VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP118/2016

CATCHWORDS

Delays for non-completion, pre contract signing and post contract signing: *Domestic Building Contracts Act 1995, Building Act 1993 and Building Regulations 2006*. Misleading or deceptive conduct s18 *Australian Consumer Law*. Rescode requirements concerning overlooking. Procedure - party seeks to deliver evidence post hearing *Frugtinet v Law Institute of Victoria Ltd; Eastman v Director of Public Prosecutions (ACT)*. Specific performance, when orders are appropriate: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*; s53 of the *Domestic Building Contracts Act 1995*.

FIRST APPLICANT	Thi Ngoc Loan Tran
SECOND APPLICANT	Cong Hoan Nguyen
RESPONDENT	Carlisle Homes Pty Ltd (ACN 106 263 209)
WHERE HELD	Melbourne
BEFORE	Member MJF Sweeney
HEARING TYPE	Hearing
DATES OF HEARING	18, 19 and 25 August 2016
DATE OF ORDER	7 November 2016
DATE OF REASONS	7 November 2016
CITATION	Tran v Carlisle Homes Pty Ltd (Building and Property) [2016] VCAT 1873

ORDER

1 Subject to order 2, the application of Thi Ngoc Tran and Cong Hoan Nguyen (owners) is dismissed.

2 In respect of the claim of the owners for gas utility charges, Carlisle Homes Pty Ltd (builder) must pay the owners $96.00. The order for payment of $96.00 is set off against the orders for payment made in order 3.

3 On the counterclaim of the builder, the owners must pay the builder as follows:

(a) interim liquidated damages at the rate of $250 per week, for the period 6 April 2016 to the date of these orders, 7 November 2016, assessed at $7,657.53;

(b) in accordance with signed variation No 4 between the parties, the sum of $3,461.00; and

(b) pursuant to s 115B(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, reimbursement of the application fee paid by the builder of $575.30;

After allowing for the setting off the sum of $96.00 ordered in order 2 above, the owners must pay to the builder the sum of $11,597.83 forthwith.

4 Pursuant to s 53(1) and s53(2)(h) of the *Domestic Building Contracts Act 1995*, I order and direct that the builder must complete the incomplete building work as follows:

(a) construction of a balustrade for rear balcony No 2, in the manner referred to in order 5(b) below, in compliance with all relevant regulations, including the Rescode requirements relating to overlooking;

(b) completion of all remaining works in accordance with the Agreement (as that expression is defined in paragraph 12 of the Reasons); and

(c) make application for and obtain an occupancy permit as soon as reasonably practicable.

5 Pursuant to s53(1) of the *Domestic Building Contracts Act 1995*, I order and direct that the owners must comply with the following:

(a) make the works immediately available to the builder to enable compliance with order 4 above and not to otherwise prevent or hinder in any way the builder's compliance with these orders;

(b) by not later than 4.00pm on 15 November 2016, the owners must notify the builder, by email, of their selection of balustrade for rear balcony No 2, limited to 1700mm high frosted glass type or 1700mm aluminium louvre type, and if louvre type is selected, to advise at the same time a colour for the louvre that is available; and

(c) in addition to the sums ordered to be paid under order 3, comply with the Agreement and pay all amounts due and payable upon completion of the works in accordance with the Agreement.

6 If the owners fail to comply with order 5(b), the builder is directed to install to rear balcony No 2 an aluminium louvre type balustrade in the 'surfmist' colour to a height of 1700mm.

7 Costs, if any, reserved upon application of the builder by not later than 8 December 2016.

8 I direct the Principal Registrar to also serve a copy of these orders on the parties, including by email as follows:

(a) Owners: loantran63@gmail.com

(b) Builder: legal@carlislehomes.com.au

MEMBER MJF SWEENEY

APPEARANCES:

For the Owners	Ms Thi Ngoc Loan Tran, in person
For the Builder	Ms Donna Abu-Elias, internal Solicitor

REASONS

INTRODUCTION

1 The applicant owners seek $240,296.71 from the respondent builder. The largest component of the claim is $200,000 for pain and suffering. There are also substantial claims arising out of alleged delays concerning variations for selection of the type of facade, screening treatment to the rear balcony No 2 and site cut issues. Claims are also made for garage issues, utility costs, medical expenses, case preparation costs and Tribunal lodgement fees.

2 The builder counterclaims for $9,680 for delay, costs for provision of security protection and garden maintenance and Tribunal lodgement fees. The builder says it is wants to complete the house but is prevented from doing so by the owners. The builder says that the main obstruction on the part of the owners is their refusal to complete the signing of a variation for completion of the balustrade to the rear balcony No 2. Therefore, in addition, the builder seeks orders for specific performance to enable completion of the works, issue of an occupancy permit and for payment by the owners of amounts outstanding when works have been completed.

3 Whilst the works have stopped, the contract is technically still on foot. The works appear to be complete with the possible exception of defects and minor works and with the exception of completion of the balustrade to the rear balcony No 2. The balustrade must be in place before an occupancy permit can be granted. The owners have paid to the end of each stage which, if there was no dispute about alleged failures by the builder, would leave the balance outstanding, apart from allowing for variations, as the final stage payment when work under the Agreement is completed.

REPRESENTATION

4 Ms Tran appeared for the owners. Ms Abu-Elias, in house solicitor, appeared for the builder. Evidence was given by Ms Tran for the owners. For the builder, evidence was given by Ms Abu-Elias, Ms Bevis (Operations Manager – East), Mr Perez (Permits Coordinator) and Mr Tabak (Building Manager). Evidence was also given for the builder by Mr Murphy, of DJM Building Consultants Pty Ltd, the appointed building surveyor.

WHY DID THE WORKS STOP?

5 The major areas of dispute concern three matters. First, a dispute over the choice of facade and the change from the Hardwick facade to the Azur facade. Secondly, the level of site cut and fill for the house slab. Thirdly, a dispute over the height and type of balustrade to be erected for the rear balcony No 2 and applicable planning requirements in a situation of overlooking a neighbouring property.

6 However, it was the dispute about the height and type of balustrade that was the cause of the works stopping. The builder says that the Rescode requirements for overlooking necessitated a variation from a 1000mm glass balustrade, originally provided for in the Agreement, to a 1700mm balustrade.

7 The owners do not believe that they should have to change the balustrade height and type, saying that they were first in time to engage the builder to build their house, before neighbouring houses were built. The owners believe that this means that any overlooking issue under Rescode is not caused by them. The owners also say, in the alternative, they should not have to pay for any increased cost caused by a change of balustrade.

8 The balustrade dispute caused a stalemate, with the owners refusing to sign variation No 11, which was for the selection of a colour, 'Surfmist', for a louvre screen. This has prevented the builder from completing the works. Because of this, the builder believes that it was unable to enter the site and complete the works required for the issue of an occupancy permit. The builder then issued and served a notice of suspension under the Agreement and the works were suspended from 6 April 2016. The works remain suspended.

ALLEGED DELAYS

9 The delays complained of by the owners are not delays occurring between the signing of the Agreement and commencement of the works up to the agreed time for completion under the Agreement. The delay claims are in respect of the period between when the owners signed a sales quotation on 23 February 2013 and up to either the signing of the Agreement on 9 January 2015 or the issue of the building permit on 13 March 2015.

10 The dispute about the change of the facade and time taken to resolve it and the levels of site cut and fill are the issues that the owners say resulted in delays to signing the Agreement, obtaining a building permit and start of the works.

HISTORY

11 On or about 23 February 2013, the owners and the builder signed a sales quotation. The prices quoted were described in the quotation as estimates only, stating that the sales quotation was not binding on the builder. The signing of the quotation enabled the builder to proceed to arrange for the conduct of soil tests and a survey of the building site, prior to the owners finalising their purchase of the lot and securing title.

12 After a very lengthy period of negotiation and finalisation of details of the new build, a construction agreement was signed on 9 January 2015. The construction agreement included the following documents (Agreement).

- HIA General Conditions (38 pages)

- Contract Tender Document No 8 (18 pages), dated 23 April 2014, but signed on 9 January 2015
- Colour Selection document which includes fittings and tile selections (36 Pages)
- Geotechnical Site Investigation Recommendations
- Contract Specifications (44 pages)
- Contract plans dated 22 April 2015, but signed 9 January 2015, including site plan and elevations

13 Contract Tender Document No 8 provides details of the total price of $419,537, payable under paragraph 2 of schedule 1 of the General Conditions.

14 The Agreement provided for the following:

(i) site cut: as per Contract Tender Document No 8, clause 4.1, excavate a site cut of 500mm and approximate fill of 300mm to building area including soil removal as necessary to achieve a level building platform;

(ii) facade: as per Contract Tender Document No 8, clause 1.2, provide a Hardwick facade in face brickwork including rendered lightweight cladding above garage roof line and rendered porch;

(iii) balcony: as per contract drawings, elevation B, dated 22 April 2014 and signed 9 January 2015, glass balustrade of 1000mm minimum height;

(iv) garage wall, western wall, sited on zero lot line (site plan 22 April 2014);

(v) downpipes: down pipes provided for on garage;

(vi) time for completion (clause 10 and schedule 1, item 1 of General Conditions);

(vii) progress payment regime (schedule 3 of General Conditions);

(viii) liquidated damages of $250 per week (clause 9 of schedule 1 of General Conditions).

15 In addition, the Agreement was varied, either at the same time as signing the Agreement or sometime afterwards, through the parties signing four contract variations. These included:

- Post-contract variation No 1, signed 9 January 2015, for selection of the facade type. The type of facade specified under the Agreement was varied by selection of the Azur in lieu of the Hardwick façade;
- Post-contract variation No 1 also specified the level of site cut and fill. The level of cut and fill was varied to a cut of 100mm and fill of 600mm;

- Post-contract variation No 4, signed 16 February 2015, specified the height and type of screening or balustrade for the rear balcony. The height and type of screening or balustrade was varied to provide for a height of 1700mm and a powder-coated louvre type screen.

16 Further building variations were agreed and made to the Agreement and are referred to later.

17 The builder's time line and process, from signing of a quotation through to contract signing and start of construction, is described in a document titled 'Procedures of Purchase', a copy of which was provided to the owners.[1] The Procedures set out a 12 week phased progression from payment of initial deposit, through tender appointment and contract tender signing by the client (week 5), order of contract drawings (week 6), signing of final HIA building contract (week 8) and completion of construction drawings, supplier orders and construction start (week 12).

18 There were considerable delays to the above 12 week programme. It took almost 2 years from the signing of the sales quotation until the Agreement was finally signed. The delays mainly occurred through multiple amendments and issuing of new documents during the contract tender document phase, ultimately concluding with signing contract tender document No 8 on 9 January 2015, the time of signing the final Agreement.

