of 26 November 2015 and 12 January 2016, presumably as a direct project cost pursuant to clause 4.4 of the contract.

122. In those circumstances, there is no legal basis for AHD to avoid liability for its landscaper, even though it was acting as a project manager. By engaging subcontractors directly, AHD was managing or arranging building works, and so provided a warranty (implied by section 8 of the DBC Act) that it would manage its subcontractors with reasonable care and skill. By failing to follow up on the errors caused by its subcontractors, AHD is in breach of the warranty.

123. The owners rely on a cost estimate provided by the quantity surveyor Mr Dastin to rebuild the wall at a cost of $13,500. This cost includes the entire stone veneer, the concrete block core and a portion of the stone wall being dismantled and rebuilt. Mr Dastin was not called to give evidence and so could not be questioned about his estimates.

124. Attached to the owners' closing summation were two photographs which the owners said show that the concrete block core was damaged. AHD objected to these photographs being admitted after the evidence had closed. I agree with AHD that it would be unfair to it to allow new evidence at this stage of the proceeding and I do not have any regard to these photographs.

125. Mr Toomey disputed this costing, saying that the 116 hours allowed was excessive. He estimated the job would take 16 hours, with one day's labour to demolish and clean the stone back and one day with a stonemason to rebuild.

126. I must make a decision on the reasonable cost to rebuild the wall, in the absence of any tested evidence. Based on the photos I was shown during the hearing, I do not accept that the work would require the 116 hours estimated by Mr Dastin. Further, there is no evidence before me to indicate that the pad and strip footing requires replacing. I will allow 48 hours of labour to remove the old stone, clean and reinstall it, being two men for three days, at the $75 per hour estimated by Mr Dastin, plus a further $1500 for materials as he has estimated, making a total of $5100.

<u>Damage to pool retaining wall</u>

127. This claim is similar to the previous item, in that the owners allege a retaining wall next to the pool was damaged by the excavator engaged by AHD. In the same correspondence referred to above, Mr Toomey conceded that the excavator was carrying out work in the damaged area and said that he would follow it up with Rob.

128. During the hearing, Mr Toomey argued that the wall had been damaged by tree roots belonging to trees that had since been removed. He was shown photos of the area[91] and was asked to agree that the areas where trees had been removed was to the left of the stairs to the pool, whereas the damaged wall was to the right. He admitted that he had not seen any trees on the right-hand side but said they were likely to have been the same as the others.

129. In the absence of any evidence of previous trees, or existing damage at the time the works were commenced, and in light of Mr Toomey's concession that he had not actually seen any trees, I accept the evidence of the owners that the damage to the wall occurred after the landscaping had commenced. For the reasons set out above, including the warranty provided by AHD to manage its subcontractors with reasonable care and skill, AHD is liable to compensate the owners for the damage caused by its subcontractors.

130. As for the reasonable cost to repair the wall, Mr Toomey was unable to provide an estimate when I asked him during the hearing. During the hearing the owners relied on Mr Austin's estimate. However in their closing summation, they advised that they had already had the wall repaired and sought to include copies of the receipts for that repair work, and reduced the claim to $3370. In its closing submissions, AHD objected to the owners relying on evidence that had not been tendered during the hearing. In respect of the previous item I agreed with AHD and did not allow the new photographs, but I will allow the evidence of the cost of repairs for this item. The reason for disallowing the photographs was that it would have been unfair to AHD as they were not proven or tested. However, in respect of this claim, the effect of the new evidence is to reduce the amount of the claim from $5210 to $3370, and as business records, I am prepared to admit them into evidence[92].

131. Further, I note, with approval, the comments of Deputy President Macnamara (as he then was) in *Serong v Dependable Developments Pty Ltd*[93] that:

> "…the actual cost of rectifying the defects is the proper measure of damage where those defects have been rectified: *Hyder Consulting (Aust) Pty Ltd v With Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313".

132. I will allow the claimed amount of $3370.

[91] TB 70-71
[92] As I may under section 98(1)(c) and (2) VCAT Act
[93] [2009] VCAT 760

E. Is the second respondent liable for misleading and deceptive conduct under the ACL?

133. The owners allege that AHD contravened section 18 of the Australian Consumer Law, and that by virtue of sections 236 and 2 of the ACL, Ms Toomey personally is liable for the contravention, as she was the person who made the representations.