19 In the event, once the Agreement was signed and build started, the house was due to be completed in or about the second week of January 2016, under clause 1 of Schedule 1 of the Agreement, General Conditions.

20 The house was materially complete prior to Christmas 2015, save for the installation of the balustrade to the rear balcony No 2, some downpipes to the garage and minor sundry work.

21 The owners' amended claim, received by the Tribunal on 30 May 2016 and clarified by Ms Tran at the hearing, is for $240,296.71. The claim is constituted as follows, with a relatively small and non material discrepancy in the addition making up the total claim:

• Interest on borrowed monies for delay	16,064.00
• Liquidated damages for delayed completion from 14 January 2016 to today's hearing	7,785.71
• Fencing	440.00
• Land tax	868.30
• Rates and utilities (aggregated)	3,295.80
• Facade variation	3,800.00

[1] Builder's documents, number 4.

- Balcony variation 4,461.00
- Medical expenses 906.30
- Pain and suffering 200,000.00
- Case preparation/translation (aggregated) 1,785.00
- VCAT application fee 1,081.20

22 The owners' points of claim were made in a confusing manner. They are set out in several documents with the main points of claim set out in a letter dated 29 January 2016. Further points of claim made by the owners are elaborated upon in a document titled: 'Points of Defence and Counterclaim' dated 15 July 2016, which I have understood as partly containing points of defence to the builder's counter claim and additional claims to the earlier points of claim. For reference purposes, the primary document of 29 January 2016, setting out points of claim, was denoted by the builder in paragraphs numbered 1 to 95. I have adopted this numbering.

23 The points of claim make multiple references to alleged breach by the builder of different provisions of the *Domestic Building Contracts Act 1995* (DBC Act), the *Building Act 1993*, the *Building Regulations 2006*, including *Rescode*, and both specific and generalised references to breaches of the *Australian Consumer Law* (ACL).

24 The issues in dispute are made out from the owners' points of claim as understood by me through the above documents and through various clarifications during the hearing. The issues fall into the pre-contract discussions/negotiation period and the post-contract execution period.

ISSUES

25 The issues in dispute arising from the owners' claim are:

Re Hardwick façade:

(a) Whether, in breach of s18 of the ACL, the builder engaged in misleading or deceptive conduct about the availability of the Hardwick facade, or made a false or misleading statement;

(b) Whether knowingly, in breach of s 246 of the Building Act, the builder provided a false or misleading statement or information about the availability of the Hardwick facade to a person carrying out a function under the Act;

(c) Whether, in breach of s 26(1) of the DBC Act, the builder failed to provide notice that a change of facade was required, giving rise to a claim for loss or damage;

(d) Whether the builder breached s 248(1) of the Building Act; s 132 of the DBC Act; s 243 of the Building Act.

Re site cut and fill:

(a) Whether the builder misdescribed the level of the site cut, resulting in delay to signing the Agreement and start of construction, entitling the owners to damages for delay;

(b) Whether, in breach of s 246 of the Building Act, the builder knowingly provided a false or misleading statement or information about the level of the site cut to a person carrying out a function under the Act;

(c) Whether, in breach of the Building Regulations, reg 1502(a), the builder failed to complete works in respect of the site cut and fill in a competent manner and to a professional standard;

(d) Whether, in breach of s 30(3)(a)(i) of the DBC Act, the builder failed to prepare proper footings design, entitling it to damages for loss;

(e) Whether, in breach of s 40(3) of the DBC Act, the builder improperly demanded instalment payments not directly related to the progress of the works;

(f) Whether, in breach of s 22(a) of the DBC Act, the builder failed to provide written details of prime cost items.

Re balcony:

(a) Whether, in breach of s 246 of the Building Act, the builder knowingly provided a false or misleading statement or information to the owners, by remaining silent about Rescode requirements for screening at the time of contract signing on 9 January 2015; or, in breach of s 18 of the ACL, engage in misleading or deceptive conduct;

(b) Whether, in breach of the Building Regulations, reg 1502(a), carrying out works in a competent manner and to a professional standard, the builder failed to undertake balcony works before the neighbour obtained an occupancy permit;

(c) Whether the builder, in breach of s37(1), s 37(2)(b) and (3) of the DBC Act, improperly gave effect to a variation;

(d) Whether the builder, in breach of s 23 of the DBC Act, failed to provide required documentation showing the cost of any prime cost item or provisional sum.

Re garage:

(a) Whether, in breach of the Agreement, the builder failed to carry out the works as to the location of the garage wall in accordance with the agreed specifications;

(b) Whether, in breach of the Agreement, the builder refuses to complete the garage downpipes in accordance with the agreed specifications.

Re delay in completion of works generally:

(a) Whether the owners are entitled to delay damages because of alleged failure of the builder to complete the works within the building period under the Agreement.

Re progress payment:

(a) Whether, in breach of the Agreement, the builder improperly demanded progress payments for the frame stage and for the lock up and fix stages.

Re other issues:

(a) Whether the owners are entitled to damages for utility costs;

(b) Whether the owners are entitled to damages for medical expenses and for pain and suffering;

(c) Whether, in breach of s 18 of the DBC Act, the builder wrongfully lodged a caveat on the owners' title.

26 The issues arising from the builder's counterclaim are:

(a) Whether the builder is entitled to liquidated damages for the period of delay in completion of the works;

(b) Whether the builder is entitled to damages for costs incurred in maintaining the property until an occupancy permit is issued;

(c) Whether it is appropriate in all the circumstances for the Tribunal to make certain orders for specific performance.

PROCEDURE

27 A day following the hearing, the Tribunal's registrar received a communication from Ms Tran, for the owners, enclosing a document of several pages relating to evidence in the case, with a request for me to take this further material into account in making my decision. On its face, the material did not appear to have been copied to the builder.

28 The material was brought to my attention. I directed the registrar to respond to the owners and advise that, as the hearing had been concluded and as I was in the process of making my decision, no further evidence would be received. I directed the registrar to return the document to the owners and not retain a copy of the material on the Tribunal file.

29 I have not read the material. The material and the request for me to consider it have formed no part of my consideration in arriving at my decision.

30 The owners were afforded every reasonable opportunity to present their case. The hearing was set down for one day. In fact, the hearing proceeded for three days and concluded after all parties had presented their cases and closing submissions.

31 There was one matter arising from the proceedings that requires comment. At the conclusion of the builder's case, Ms Tran for the applicant complained that the builder had not produced its witness Mr Xavier Perez, yet it sought to rely on his witness statement dated 14 July 2016. Ms Tran said that she had material and questions that she wanted to put to Mr Perez.

32 Ms Tran's complaint is unfounded. My notes of the proceedings clearly show that Mr Perez attended, gave evidence in chief and was cross-examined. Ms Tran's cross-examination included questions asking Mr Perez why she was not informed by the builder about not being able to have the Hardwick facade and Mr Perez's response. After concluding her cross-examination, the builder called its next witness. Ms Tran is confused and mistaken about non attendance of Mr Perez.

33 To the extent that material sought to be introduced by Ms Tran relates to issues associated with the evidence of Mr Perez, Ms Tran has been afforded the opportunity of presenting this at the hearing, either during her cross-examination of him and, if properly related to his evidence, in her closing submissions.

34 The above circumstances are sufficient in themselves to demonstrate that the parties, and the owners in particular, had been afforded the opportunity of a fair hearing consistent with the principles of natural justice and the requirements of s 97 and s 98 of the *Victorian Civil and Administrative Tribunal Act 1998*. Both parties to a proceeding are entitled to be accorded natural justice. The circumstances are a proper basis for disallowing the admission of the owners' additional material after the conclusion of the hearing.

35 The Court of Appeal of the Supreme Court of Victoria considered the principle and authorities applicable when a party sends additional material to the court after the hearing has been concluded. Whilst the decision is concerned with the conduct of an appeal, there is no reason why the principle enunciated should be so confined.

36 In *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178 (13 August 2012) per Warren CJ, Nettle JA and Beach AJA, a week after the hearing of the appeal and after the Court had prepared its reasons, the appellant sent an email to the Registry in which he stated that he had withdrawn his instructions to the senior counsel and solicitors who had represented him on the appeal, and enclosed 18 typed pages of 'Further Submissions'.

37 The Court refused to have regard to the 'further submissions', stating:

> … they should not have been forwarded to the Registry. Neither the Rules of Court nor the applicable Practice Statements gave any authority for them to be forwarded without leave, and the court has not been asked to give or given leave for them to be filed. Moreover, if leave had been sought, we would have refused it, because, if we were to give leave, we would then have to give leave to the builders to file replies, with consequent delay in the business of the court.

> As has been said repeatedly in the High Court and in this court, the idea that parties may, without leave, file supplementary written submissions after the conclusion of oral argument is misconceived. The time and place to present argument, whether wholly oral or as supplemented by written submissions, is the hearing of the appeal. Once the hearing of an appeal has concluded it is only in very exceptional circumstances, if at all, that the court will later give leave to a party to supplement submissions.

38 The Court of Appeal referred to the High Court decision of McHugh J in *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28:

> Efficiency requires that the despatch of the court's business not be delayed by further submissions reflecting the afterthoughts of a party …

39 Whilst *Frugtniet* was concerned with a proceeding on appeal, this does not take away from more general application of the principle to a first instance hearing, such as the present proceeding before the Victorian Civil and Administrative Tribunal.

FAÇADE ISSUE (a): Did the builder, in breach of s 18 of the ACL, engage in misleading or deceptive conduct about the availability of the Hardwick facade, or make a false or misleading statement?

FACADE ISSUE (b): Did the builder, in breach of s 246 of the Building Act, knowingly provide a false or misleading statement or information concerning the availability of the Hardwick facade to a person carrying out a function under the Building Act?

40 Ms Tran said the builder lied and misled the owners about the need to change the facade to the Azur type. She said that she became convinced that the builder had lied about this when she received the builder's defence and counterclaim dated 15 July 2016. The builder's defence and counterclaim disclosed document number 18, an email letter dated 19 May 2014 from the estate developer, Shelton Finnis, to the builder. The email stated, in effect, that the Hardwick facade chosen by the owners was not acceptable due to there being a similar facade nearby.

41 Ms Tran said that the date of the email proves that the builder knew about the problem of having the Hardwick facade almost two years before the builder disclosed the issue to the owners. The owners state that 'this important letter has explained all our problems with Carlisle'.

42 Whilst Ms Tran acknowledges that she signed the Agreement on 9 January 2015 which included the change to the Azur facade, what had not been disclosed to her was the possible option of making changes to the Hardwick facade instead of having to change to a different facade. The owners' issue is that they say they were not told that making some changes to the Hardwick facade could suffice.

43 The sales quotation signed by the owners and the builder on or about 23 February 2013 specified a Hardwick facade, in face brickwork including rendered lightweight cladding above garage roof line and rendered porch for an additional estimated cost of $8,950.

44 Around 18 September 2013, the owners completed the purchase and registration of title of the land in Keysborough.

45 In development of the estate, the developer, Shelton Finnis, retained the right to approve the building type, including facade treatment, before development and construction is permitted to commence. The rationale for this is, amongst other matters, to avoid houses in relatively close proximity to each other from being too similar looking.

46 A neighbouring site at lot 96, about 4 lots away from the owners' site, also entered into negotiations with the builder for the construction of a new house. In similar manner to the owners, this party paid their deposit on the sales quotation on or about April 2013, that is, about 2 months later than the owners.

47 The neighbouring house at lot 96 was also designated as a Hardwick facade, but without the full rendering selected by owners for their facade. The builder said that they were of the view that this difference was sufficient to make both facades acceptable to the developer.

48 Ms Tran said that the builder's sales consultant encouraged them to pay the $1,000 deposit and sign the sales quotation on 23 February 2013 so as to secure the Hardwick facade, especially as the sales consultant told them that two dwellings within 5 lots were not permitted to have the same facade.

49 Ms Tran's evidence in chief and in her points of defence is that the builder 'planned in advance from the beginning to deceive us'.[2] She said that because they signed the sales quotation first, before the neighbours, they should be entitled to have the Hardwick facade. However, the builder told her that they must change the Hardwick facade.

50 Ms Tran repeatedly said that the builder favoured their other client at lot 96 over the owners. She said that the builder planned in advance to allow lot 96 to have the Hardwick facade by progressing their development and building permit quickly and by neglecting the owners' development.

51 As support for this, Ms Tran tendered an email of the City of Greater Dandenong, dated 5 July 2016, which gave the date on which the building permit for lot 96 was issued, namely, 4 October 2013. As the owners' first building permit application was not completed until 12 May 2014, this proved, according to Ms Tran, that the owners were being neglected by the builder.

52 She said that when they signed the Agreement on 9 January 2015 which contained the Azur facade, this was done in ignorance of the true situation

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[2] Owners' points of defence, paragraph 24.

due to the builder refusing to disclose to them that that could have made some changes and thereby retain the Hardwick facade.

53 Ms Tran said that on 9 May 2014, Ms Jennifer Jones, the builder's Client Liaison Executive, told her about Shelton Finnis' requirement for the owner to change the Hardwick facade to another facade. Ms Tran said that the actual email of Shelton Finnis was intentionally withheld from her. Ms Jones' notification of the applicant was 10 days after the Shelton Finnis email notification to the builder.

54 Ms Tran said that, a year and a half later, the builder's internal solicitor, Ms Donna Abu-Elias, by emails of 17 and 18 December 2015, stated that the owners were offered the option to keep the Hardwick facade with only some things to be changed. Ms Tran says that this email is evidence of the earlier deception of Ms Jones saying that the owners must change the facade.

55 Ms Tran said that the builder lied to them 3 or 4 times. The first lie of the builder was on 9 May 2014 when Ms Jones said they must change the facade as distinct from making some alterations. The second lie is the assertion by the builder, stated in a letter of 17 December 2015, in which the builder said that it told the owners that they could make small changes. The third lie was the resending of the above letter to the owners. The fourth lie was not clearly made out. It may be Ms Tran saying that the City of Greater Dandenong noted the neighbour's building permit had been issued on 4 October 2014 yet that the builder did not show her the Shelton Finnis letter until May the following year.

56 The owners' claim for the alleged deception is reimbursement of the additional cost incurred by them in the change from the Hardwick facade to the Azur facade of $3,800. Costs of delay, generally stated, and said to be due to the facade change, are also claimed.

57 Ms Tran's evidence was lengthy and put in different ways. The above summary seeks to record the relevant evidence concerning the facade and not intended to be an exhaustive summary of her evidence.

58 Ms Lauren Bevis, Client Liaison Executive Team Leader and, from September 2013, Operations Manager - East, gave evidence for the builder, including the adoption of her detailed witness statement dated 14 July 2016.

59 The evidence of Ms Bevis included the following. This evidence is summarised in a chronological order and refers to evidence beyond simply the facade issue (as it is relevant to other claims discussed below):

(i) a copy of the builder's Procedures of Purchase document was given to the owners at or about the time of signing the sales quotation. Week 3 of the procedure provides that a booking be made for contract tender appointment;

(ii) the contract tender appointment was postponed several times due to unavailability of the owners. A contract tender appointment was made for 25 July 2013;

(iii) on or about 2 July 2013, Ms Tran discussed with the builder the possibility that they may sell the land as they were not happy with it. Because of this uncertainty, the tender appointment was cancelled;

(iv) on 22 July 2013, Ms Tran attended at the builder's office and, amongst other matters, said that she was still in discussion with the developer on whether or not to keep the land;

(v) at a meeting on 21 August 2013, the owners attended the builder's office and made many structural changes. Ms Tran said that if she could not get a number of these changes she would not wish to use the builder as the builder;

(vi) on 26 September 2013, Ms Jones for the builder called the owners to enquire if the land purchase had settled so that a tender appointment could be made. Subsequently, the builder became aware that the owners had completed the land purchase and became registered on title around 18 September 2013.

60 As a matter of chronology, I note the building permit for the neighbours at lot 96, who had selected a Hardwick facade, was issued on 4 October 2013. In contrast, the stage of development of the owners' tender document, plans and contract was still in the very early stages, with the owners having just completed the purchase of their land.

61 The evidence of Ms Bevis continued:

(i) on 7 November 2013, the builder met and discussed preliminary items in the tender document, other than the site soil tests which had not become available;

(ii) on 12 December 2013, tender No 2 meeting took place. The owners made further changes;

(iii) on 19 December 2013, tender No 3 was sent to the owners for their review;

(iv) on 12 February 2014, the owners indicated acceptance of the tender document and the builder requested payment of the tender deposit. Contract signing appointment was made for 12 March;

(v) notwithstanding the arranging for contract signing, the owners continued to make changes to the tender document and had not paid the deposit;

(vi) on 19 March 2014, the owners sent an email stating that they were 'happy with the tender now'. However, after this date, they proceeded to make more changes;

(vii) continual changes were made by the owners to the tender document resulting in contract tender No 7 which was signed on 25 March 2014. The deposit was paid on 26 March 2014. The owners were told that no more changes could be accepted;

(viii) however, on 27 March 2014, the owners requested further changes. Tender No 8 was prepared;

(ix) on 24 April 2014, the builder prepared the contractual documents. The documents were couriered to the owners and a contract signing date arranged for 30 April 2014;

(x) again, because the owners had made many more changes, 41 in total, the signing could not proceed. The builder needed to price the changes and put them into a document, subsequently referred to as post-contract variation No 1. The signing and was rescheduled for 19 May 2014;

(xi) in anticipation that the contract would be signed, and due to the delays, in order to hasten matters, on 1 May 2014, the builder lodged a preliminary building permit application. The builder also applied in writing to the developer, Shelton Finnis, seeking approval;

(xii) on or about 14 May 2014, the owners queried the level of the site cut and fill referred to in tender No 8. The owners claimed that the level had been changed without their consent between agreed tender No 7 (400mm cut and 300mm fill) and tender No 8 (500mm cut and 300mm fill).

62 Ms Bevis said that, in respect of the facade issue, following sending the plans to the developer for approval around 1 May 2014, Shelton Finnis sent its email on 14 May stating that the Hardwick facade was too similar to that at lot 96 and required changes.

63 Mr Xavier Perez, the builders' Permits Coordinator, said that he forwarded the email from Shelton Finnis about the need to make changes to Ms Jennifer Jones for attention.

64 Mr Perez said that his job included checking on adequate facade separation,[3] that is, not having the same facade type too close to each other. He said that if a house had a Hardwick type fully rendered facade, such as the owners' proposed facade, compared to a non-rendered facade of the same type, as per lot 96, developer approval would depend on reviewing it at the time, with the possibility that the developer may not give approval.

65 Mr Perez said that the sales quotation signed by the owners dated 25 February 2013 stated, at clause 5.1, that the developer may require adjustments to the facade and the agreement is subject to that term.

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3 Exhibit XP1 to statement of Xavier Perez dated 14 July 2016.

66 In respect of the email sent by the developer, Ms Bevis said that the owners met with the builder's Ms Jones on the same day as receipt of the email. At that meeting, Ms Bevis, reporting on what Ms Jones had recorded in notes as having been said, said that the owners were told of the developer's requirements concerning the facade.

67 Ms Bevis acknowledged that the builder cannot be sure if the actual email from Shelton Finnis was shown to the owners, but believes that the contents of the email were discussed.

68 Following from this, Ms Bevis said that her understanding was the owners were told at the 19 May meeting that they could change a few things to differentiate it from the other Hardwick facade already approved for lot 96. Ms Bevis was not present at this time.

69 The owners notified the builder of their selection of the Azur facade by email on 17 July 2014. That email states 'Can I choose the Azur facade … instead of the Hardwick facade because they are similar so I don't need to change the rear window of the study room? Thank you!'

70 In all this, the owners did not dispute that they were told of the need to address the facade issue and that they were told at the meeting on 19 May 2014. What the owners assert is that that were incorrectly told that they had to choose another facade, and not that making some changes might possibly satisfy the developer. The owners say that this is the lie of the builder and the reason why they were not shown the actual email from Shelton Finnis.

71 In respect of the claim for $3,800, the builder says that the owners must be bound by their contractual agreement. They requested the Azur facade. They signed post-contract variation No 1, at the same time as the other contractual documents, on 9 January 2015, confirming their acceptance of the change and the cost of $3,800. In respect of any claim for delay arising from a change to the facade, the builder says there was no delay. The issue was first notified on 19 May 2014 and resolved by 17 July 2014. The Agreement was not signed until 9 January 2015, more than 5 months later, due to matters not connected with the facade.

72 The question for decision is whether the builder has made a statement that is false or misleading or engaged in conduct that is misleading or deceptive.

73 Notwithstanding the detailed evidence, the answer to this question comes down to an examination of a relatively small area of disputed fact. There are two areas. First, whether the builder misled or deceived the owners by seeking to promote the interest of the owners of lot 96 over their own. Second, whether the owners were deceived or misled into believing that they had to change the facade type instead of only making some changes to meet the developer's concerns.