134. These sections provide as follows:

> 18(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> 236(1) If:
>
> (a) a person (the claimant) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened the provision of Chapter 2 or 3;
>
> the claimant may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
>
> 2. A person is involved in a contravention of a provision of this Schedule… if the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> …
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention…

The representations

135. The owners allege that Ms Toomey misled and deceived them in representing that the owners needed to pay for the cabinetry in full before it could be ordered, and that subsequently, the order for the cabinetry had been placed with Kraftmaid in America. She backed up that representation by providing a copy of an order confirmation form[94]. The owners gave evidence that they paid for the cabinetry in full in reliance on Ms Toomey's statements that she would then place the order with Kraftmaid and accepted her assurance that AHD had done so. They rely on the following evidence in support of this allegation:

a. evidence from Mr Echeverry that in all the meetings he had with her, Ms Toomey led him to believe that she was dealing directly with

[94] TB B420

Kraftmaid and that they would be the company supplying the cabinetry;

b. a series of emails, including those dated 24 March 2014[95], 14 April 2014[96], 5 May 2014[97] from Ms Toomey in which she advised that AHD was awaiting delivery of a new “Kraftmaid Cabinetry price book and spec book”, that the owners would be assigned their own in-house Kraftmaid designer, that she was “excited to be working with a designer in-house rather than a dealer”, that she had “communications with Kraftmaid” and the “cabinetry plans have been passed on to two designers”, that she had “emailed Kraftmaid with your responses and they will assume some artistic license in drawing up both the fireplace area and the WIR, and are aware of the images that appeal to you and the look you want to achieve. KM are asking for specific dimensions… always good to give them a visual image when they are designing for you.”;

c. email dated 15 December 2015[98] from Ms Toomey in which she stated that Kraftmaid would FedEx the hardware to AHD;

d. final drawings and quote provided by Ms Toomey on 8 January 2016[99] which list Kraftmaid as the supplier;

e. email dated 11 January 2016[100] in which Ms Toomey advised “We will get you an invoice later today or tomorrow so we can get cabinetry order into production”;

f. Ms Toomey’s evidence during the hearing whereby she said she only does the design work, but leaves it for her office staff to order the goods from America;

g. a purchase order sent by the office staff of AHD to the owners indicating that the cabinetry had been ordered[101]; and

h. her acknowledgement that she had been copied in to the owners’ correspondence throughout 2016 where they were asking for confirmation of the cabinetry order, but that she did nothing to respond to them, leaving it all to Mr Toomey.

136. The respondents’ defence to this allegation is that Ms Toomey was at all times acting as a director of AHD, and not in any personal capacity. Further, Ms Toomey gave evidence that AHD operated by using an

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95 TB B32
96 TB B35
97 TB B39
98 TB B250
99 TB B257 and B550
100 TB B257
101 TB B418-420

American intermediary (Mr Shorr) to assist with the design and supply, since Kraftmaid does not deal with companies the size of AHD directly. The owners' response to the involvement of Mr Shorr was that Ms Toomey had never mentioned him during the project. Ms Toomey said that it was not relevant for the owners to be told that AHD used an intermediary.

137. Based on the evidence set out at paragraph 135 I conclude that Ms Toomey did represent to the owners that she was dealing directly with Kraftmaid, that Kraftmaid was preparing the design for the owners, that the order for the cabinetry had been placed with Kraftmaid and that Kraftmaid was supplying the cabinetry. I also accept the owners' evidence that they relied on Ms Toomey's advice that AHD required payment from them prior to placing the order, when they paid for the cabinetry in full. They said that without that representation, they would have waited until after the cabinetry had been delivered and installed, to ensure they got what they were paying for.

138. The next questions to be considered are whether the representations were misleading or deceptive and whether Ms Toomey is personally liable for these representations.

Were the representations misleading or deceptive

139. Objectively, the representations were misleading and deceptive. Despite payment having been made in full, no order was placed for the cabinetry with Kraftmaid. In fact, the respondents have failed to prove that an order was placed with anyone at all. Despite the representation that the cabinetry order would be put into production, no cabinetry has been produced.

Ms Toomey's liability

140. Section 236 of the ACL makes liable any person who has been involved in the contravention. Section 2 defines "involved in" to include the person who procured the contravention or has been in any way knowingly concerned in or party to the contravention. As Ms Toomey was the person who made the representations, and was (at least in her own mind) the director of AHD who delegated responsibilities to Mr Toomey, I am satisfied that she is a person involved in the contravention. The question then is whether she can rely on a defence that she was acting at all times as a director of AHD, and not in her personal capacity.

141. It was suggested during the hearing that because AHD was deregistered from November 2015, Ms Toomey could not rely on the defence that she was acting as a director of AHD in respect of any representations made after that date. In response, Counsel for Ms Toomey submitted that there was some authority which provided her with retrospective protection. However, no reference has been made to that authority in the respondents' closing submissions.

142. Instead, in making their submissions at section C above, the respondents provided authorities in respect of section 601AH(5) of the *Corporations Act* 2001 (Cth). I have considered this section and these authorities insofar as they relate to Ms Toomey's liability. Section 601AH(5) provides as follows:

> (5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company….

143. As was pointed out by the respondents, Justice Campbell in *White v Baycorp Advantage Business Information Services Ltd*[102] interpreted that section as follows:

> "… If a director had purported to act on behalf of a deregistered company during the period of deregistration, mere reinstatement would not validate his action, because section 601AH(5) provides only a limited measure of retrospectivity, so that the director regains his office only from the time of reinstatement …"

144. Justice Barrett in *CGU Workers Compensation (NSW) Ltd v Rockwall Interiors Pty Ltd*[103] held that that section meant as follows:

> "Section 601AH(5) creates only a limited form of retrospectivity. It recognises expressly that the persons who were directors at the time of deregistration are not to be regarded as having continued as directors throughout the period of the company's non-existence."