74 On the first area, much of Ms Tran's evidence focussed on her view of how the builder engaged in deception and lies and how it promoted the interests of the owners of lot 96 over the superior rights of the owners.

75 I am not satisfied that there is evidence to support the view that the builder had any interest in promoting one project over the other. On the question of selection of a facade, it was the owners who first selected the Hardwick type, with the treatment of full rendering. The rendering had the effect of distinguishing it to some degree to the later selection made by lot 96. Further, for the reasons examined below, due to being later in time, it is probable that the owners had the better case to insist that they should not have to be the ones to change the facade selection.

76 The process however is one where, once the plans are finalised, the developer retains the right to review them and insist on having a separation of 5 lots between like facades. The developer's rights were made known to the owners in the sales quotation signed by them on 25 February 2013. Clause 5.1 clearly states under the heading 'Developer Requirements' that the developer has a right to require facade adjustments. To that extent, given the separation of 5 lots requirement, the developer can require that a different facade might be required.

77 That being the case, the developer assesses the position at the time the plans are refined and submitted to it on or about the time of a party applying for a building permit. On this point, the owners say that they were first in time when the sales quotation was signed. However, the relevant time, for the above reasons, is the time about which a building permit application is made.

78 The owners of lot 96 were issued a building permit on 4 October 2013. That is about the time that the developer reviewed its facade type. On the other hand, the owners had proceeded at a very slow pace, including being uncertain as to whether to retain their land, such that they were not in a position to have their plans reviewed by the developer until May 2014, some 6 months later.

79 I find that the builder did not engage in a deception or in misleading or deceptive conduct to promote the interests of the owners of lot 96 ahead of their own. The builder was compelled to act in accordance with the requirements of the developer of the estate and in accordance with the instructions of their client, the owners.

80 I find that it was the owners who were indecisive on a number of matters, including up to a very late stage of the contracting process, and that, even leaving aside for the moment issues of delay alleged to be associated with the site cut, the owners' indecision throughout the contract tender process caused substantial delay in finalising the plans to the stage necessary to have them submitted to the developer for approval of matters, such as the facade.

81 Concerning the second area, the owners say that they were misled or deceived by the absence of any statement, silence, or by the conduct of the builder in not making them aware that they did not have to change the

facade, but that the developer's concerns could be addressed by simply making a number of changes.

82 The owners say that, in being misled by the builder and placing reliance on its misleading behaviour, they changed the facade to the Azur type, thus causing them a loss of $3,800.

83 The misleading conduct is alleged to have occurred at a meeting with the builder, held on 19 May 2014. The owners say that from the receipt of the developer, Shelton Finnis' email earlier on the same day and throughout, the owners were only told that they were required to change their facade selection and not shown the email, or told that making some changes to the existing facade possibly could work.

84 The owners' allegation of misleading or deceptive conduct arises under s 18 of the ACL. The allegation of knowingly providing a false or misleading statement or information arises under the Building Act. Both allegations relating to the Hardwick facade are based on similar types of prohibited behaviour, but with quite different statutory requirements.

85 Section 246 of the Building Act provides:

> … a person must not knowingly make any false or misleading statement or provide any false or misleading information to a person or body carrying out any function under this Act or the regulations.

86 Section 18 of the ACL provides:

> A person must not, in trade of commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

87 The allegation of breach of s246 of the Building Act is not made out and is misconceived. The builder was not required to provide information or a statement to a person having authority under the Building Act and did not do so.

88 Putting to one side the particular and different framing of each of the statutory prohibitions and the different ingredients required to prove a breach of each of those sections, including intent in the case of the Building Act, the basis for initially establishing any false or misleading statement or any misleading or deceptive conduct, on the evidence of the owners, arises out of the same factual matrix.

89 The test of misleading or deceptive conduct under s 18(1) of the ACL, is an objective test. Whether or not s 18(1) of the ACL is contravened depends on whether the statement in fact contains or conveys a meaning which is false, and not on the maker's intention or belief. *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; [1984] 55 ALR 25.

90 The builder's evidence as to what occurred at the meeting on 19 May 2014 is largely based on the hearsay evidence of Ms Bevis as Ms Jones was unable to attend to give evidence. Ms Bevis' evidence is substantiated by internal records of the builder, including email records. She said that at the

meeting on 19 May 2014, the builder's Ms Jones was unsure if she had given a copy of the actual email to the owners. However, Ms Bevis said that a facade options sheet was given to them and they were advised that if they did not want to change the facade, they could keep the facade but would be required to make changes to differentiate it and that there would be no additional cost.

91 The owners selected the Azur facade at an increased cost. The Hardwick facade costs $8,950, the Azur costs $14,750. When the owners selected the Azur, the builder gave the owners a $2,000 discount, seeking the balance of $3,800. The additional charge of $3,800 is confirmed in post-contract variation No 1, signed by the owners on 9 January 2015, with the notation 'Discounted price as agreed by Management'.

92 As summarised above, the owners claim they were not given a copy of the email. In determining whether or not they were given a copy, and the uncertain evidence of the builder on this point, the Tribunal accepts that the owners may not have been given a copy of the email.

93 But misleading or deceptive conduct is not made out by the fact of not being given a copy of the email. As I have said above, I do not accept that there was any intentional motive on the part of the builder to somehow favour the owner of lot 96 or that the builder lied to the owners in the manner claimed by them.

94 Of course, intent is not required as an element in proving misleading or deceptive conduct under the ACL. The question is one to be determined objectively. But before all else, the question is, what was the complained of conduct? Did the builder in fact fail to tell the owners about the ability to simply make changes instead of having to choose a new facade type?

95 In the overall context and circumstances of the relations between the parties in negotiating the finer details and the demonstrated effort made by the builder in regularly following up contact with the owners, in my opinion, shows that the builder behaved in a diligent and professional manner.

96 I am satisfied the builder took care and acted with patience in its communication with Ms Tran, especially in circumstances where she was not fluent in English.

97 The owners also referred to emails of 17 and 18 December 2015 sent by the builder's internal solicitor, Ms Donna Abu-Elias. Those emails stated that the owners had at the time been offered the option to keep the Hardwick facade with only some things to be changed.

98 Ms Tran said, and it was claimed in the points of claim at paragraphs 26 to 28, that these emails are evidence of the dishonesty of the builder and of Ms Jones, at the direction of the builder, 'knowingly providing false information of competent authority to me'. That is, Ms Tran said the emails were inconsistent with what she asserts was purportedly said by Ms Jones, namely, that the owners must change the facade.

99 If the internal solicitor's emails sent on 17 and 18 December 2015 serve any evidentiary purpose, it is to encourage the drawing of an inference that Ms Jones, on 19 May 2014, did explain to the owners that they had the option of making some changes to the Hardwick facade. In my opinion, the drawing of such an inference is preferred over the inference put by the owners that it demonstrates dishonesty on the part of Ms Jones.

100 For the above reasons, I accept the builder's evidence and find that the owners were told that they could makes changes that could be put back to the developer for its consideration. Any question of silence as connoting misleading or deceptive conduct by not explaining the same therefore does not arise.

101 The claim, to the extent it relies on a finding of misleading or deceptive conduct in breach of s 18 of the ACL, has not been proved and is dismissed.

FACADE ISSUE (c): Did the builder, in breach of s 26(1) of the DBC Act, fail to provide notice that a change of facade was required, giving rise to a claim for loss or damage?

102 The owners also claim breach by the builder of its duty under s 26(1) of the DBC Act. The section states that a builder must provide an owner with a copy of a notice or other document that the builder is given in relation to the building works by any public statutory authority, provider of services such as gas, electricity etc. or by a person registered under the Building Act as soon as practicable after receiving the notice or document.

103 In the present case, the owners allege a breach by the builder is constituted by the builder's failure to give the owners a copy of the email letter dated 19 May 2014, from Shelton Finnis.

104 I do not accept, as a matter of statutory construction, that the developer's informal email of 19 May 2014 constitutes 'a report, notice, order or other document' as that expression, properly construed, is intended to operate. Also, the developer is not a person that falls into one of the categories of people referred to in the section. I find no breach by the builder of s 26(1) of the DBC Act and dismiss the claim.

FACADE ISSUES (d):

105 For completeness sake, several other claims were made by the owners related to their claim regarding the facade in the owners' 'Points of Defence and Counterclaim' document. These have been grouped together as issues at paragraph 24(d) under the sub heading, re Hardwick facade.

106 The owners claim damages for breach of s 248(1) of the Building Act. S248(1) provides that a person must not act on behalf of an owner of a building or land for the purpose of making any application, appeal or referral under this Act or the regulations unless the person is authorised in writing by the owner to do so.

107 The breach asserted is misconceived. No evidence was led to prove the asserted breach and is dismissed.

108 The owners also claim breach of s 132 of the DBC Act concerning the prohibition against contracting out of the Act. The facts alleged to give rise to the breach were unclear. No persuasive evidence was given to support a breach. The claim is dismissed.

109 The final claim related to the facade selection issue was an alleged breach of s 243 of the Building Act, concerning an offence by a body corporate. The body corporate referred to in the section is not a reference to such a body under the Corporations Act but to what is now termed an Owners Corporation under the Owners Corporation Act. This section has no application in the present proceedings. The claim is misconceived and is dismissed.

SITE CUT AND FILL ISSUE (a): Did the builder misdescribe the level of the site cut, entitling the owners to damages for delay?

110 The owners claim loss and damage for delay from 12 May 2014, when the application for initial building permit was lodged and request for additional information was made, until 13 March 2015, when the building permit was issued.

111 The alleged delay is mainly in the pre-contractual period up to 9 January 2015, approximately 8 months. The rest of the alleged delay is from the contract date up to the issue of the building permit on 13 March 2015, just over 2 months.

112 First, in respect of the pre-contractual period. Ms Tran said that the owners had accepted tender No 5 and agreed to attend a meeting for signing all documents on 12 March 2014. Ms Tran said that the builder cancelled the meeting through no fault of the owners and then sent an amended tender, tender No 6.

113 Ms Tran said that further additional changes were made and incorporated in a later tender, tender No 7. She said that the owners agreed with this tender and that they paid the deposit of $2,000 on 26 March 2014. Signing of contract documentation was arranged for 30 April 2014.

114 By letter dated 24 April 2014, the builder sent to the owners, documents including the HIA building contract, tender No 8 dated 23 April 2014, contract specifications and plans.

115 On reviewing paragraph 4.1 of tender No 8, Ms Tran said that the builder had arbitrarily changed the structural site cut without the owners' consent. She said that it was because of this arbitrary change made without authorisation that was the cause of delay which resulted in the tender No 8 not being signed until 9 January 2015 and the building permit not being obtained until 13 March 2015.

116 Ms Tran produced an email, dated 1 May 2014, that she sent to the builder's Ms Jones querying why the depth of the site cut had been changed from 400mm to 500mm. In the email, Ms Tran asked if the site cut depth could be made smaller. She explained that the next door house was built 'higher normal ground level', whilst her house is to be built 'lower' normal ground level.

117 Ms Tran said in evidence that the result of the level differences would be that the two houses would be on two different levels and that she did not want this.

118 Ms Tran explained that in all the first 7 tenders, the site cut was recorded as 400mm. She said that she could not agree to a 500mm cut as it would make the garage look uneven compared to the garage next door.

119 Ms Tran concedes (owners 'points of defence and counterclaim', paragraph 6(c)) that she received an emailed letter dated 30 October 2014 from the builder which described in some detail how events unfolded concerning the site cut, including an explanation that there was no change to the actual plans specifying the site cut and the owners' request to change the site cut so that their garage would sit higher.

120 In short, the owners claim that the builder's misdescription of the depth of the site cut in tender No 8, resulted in delays to contract signing and commencement of the works, thereby causing loss.

121 In addition, the owners say that this delay also caused the issue with the balustrade on the rear balcony No 2. This is because the delay meant that adjoining houses were completed prior to the owners' house, thereby raising overlooking issues that would not otherwise have occurred. This issue is addressed below.

122 The owners claim interest on borrowed funds up to 13 March 2015.[4] They also claim liquidated damages, under clause 40 of the contract general conditions, for 218 days for the period 14 January 2016 to 18 August 2016.[5]

123 The builder disputes the basis for any claim. Ms Bevis for the builder said that pre-contractual delays occurred due to the owners' requests for numerous and continual changes to the tender documents and contractual drawings (referred to in paragraph 60(x) above), over the whole period until the contract signing, and continuing on afterwards in respect of post-contract variations.

124 Ms Bevis agreed that at the contract signing meeting held on 19 May 2014, the owners refused to sign the documents due to their concerns about the site cut and fill and issues they had about the height of the neighbour's garage being higher than theirs.

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4 Owners' particulars, paragraph 84, item 1.1.

5 Owners' particulars, paragraph 85.

125 Ms Bevis agreed that there had been an incorrect statement in tender No 8 which stated that the site cut was 500mm. It should have stated 400mm. However, the plans themselves on which the works are premised, were correct on all occasions and nothing had changed in any of the versions of the plans about the site cut being premised on a 400mm cut and 300mm fill. She referred to drawings dated 10 December 2013 and 22 April 2014 showing an unaltered contour cut line of 100.1 as evidence that at no time had any change been made. Ms Bevis said that all this was made known to the owners.

126 Ms Bevis referred to the builder's email dated 30 October 2014 sent to the owners. The email is contained at document number 11 in the builder's bundle of documents. Ms Bevis explained that the owners were told on a number of occasions that they were mistaken about there being a change to the manner of conducting the site cut, between tender No 7 and tender No 8. The email was sent to clarify issues associated with the site cut.

127 Ms Bevis said that the real issue was the owners' desire and concern to, as Ms Tran referred to, 'lift up' the house so that it would be level with the neighbouring house.

128 Ms Tran herself refers in the owners' additional statement dated 26 May 2016 at paragraph 23 about the 31 October 2014 meeting with the owners concerning 'to lift the house'.

129 The builder submitted that it is vexatious for the owners to state in their points of claim, paragraph 9, that the builder arbitrarily changed the tender details.

130 In this regard, Ms Bevis denied that the builder did not discuss the site cut issue until the end of October 2014. She said that from 22 May to 30 October 2014 there were numerous phone conversations and meetings which were concerned with additional site costs for the conduct of works outside the builder's normal building process.

131 The builder submitted that, in any event, all the discussions and meetings including as to additional site works costs associated with increasing the height of the house on the lot, were at the pre-contract stage.

132 Further, Ms Bevis points to post-contract variation No 1 (document number 9 in the builder's bundle, signed on 9 January 2015), as proof that the owners finally came to a new and quite different agreement on the appropriate site cut level and associated additional cost.

133 Notwithstanding the detailed evidence given in this case on the issue of delay related to the level of the site cut, the main basis of the claim is for the pre-contractual period.

134 I am not satisfied that the owners have made out a cause of action for damages for delay in circumstances where there is no contractual agreement executed between the parties for the conduct of works within a specified

time or indeed where there is the absence of any agreement in respect of which a reasonable time for completion might be implied.

135 I find that what transpired between the parties from May 2014 onwards, was a continuation of extensive negotiations and review demanded by the owners at every stage of the process up to the signing of the contract on 9 January 2015.

136 I do not accept the necessary inference in the owners' case on the question of the site cut that there is some contractual basis or some legislative basis under the DBC Act that the builder is liable in the period before any concluded agreement has been reached.

137 The very fact of serious and ongoing discussions and negotiations over site excavation costs and appropriate footings, ultimately reflected in post-contract variation No 1, demonstrates that no cause of action for breach of contract or for breach of legislative prescriptions reliant on the existence of a relevant contract has been disclosed by the owners.

138 In my opinion, I agree with the builder and find that there is no tenable basis for the owners to claim that they suffered loss due to delay because of some alleged arbitrary change to the site cut. I accept that no change was made to the site cut at the relevant time as evidenced by the drawings. Whilst the owners were obviously initially confused about tender No 8 showing a 500mm site cut, it was fully explained to them on a number of occasions, including in writing.

139 The owners subsequently proceeded to negotiate a totally new approach to the height of the house based on their desires to be of an equivalent height to the neighbouring house. The change was driven vigorously by the owners causing extensive additional studies to be undertaken by the builder.

140 The owners' many and varied demands in this respect meant that the builder needed time to work through new structural approaches and to develop an agreed suite of contractual documentation and fully explain them to the owners.

141 In the end, the owners agreed to a totally different approach to the site cut and fill. Paragraph 2.1 of post-contract variation No 1 signed by them on 9 January 2015 varied paragraph 4.1 of tender No 1, also signed on the same day. The owners do not seek to be released from their bargain and have received the benefit of it. They have not proved a basis for making a claim arising from pre-contractual loss. This part of the claim is dismissed.

142 In so far as the owners' claim, arising from the site cut being mistakenly referred to as 500mm in tender No 8, for loss for delay in the period from signing the contract on 9 January 2015 to issue of the building permit on 13 May 2015, the basis for such claim has not been proved for the reasons provided above. That is, there was no mistake in the contract drawings which show an unaltered contour cut line of 101.1. Also, in any event, the

Agreement, representing the entire agreement between the parties, was agreed on the basis of a totally new site cut.

143 The owners, once they signed the contract on 9 January 2015, became bound by and entitled to the benefit of its terms and conditions. The contract is the entire agreement between the parties.[6] No evidence was led to prove that this was not the entire agreement.

SITE CUT AND FILL ISSUES (b), (c) and (d): Did the builder breach s 246 of the Building Act; reg 1502(a) of the Building Regulations; or, s 30(3)(a)(i) of the DBC Act?

144 In respect of any alleged breach by the builder of s 246 of the Building Act, both the fact of a statement being false or misleading and the requisite intent must be proved by the owners.

145 The owners' allegation in this respect is not clear but appears to be made against the builder based on the erroneous statement of the site cut being 500mm in tender No 8.

146 In seeking to prove such an allegation, the owners must clearly identify the precise statement relied on. I have identified the above statement as best I can from a review of the variously made out points of claim.

147 The owners must also prove the builder had knowledge and that the statement was provided to a person contemplated under the section.

148 I have found, for the reasons given above, that the builder did not act in a false or misleading manner and that all the drawings represented the correct position.

149 In respect of any alleged false or misleading statement about the site excavation, the claim has not been proved and is be dismissed.

150 The owners also claim a breach of reg 1502(a) of the Building Regulations. The regulation provides that a registered building practitioner must perform the work of a building practitioner in a competent manner and to a professional standard.

151 The breach is not made out. The owners did not produced evidence in support of a lack of relevant standards about the conduct of the site cut and fill works under the contract, notwithstanding that the house has been substantially completed for over 8 months. The claim is dismissed.

152 In respect of any alleged breach by the builder of s 30(3)(a)(i) of the DBC Act, the owners produced no evidence of improper preparation of footings design under the contract and no evidence of a failed structure resulting from any improper preparation. The claim is dismissed.

[6] Agreement, General Conditions, Interpretation, clause 3.0.

SITE CUT AND FILL ISSUE (e): Did the builder, in breach of s 40(3) of the DBC Act, improperly demand progress payments?

153 The claim is misconceived. The Agreement, signed on 9 January 2015, provides for a method of progress payments as a variation to those provided for under s 40 the DBC Act. The variation as to time of making progress payments is permitted under the DBC Act. The variation is contained in the General Conditions, schedule 3, page 9 and in Attachment 1, page 10. Both these pages have been initialled by the owners. The owners have also initialled acknowledgement of having read the warning that a variation has been made to that provided for under the DBC Act. The owners are bound by their agreement. Claim dismissed.

SITE CUT AND FILL ISSUE (f): Did the builder, in breach of s 22(a) of the DBC Act, fail to provide written details of prime cost items?

154 The claim is misconceived as there were no prime cost items. Schedule 2 of the Agreement's General Conditions dealing with prime cost items is marked as deleted. The deletion has been initialled by the owners. The claim is dismissed.

BALCONY ISSUE (a): Did the builder, in breach of s 246 of the Building Act, knowingly provide a false or misleading statement or information to the owners, by remaining silent about Rescode requirements for screening at the time of contract signing on 9 January 2015; or, in breach of s18 of the ACL, engage in misleading or deceptive conduct?

155 The relevant provision of s 246 of the Building Act have been summarised previously. It is concerned with knowingly making a statement or providing information to a person having a function under the Building Act. It is not concerned with the making of a statement or providing information to the owners. The claim is misconceived. Claim dismissed.

156 The owners' points of claim and generalised particulars appear to be also suggestive of a claim against the builder for misleading or deceptive conduct. Misleading or deceptive conduct under s 18 of the ACL is not expressly pleaded. Whilst the Tribunal is not a tribunal of pleadings, claims must nevertheless be made out in a way that enables a builder to respond to the case being put against it.

157 The builder's defence, in particular paragraphs 42 to 58, deny and contest the allegations made against it, including those that generally allege conduct of a misleading nature. In these circumstances, I think it appropriate to consider a claim of the owners against the builder for misleading or deceptive conduct in breach of s 18 of the ACL.