145. On the basis of those authorities, I accept the owners' submission that Ms Toomey cannot rely on her role as a director of AHD when she made the representations after November 2015.

Loss and damage

146. Section 236 of the ACL provides that if a person suffers loss or damage "because of" misleading and deceptive conduct, the person can recover the amount of the loss or damage. I am satisfied that the second respondent's misleading and deceptive conduct caused the owners to suffer loss and damage. The amount is the loss of the money which they paid for the cabinetry.

147. As a result of the above, I will order that Ms Toomey is jointly and severally liable with AHD to pay to the owners the cost of the cabinetry, including the interest on the loss of the use of that money.

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[102] [2006] NSWSC 441 at [115]
[103] [2006] NSWSC 690 at [17]

F. Is the respondent entitled to payment for continuing to provide services between January and October 2016?

148. AHD alleged that the project management agreement was on a month by month basis, with no fixed term. It said that because it continued work on the project until it was terminated in October 2016, it is entitled to be paid the monthly fee for each of the months it worked. It claims $4666 per month for the 10 months from January to September 2016. The amount is calculated by dividing the sum of $28,000 by six months, being the amounts contained at clause 4.2 of the Letter.

149. As discussed in relation to the claim for a refund of the project costs above, I have found that the agreement required AHD to provide its project management services until the works were complete in accordance with the plans and specifications, for the contract sum of $28,000. Accordingly, AHD is not entitled to payment for any further months of work.

150. Further, I note that AHD is in breach of many of the consumer protection requirements of the DBC Act. These included that AHD must not enter into the agreement unless:

    a. Mr Toomey was a registered building practitioner and his registration authorised him to carry out the project management work (section 29 DBC Act);

    b. AHD provided domestic building warranty insurance for its project management services (sections 135-137A *Building Act* 1993 and Domestic Building Insurance Ministerial Order 23 May 2003);

    c. the contract set out the matters specified in section 31 of the DBC Act, including stating Mr Toomey's registration number, the warranty insurance policy, the checklist required and notice of a cooling off period; and

    d. as the agreed progress payments differed from the Table set out in section 40 of the DBC Act, the contract must contain the acknowledgement required by the Regulations (section 40(4)).

151. The failure to comply with these sections means that AHD should not have entered into the agreement in the first place, and having done so, is liable to be prosecuted (for example, under sections 29, 29A, 31, 32 DBC Act and section 136(2) *Building Act*). In those circumstances, I do not think it would be fair to make an order giving payment to AHD (fairness is a requirement I must take into consideration under section 53(1) of the DBC Act).

152. Further, I have regard to the decision of the Court of Appeal in *Dover Beach Pty Ltd & Anor v. Geftine Pty Ltd* [104] (and the cases considered therein), where it considered the effect of a builder entering into a contract in breach of the requirement to provide the required insurance. The Court held that if such a contract were void, the builder would be entitled to restitutionary relief for work done. In the present case, I have found that AHD did not complete the works it was required to carry out under the project management agreement, and that any work it did carry out in 2016 was done as part of its obligations under the agreement. Accordingly, on a quantum meruit or restitutionary basis, AHD's claim is not allowed.

RECONCILIATION

153. As a result of my findings above, I will order that the first respondent must pay the applicants $109,411.91. This amount is calculated as follows:

1.	Reimbursement of project management fees	Not allowed
2.	Reimbursement of shipping costs of windows	$11,390.92
3.	Reimbursement of cabinetry cost	$43,348.60
3a.	Interest on cabinetry payment	$9748.43
4.	Reimbursement of skip bin charges	$3877.00
5.	Reimbursement of scaffolding charges	$15,608.60
6.	Replacement of window hardware	$16,968.36
7.	Repair front pillar	$5100.00
8.	Repair pool retaining wall	$3370.00
Total		$109,411.91

154. Further, the second respondent is liable to the owners for the cabinetry items, namely $53,097.03.

155. The counterclaim is dismissed.

Orders

1. The first respondent must pay to the applicants the sum of $109,411.91.

2. The second respondent must pay to the applicants the sum of $53,097.03.

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[104] [2008] VSCA 248 at [70]

3. Costs and reimbursement of fees reserved with liberty to apply.

SENIOR MEMBER S. KIRTON

Attachment: Interest calculation undertaken by netlaw.com.au

Jurisdiction VIC Penalty Interest

Start Date 29/Mar/2016

End Date 29/Jun/2018

Amount $43348.6

Modifier 0%

Reference BP518/2017

Start Date	End Date	Days	Rate	Amount Per Day	Total
29/Mar/2016	31/Jan/2017	309	9.5%	$11.2548	$3477.73
01/Feb/2017	29/Jun/2018	514	10%	$11.8763	$6104.43
Total		**823**			**$9582.16**