158 To the extent that the question of the owners is concerned with a breach of s 18 of the ACL, it arises from the owners' concern about the balustrade to be installed on the balcony No 2 at the rear of the house. The original drawings and contract provide for the balustrade to be 1000mm high with frosted glass.

159 The owners claim that the change to 1700mm high louvres was not disclosed to them at the time of contract signing on 9 January 2015 when the builder knew about, or should have known about, the Rescode requirement for a high screening due to overlooking the neighbouring property.

160 Ms Tran says she was not aware of any Rescode requirement or overlooking issue or the proposal of having louvres until 2 February 2015 when the owners received post-contract variation No 4 from the builder. Further, she said that there should be no overlooking problem under Rescode because, at the time the building permit was obtained, there were no other houses constructed. Thus, as the owners' house was first in time, they should not have to undertake screening for overlooking.

161 In the alternative, Ms Tran said that from measurements that she had taken, the balcony did not overlook the private open space or into a habitable room of the neighbour.

162 The builder's Mr Perez said that there had been an initial application for a building permit. This application expired after 6 months. The expiration occurred because no progress could be made towards obtaining the building permit whilst extensive negotiations and changes were still occurring with the owners. A new permit was not applied for until the time around contract signing. The new building permit application had attached plans showing the rear balcony with louvres of 1700mm high and was issued on 13 March 2015.

163 The sequence of events according to Mr Perez is that on 23 January 2015 the builder completed an overshadowing plan to ensure compliance with Building Regulations, including reg 419 which details the Rescode requirements. These plans were prepared by the builder's Ms Madeline Gray on 23 January 2015, following her confirmation with Council about the status of development of adjoining neighbouring properties, in particular, that occupancy permits had been issued for the two adjoining lots.

164 It was only on finding out from Council that occupancy permits had been issued for the two adjoining properties that the builder first became aware that there was an overshadowing issue.

165 The evidence of the building surveyor, Mr David Murphy, was that he needed to review the building permit application to ensure, amongst other things, appropriate compliance with Rescode concerning overlooking. He began this review following receipt of a communication from the builder on 9 February 2015 about the issue of overshadowing having arisen.

166 Mr Murphy said that on 10 February 2015, he prepared a letter for the builder for the use of the owners that explained the Rescode requirements and how they operated. The letter, dated 10 February 2015, exhibited as DM3, stated that the original building permit application and associated

plans were assessed by him as compliant at the time (around 12 May 2014) when there were no other houses constructed. However, due to the long time taken to complete negotiations and the lapse of the original building permit application, by the time of the second application, the two adjoining lots 66 and 68 had houses completed on them.

167 Mr Murphy said that the operative date for establishing who has the obligation to comply with overlooking Rescode requirements is the date of the issue of an occupancy permit.

168 I find that as a matter of interpretation, the operation of the Rescode overlooking requirements fall on the party who has not yet obtained an occupancy permit and overlooks a party who has already an occupancy permit. Ms Tran's evidence as to not being the overlooking party was based the owners having made the earlier application for a building permit. As noted above, that building permit application lapsed. In any event, the building permit application date does not affect the manner of operation of Rescode, which is, as I have found, triggered by the issue of an occupancy permit.

169 Mr Murphy said that, as a result of the assessment of overlooking by the owners' bedroom 4 and activity room windows and the side and rear of the balcony, screening was required to prevent overlooking into the adjoining habitable room window and private open space of lots 66 and 68.

170 I find that the evidence of Mr Murphy as to the measurements made to assess whether or not there is overlooking is to be preferred to that of Ms Tran. Ms Tran's measurements were not made in a manner that correctly reflected the requirements of Rescode as to looking into a habitable room or into a private open space.

171 On the question of being misled by not being told about the overlooking issue at the time of contract signing, Ms Bevis gave evidence of the sequence of events around when the builder first found out about the overlooking issue similar to that of Mr Perez in paragraphs 161 to 162 above. She said that she first became aware of it on 30 January 2015. Ms Bevis said that according to the file notes of Ms Jones, the owners were notified of the overlooking issue on 6 February 2015. Ms Tran has acknowledged that she in fact first learned of the issue on 2 February 2015.

172 Ms Bevis said that from later discussions with the owners on 10 February 2015, Ms Bevis requested from Mr Murphy the letter referred to above to assist the owners' understanding of how the Rescode requirements operated.

173 Ms Tran said that the owners did not agree to have the louvres and did not agree that the amended plans should be lodged with the building surveyor for the building permit with louvres.

174 In response to this evidence, Ms Bevis' evidence was that the owners agreed to replace the screening with the powder-coated louvres but later

requested the option of making an application to the Council to seek dispensation from the Rescode requirements. It was agreed that an application to the Council be made.

175 Ms Bevis produced post-contract variation No 5 signed by the owners on 16 February 2015. This variation states at 1.1 that the balcony is to have a 1000mm frosted glass balustrade in lieu of appended plans showing 1700mm high aluminium powder-coated louvres to the balcony 'as dispensation is being sought from the City of Greater Dandenong'. Post-contract variation No 6, also signed by the owners on 16 February was more specific. It provided at item 1.1 as follows:

> Clarification – Dispensation is being applied for to the City of Greater Dandenong for Overlooking issues. If Dispensation is rejected clients will be required to pay $3,461.00 to supply either Aluminium Louvre Screens or Frosted Glass to Balcony No.2 to comply with Rescode Requirement.

176 In my opinion, the evidence of the builder is clear. The owners were given every opportunity to comment on and consider alternative approaches to the treatment of the rear balcony, within a reasonable time of the builder becoming aware that the Rescode requirements would have application due to adjoining buildings having received certificates of occupancy.

177 The owners are bound by their bargain freely entered into. The assertions by Ms Tran that the owners were somehow coerced into signing variations they did not agree with and that the builder has breached the building laws are without foundation. I do not accept those propositions put by Ms Tran that the owners were misled or deceived or likely to have been misled or deceived by the conduct of the builder.

178 Allegations of misleading or deceptive conduct are inconsistent with the several signed variations, signed after several discussions with the builder and after the independent building surveyor had written a letter explaining the operation of Rescode and its application to the specific setting of the owners' house. The allegations are inconsistent with the express notations to the variations, referring to the agreed position of the parties as to what should happen, if application to the City of Greater Dandenong were refused.[7]

179 This evidence points to the owners having been told of the overlooking issue and being well aware of the ramifications and options at all relevant times. The claim to the extent based on misleading or deceptive conduct under s 18 of the ACL is dismissed.

180 It is not part of this proceeding, but the owners have 'pleaded' (at paragraph 51) and given evidence against the building surveyor as to it having 'knowingly gave misleading information to persuade my consent'. The building surveyor is not a party to the proceedings. There is no foundation

[7] Full details of variations signed by the owners are referred to in paragraphs 213 to 219 following.

for this assertion. I am not satisfied that the independent building surveyor has acted in any way whatsoever in an improper manner or has sought to actively persuade the giving of consent by Ms Tran.

181 On the contrary, the building surveyor sought to assist the owners by writing a letter as requested by the builder for the benefit of the owners. The letter is factual. The letter is a clear explanation of the operation of Rescode. The letter correctly explains the application of Rescode to the specifics of the owners' situation.

BALCONY ISSUE (b): Did the builder, in breach of reg 1502(a) of the Building Regulations, fail to carry out works in a competent manner and to a professional standard, by failing to advise the owners of the Rescode requirements, or, by failing to be aware that Rescode requirements operated in respect of the owners' house?

182 The relevant evidence has been summarised above.

183 I have accepted the evidence of the builder and found that the builder first became aware of the overlooking issue on 23 January 2015.[8] I accept that the owners were notified, as conceded by Ms Tran, on 2 February, about 10 days later. In the circumstances of this proceeding, there can be no reasonable case made out simply on the basis that the builder did not advise until 10 days after first becoming aware.

184 The owners' claim for breach of reg 1502(a) appears to be also based on the assertion that the builder, as a professional builder, should have known at an earlier date about the completion of the other two houses and that this would present an overlooking issue for the owners. There is some merit in such a contention. A professional builder, with at least one other housing project in the Shelton Finniss development, ought reasonably be aware of the situation at the time of signing a new contract of the status of the proposed house in the context of other constructions taking place. That awareness would indicate whether there could be the potential for overlooking issues.

185 However, in my opinion, even if the builder could or should have been more alert to the progress of developments on the adjoining lots, this would not impact on the timing of the operation of Rescode against the owners' house. The adjoining lots had received their respective occupancy permits even before the owners signed their building Agreement. The delay in signing has been referred to above and it was due to the continual revision and amendment of plans at the request of the owners and not due to the performance of the builder.

186 Any loss suffered by the owners does not flow from the performance of the builder in terms of overlooking caused by the owners house being developed after the adjoining house had be granted an occupancy permit.

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8 Paragraph162.

187 For these reasons, I am not satisfied that the builder failed to act with competence or fail to act with a professional standard or in accordance with the Rescode requirements, giving rise to a claim for damages. The claim is dismissed.

BALCONY ISSUE (c): Did the builder, in breach of s 37(1), 37(2)(b) and 37(3) of the DBC Act, improperly give effect to a variation?

188 For the reasons summarised above, and referred to in more detail at paragraphs 213 to 219, I have found that the owners have signed each relevant variation. Indeed, the owners do not deny signing the variations.

189 The variations comply with the DBC Act, including s 37(1), s 37(2)(b) and s 37(3). I make these findings based upon reviewing each of the variations tendered by both the applicant and the builder and that the variations were signed freely and in full knowledge of the particular circumstances and reasons giving rise to the variations as referred to in the summary evidence above. The claims made in respect of these breaches are dismissed.

BALCONY ISSUE (d): Did the builder, in breach of s 23 of the DBC Act, fail to provide required documentation showing the cost of a prime cost item or provisional sum?

190 The claim is misconceived. There are no prime cost items in respect of the variation associated with the louvres for the balcony and therefore no breach of s 23 of the DBC Act. Claim dismissed.

GARAGE ISSUE (a): Did the builder, in breach of the agreement, fail to carry out the works about the location of the garage wall in accordance with the agreed specifications?

191 Ms Tran said she requested the builder, by email dated 25 April 2015, to not proceed with the concrete slab pour for the garage floor because the floor plan was not in accordance with the drawings. She said that the garage was to be built on the zero lot line and that the framing for the slab showed that it was not properly positioned.

192 On 15 June 2015, the builder's employee, Mr Jon Lanyon, attended the site to explain to the owners and the neighbour the 'zero lot line' on the plans. The owners were not satisfied and sent an email dated 19 June 2015 describing certain measurements and that now there was a 60mm gap between the two adjoining garages.

193 On 25 June 2015, the builder's Ms Jones sent an email to Ms Tran confirming to her that the frame stage has been completed and payment for that stage was due. Ms Jones referred in the email to a second visit by Mr Lanyon to verify to Ms Tran that the frame stage had now been completed correctly in accordance with the final drawings and that there would be no gap between the garages.

194 Mr Rodney Tabac, General Manager of Construction, gave evidence for the builder. He said that Mr Lanyon was incorrect in saying that there would

be no gap. However, he said tha the builder was unable to construct the garage any closer to the boundary due to the neighbour's garage guttering encroached onto the owners land by 30mm.

195 Mr Tabac said that, that being the case, the builder was able to construct the garage within the tolerances allowed for under s 272 of the *Property Law Act* (PLA). He said the garage was constructed in accordance with the plans. Section 272 of the PLA relevantly allows as an acceptable tolerance for boundary measurements a variation limit of 50mm. The builder tendered a photo numbered 36 in its bundle of documents. This photo is consistent with the owners' photo showing a gap between the two garages, except that the builder's photo shows a clearer view.

196 From the photo, it is apparent that the garage could not have been constructed any closer to the encroaching garage of the neighbour. The photo shows the overhanging guttering of the neighbour as the reason for not being able to construct any closer. The gap depicted in the photo, on the evidence of Mr Tabac, is the gap that is consistent and within the tolerance allowed under the PLA.

197 Based on the photo of the builder and the evidence of Mr Tabac as to compliance with the contract drawings and being within the tolerance allowed for under the PLA, I am persuaded that the frame stage and the garage construction was completed in accordance with the Agreement and plans. The evidence of the owners on this part of their claim has been insufficient to discharge the burden of proving, on the balance of probabilities that the builder failed to construct the slab in accordance with the Agreement. The claim is dismissed.

GARAGE ISSUE (b): Did the builder, in breach of the agreement, refuse to complete two garage downpipes in accordance with the agreed specifications?

198 As I understood the evidence on this matter, the builder's inability to complete the project and obtain an occupancy permit remains due to the failure of the owners to approve 'surfmist blue' as the colour for the louvres to the balcony and the installation of the louvres.

199 The builder concedes that two downpipes remain to be adjusted and/or completed and that it is ready, willing and able to do so and will do so immediately it is able to complete the balcony.

200 The owners simply assert that one downpipe needs to be adjusted or moved and another to be completed. The owners have not identified a claim for damages flowing from these minor and non-disputed works.

201 I find that the builder has not refused to complete the downpipe works but has been, in effect, prevented from doing so by the owners. Claim dismissed.

DELAY IN COMPLETING WORKS ISSUE (a): Are the owners entitled to delay damages because of alleged failure of the builder to complete the works within the building period?

202 The owners claimed damages for delay arising from the site cut issue for the pre-contractual period up to 9 January 2015. They also claimed damages from 9 January 2015 up to the issue of the building permit on 13 March 2015. Both these claims were dismissed for the reasons set out above.

203 The date for completion under the Agreement, clause 1 of Schedule 1 of the General Conditions, is 280 days from commencement pursuant to clause 10 and subject to clauses 34 and 36, allowing for the builder to extend the time for completion. The commencement date was 10 April 2015.

204 Accordingly, the time for completion under the Agreement, was 14 January 2016. The owner said it is 8 January 2016, but little turns on the difference.

205 The owners claim damages for delay in completion of the works from the date of project completion (alleged by them to be 8 January 2016) up to the present.[9] The liquidated damages claimed under clause 40 of the Agreement are $250 per week for delays beyond the project completion date. (The owner has not address entitlement to liquidated damages for delay beyond the date of this decision, however, that is not an issue given my determination on the question of responsibility for any delay).

206 In addition, the owners also claim damages at the rate of 13.9% or $334.53 per day, simply stating that they are entitled to the same extent as the builder claims to be entitled for damages stipulated under the Agreement, schedule 1, item 8, for interest payable to the builder for late progress payments. This second part of the owners' claim is misconceived. First, the Agreement does not operate to give relief and damages to an owner simply because the builder may be entitled under some head of claim under the Agreement. Not surprisingly, there is no clause in the Agreement granting the owner such entitlement. Secondly, it is misconceived because, if there is a valid claim for liquidated damages, then the liquidated damages represent the complete entitlement to damages under the contract.

207 Returning to the owners claim under clause 40 of the Agreement for liquidated damages. Ms Tran said in a general manner that delays leading to the late completion were caused by the many mistakes of the builder, its misleading or deceptive conduct and, it appears, on an interpretation of the Agreement, clause 40, owner's claim for agreed damages.

208 Clause 40 provides that the owner may claim liquidated damages of $250 per week if the works are not completed within the building period, as defined, which is 280 days after the commencement date, as referred to above.

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9 Owners' particulars paragraph 80, items 2, 3 and 4.

209 The builder has denied that it made mistakes and denies any allegation of misleading or deceptive conduct.

210 I have discussed the factual basis relating to the owners' allegations in some detail above. I have found that the owners have failed to prove misleading or deceptive conduct. Issues associated with facade selection and site cut and fill were pre contractual matter and therefore did not contribute to any delay once the time of commencement under the Agreement began to operate.

211 There was little evidence given by Ms Tran identifying 'mistakes' of the builder arising out of its performance under the Agreement, apart from the alleged misdescription of the site cut level in contract tender No 8 and the balustrade required to prevent overlooking.

212 On the issue of the alleged misdescription of the site cut, I have found above that the builder explained that the plans themselves contained no misdescription and that in fact no change had been made for the site cut. Further, the point about a mistake is irrelevant because, at the insistence of the owners, the level of the cut was ultimately changed and the contract entered into on the basis of the agreed cut.

213 In respect of rear balcony No 2 and installation of louvres for the balustrade, or possibly frosted glass, both to a height of 1700mm, I am satisfied that the owners agreed to the installation. This is evidenced by post-contract variations No 5 and No 6, signed 16 February 2015, building variations No 1 and No 3, both signed 2 May 2015, and building variation No 4, signed 20 May 2015.[10]

214 I am also satisfied that the owners have prevented the builder from completing the installation of the balustrade to the balcony by their refusal to allow the builder to proceed. This is evidenced by the letters, emails and unreasonable refusal to sign variation No 11, referred to from paragraph 219.

215 In respect of the owners' agreement for installation of the balustrade for the rear balcony No 2, two post contract variations were dated and signed on 16 February 2015. No 5 was signed by Ms Tran and the builder. No 5 stated:

> 1-1 … Provide 1000mm Glass Balustrade with Stainless Steel Handrail to Balcony No 2 in lieu of 1700mm Powdercoated aluminium louvre screens as Dispensation is being applied for overlooking issues. Note: Drawings to be amended. 1-2 Provide a charge for Dispensation to City of Greater Dandenong for Overlooking issues. $500.00.

216 Post contract No 6 of the same date was signed by both Ms Tran and Mr Nguyen, and the builder. No 6 stated:

[10] Respondent's documents, bundle contained at No 27.

1-1 Refer to Item 2-3 in Post Contract Variation Document No. 4 dated 2nd Feb 2015 and Item No. 1-1 in Post Contract Variation Document No. 5 dated 16th February 2015:

Clarification- Dispensation is being applied for to the City of Greater Dandenong for Overlooking issues. If Dispensation is rejected clients will be required to pay $3,461.00 to supply either Aluminium Louvre Screens or Frosted Glass to Balcony No. 2 to comply with Rescode Requirement.

217 Building variation No 1 was dated and signed by the builder on 13 April 2015 but not signed by Ms Tran and Mr Nguyen until 2 May 2015 (on or about the time of the owners' application to the City of Greater Dandenong to grant a dispensation). It stated:

3-2 Refer to Item 2-3 in Post Contract Variation Document No. 4 dated 2nd Feb 2015, item No. 1-1 in Post Contract Variation Document No. 5 dated 16th February 2015 and item 1-1 in Post Contract Variation Document No. 6:

Clarification: Provide 1700mm Powdercoated aluminium louvre screens to Balcony 2 along elevations B & C in lieu of 1000mm high balustrade die to Rescode Requirements, due to dispensation not being approved.

218 Building variation No 3 was dated and signed by the builder on 27 April 2015 but not signed by Ms Tran and Mr Nguyen until 2 May 2015 (on or about the time of the owners' application to the City of Greater Dandenong to grant a dispensation). It stated:

1-1 Refer to Item 2-3 in Post Contract Variation Document No. 4 dated 2nd Feb 2015, item No. 1-1 in Post Contract Variation Document No. 5 dated 16th February 2015 and item 1-1 in Post Contract Variation Document No. 6:

Note- Carlisle Homes acknowledges client is applying to the City of Greater Dandenong and DJM [the building surveyor] to get approval to have the privacy screens deleted from the contract.

Carlisle Homes has agreed to delete these Louvre Screens from the contract if approval is granted by DJM.

Note: If clients application to DJM is unsuccessful client acknowledges contract will not be amended and No credit will be provided.

219 Building variation No 4 was dated and signed by the builder on 1 May 2015 but not signed by Ms Tran and Mr Nguyen until 20 May 2015. It stated:

1-1 Refer to item No. 1-1 in Building Variation Document No. 3 dated 27 April 2015:-

> Clarification- Carlisle Homes acknowledges client is applying to the City of Greater Dandenong and DJM to get approval to have privacy screens deleted from the contract.
>
> Carlisle Homes has agreed to delete these Louvre Screens or Frosted Glass from the contract if approval is granted by DJM.
>
> If Dispensation is rejected clients will be required to pay $3,461.00 to supply either Aluminium Louvre Screens or Frosted Glass to Balcony No. 2 to comply with Rescode Requirement.

220 The owners' prevention in allowing the builder to complete the works and the balcony is evidenced by their letters or emails dated 9 October 2015, 23 October 2015, Building Variation No 11 dated 10 November 2015, letters dated 26 November 2015, 23 December 2015 and 22 January 2016.

221 The email dated 9 October 2015 from Ms Tran to Ms Jones stated:

> My Bank told me to only agree to pay [the progress payments due for lock up and fix stages] after I go to inspect the site and make sure that every stage is completed exactly as the contract.
>
> … Also, if that stage is related to the balcony 2 is not exactly like the contract on the 9th, January 2015 we will not pay for it. (because I have discovered that the builder failed to comply with Section 246 of the Building Act 1993; and Section 3791), (2), (3) Clause 23 of the Domestic Building Contracts Act 1995 when the builder wished to make this variation).

222 The email dated 23 October 2015 from Ms Tran to Ms Jones stated:

> After I went to inspect the site yesterday, I paid both my Lockup and Fix Claims today.
>
> I also said many times that I do not like the Louvre's (sic) on my Balcony 2.
>
> I want to send my complaint letter to Carlisle Homes' Director. Could you let me know the Director's email please! Or can I just send via your email and you will forward it to your Director. Thank you! (I will also send once more via register Post).

223 Building Variation No 11 is dated and signed by the builder on 10 November 2015. It remains unsigned by the owners. Variation No 11 states:

> 1-1 Refer to item 3-2 of Building Variation No. 1 and Colour Selection Document No. 13:
>
> Provide 'Surfmist' louvre screens to Balcony 2 due to rescode requirements.
>
> Note: Colour Selection to be updated.

224 The letter dated 26 November 2015 is from Ms Tran to the builder. The letter recites the owners' opinion of issues going back to 1 May 2014 up to signing of the Agreement on 9 January 2015 and about variations signed after that date up to 26 November 2015. The letter concludes at page 4 as follows:

> Therefore
>
> - After 9th January 2015 to this point, all the variations about the Balcony 2 WERE and WILL HAVE NO EFFECT.
> - Accordingly, the builder must refund us 44,461 for Balcony 2 variations charges. …
> - I also request the builder carry out my Balcony 2 EXACTLY like I signed HIA Building Contract dated 9th January 2015.

225 The letter dated 23 December 2015 is from Ms Tran to the builder's in house counsel, Ms Abu- Elias. In the letter, Ms Tran repeats allegations about various breaches by the builder of the DBC Act and Building Act and again states: 'Accordingly, I request that the builder must carry out my Balcony 2 EXACTLY like the signed HIA Building Contract date 9th January 2015.'

226 Ms Tran repeats her demand that the builder must refund $4,461 for the cost of the Balcony 2 variation and the demand that the balcony must be completed exactly as per the HIA Building Contract.

227 The letter dated 22 January 2016 is from Ms Tran to Ms Abu-Elias. At page 4 of the letter, Ms Tran states: 'I will not pay the final invoice if the Balcony 2 is not EXACTLY like the signed HIA Building Contract dated 9th January 2105.'

228 The owners rely on contractual rights allegedly arising under clause 40. It is correct that clause 40 bestows rights to damages on the owner for non-completion by the builder by the time set for the end of the building period. However, the right to liquidated damages in my opinion does not arise where the reason for non-completion is due to the actions of the owner.

229 Under clause 34 of the Agreement, the time for completion or, the building period, is put back or extended if the carrying out of the works is delayed due to matters including where the delay arise due to a suspension of works in accordance with clause 35, anything done or not done by the owner or any cause that is beyond the builder's direct control.

230 In the present case, in my opinion for the reasons given above, it is the owners who have acted in a manner that has not allowed the builder to complete the works in accordance by the completion date of 14 January 2016. The house was essentially completed in December 2015.

231 The present position is that the house is in all material respects fully completed save for the erection of a balustrade to the rear balcony No 2. The owners have signed a variation for a balustrade that complies with

overlooking requirements. The owners however refuse to designate a colour for the louvres by, amongst other matters, refusing to sign the Building Variation No 11.

232 Moreover, the owners have clearly stated their intent not to pay the final invoice if the balcony is not installed as per the original contractual specifications, notwithstanding the several variations signed by them, where the owners agreed and accepted the necessity of an alternative treatment to address the overlooking issue.

233 I am satisfied that it is these actions and inactions of the owners that has prevented the builder from achieving completion. I am satisfied that it is these actions and inactions of the owners that has caused an inability on the part of the builder to obtain an occupancy permit with the result that the house remains vacant to the present day.

234 I am not satisfied that the owners are entitled to liquidated damages under clause 40, that clause being necessarily limited in its operation as a matter of construction to circumstances where the owner is not the cause of the delay.

235 The claim of the owners for liquidated damages for delay has not been proved and is dismissed.

PROGRESS PAYMENT ISSUE (a): Did the builder, in breach of the agreement, improperly demand progress payments for the frame stage and for the lock up and fix stages?

236 Progress payments are governed by the Agreement. The provisions are contained in the General Conditions, clauses 29, 30 and schedule 3.

237 Ms Tran said that the progress claims were made at times when the works for each of those stages had not been completed.[11] In respect of the frame stage, Ms Tran's evidence included that the garage had not been constructed on the zero lot line. As a consequence the frame stage had not been completed correctly according to the plans, thus not entitling the builder to make a progress claim.

238 The builder's witness, Mr Tabak, said that several meetings were held between Ms Tran and Mr Lanyon, the Construction Supervisor, including on 16 June 2015. The outcome of these discussions has been summarised above.

239 For the same reasons provided on the question of the siting of the garage, I find that the owners have not proved that the frame stage invoice was sent at a time when the works to that stage had not been completed. In any event, the owners eventually paid for the stage.

240 The owners have not proved any loss or damage suffered. This part of the claim dismissed.

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[11] Owners' particulars, paragraphs 68 to 77.

241 In respect of the progress claim for the fix and lock up stages, the owners claim that it was issued and they were expected to have to pay before they were permitted to go and inspect the works to ensure that stage had been completed. They notified the builder of this by email dated 12 October 2015.

242 Mr Tabac said that inspection dates were arranged with the owners. On his enquiries, he said that Mr Lanyon sent an email immediately to Ms Tran on 13 October suggesting a site inspection for the following day, 14 October. He advised that Ms Tran responded that she could not attend until 22 October.

243 Whatever may be the position, the fact is that the completion to the fix and lock up stage was not itself disputed. It was the issue of site inspection. The owners have not proved loss or damage. This part of the claim is dismissed.

OTHER ISSUES (a): Is the builder liable for charges or expenses for gas, water, land tax, rates and fencing costs?

244 Under the Agreement, the owners' claims are limited to liquidated damages as provided in clause 40. Apart from that contractual limitation, I will address each of the claims briefly.

245 Utility charges for water and gas are claimed from the dates of connection in or about May 2014 up to eventual contract start date in April 2015.[12] The claims are based on the builder not giving the owners adequate notice of connections and that the builder should not have connected the utilities because of the delays resulting in works not commencing until April 2015.

246 Save for the gas service charge of $96, which is admitted by the builder, the builder otherwise denies liability for water, land tax and rates. It submitted that it was reasonable for the builder to connect the water around May 2014 as it was reasonably expected that the contract would be signed very soon and that the works would start.

247 I accept the submission of the builder in respect of the claim for water. The extensive evidence referred to above describes the large delays that arose during a long pre-contractual negotiation period, largely to address different and ongoing concerns of the owners.

248 The owners have not pointed to a contractual basis for their claim in respect of water utility expenses. This part of the claim has not been proved and is dismissed.

249 In respect of land tax, rates and fencing reinstatement costs, I accept the submission of the builder that these charges and costs fall to the owner of the land and fall outside the scope of the Agreement. The owners have not made out any clear basis for these claims.

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12 Owners' particulars, paragraphs 59 and 86.

250 In respect of the land tax and rates claims, the owners have generally asserted that the builder is liable because of the ongoing delay in completing the house. For the reasons given above, I have found that any delay in completion of the house is not the fault of the builder. The claims, other than the gas charge of $96 conceded by the builder, are dismissed.

251 The claim of the owners against the builders in respect of gas charges is proved in the sum of $96.

OTHER ISSUES (b): Is the builder liable for medical costs, damages for pain and suffering and other costs related to preparation for proceedings?

252 Leaving aside the question of the Tribunal's jurisdiction to consider damages for pain and suffering, Ms Tran did not present sufficient evidence to demonstrate that she suffered an illness and that that illness arose from some connection to the conduct of the builder in its performance of the building works. Further, there is no substantiation provided as to the quantum of $200,000 for pain and suffering. The claim is dismissed.

253 Medical costs, personal time and disbursement costs, apart from legal costs properly incurred, are not generally claimable by a party. The Tribunal's discretion concerning the awarding of costs is governed by s109 of the Victorian Civil and Administrative Tribunal Act. If the discretion is to be exercised, costs are limited costs such as fees, charges, disbursements expenses, remuneration to a litigant in respect of legal matters. *Gelman v Kenny* [2013] VCAT 117. In any event, the owners have failed to prove their claim in any substantive manner and so the question of costs does not arise. The claim is dismissed.

OTHER ISSUES (c): Did the builder, in breach of s 18 of the DBC Act, wrongfully lodge a caveat on the owners' title?

254 In relation to the asserted breach by the builder of s 18(1) of the DBC Act, in lodging a caveat over the owners' title, no evidence of this was led at the hearing. The builder denied having ever lodged a caveat over the owners' title. I dismiss the claim.

BUILDER'S COUNTERCLAIM

Is the builder entitled to liquidated damages for the period of delay in completion of the works?

255 As referred to above, the Agreement provides at clause 34.0 that the building period under the Agreement is extended if the carrying out of the works is delayed due to, amongst other things, anything done or not done by the owner or due to suspension of the works in accordance with clause 35.

256 Pursuant to 34.1, the builder must give notice in writing to the owner specifying that the works are to be extended and provide the reason why. If the builder has complied in the giving of notice, the builder may claim, in

addition to other rights or remedies, delay damages at $250 per week accruing on a daily basis for the period of the extension.

257 The builder issued a notice dated 6 April 2016 and sent it to the owners. The notice stated the reason why the notice was issued and a time by which the building period is extended. The notice also stated that the builder was entitled to delay damages under clause 34.3 of the Agreement at the rate of $250 per week for the time the building period is extended.

258 The notice stated that the builder is currently prohibited by the owners from completing the house due to the owners refusing to allow the installation of any louvres at the property and by refusing to advise the builder of their selection of a colour for the louvres.

259 I have found, from paragraphs 213 and following, that the owners signed variations and plans that agreed to the installation of louvres and that directed the builder to install louvres to the rear balcony. I also found that the owners have not permitted the builder to complete the installation.

260 By authorising the installation of the louvres (and, if not, frosted glass) by signing valid contractual variations and then preventing the conduct of those works, including by unreasonably refusing to select a colour, the owners have acted and are continuing to act in breach of the Agreement.

261 In these circumstances, I find that the builder has exercised its contractual right to issue the notice dated 6 April 2016 and is entitled to claim liquidated damages under clause 34.3 for the period of time that the extension of the building period is extended. The period of time by which the building period is extended is from the date of the notice, being 6 April 2016, until the works are resumed after the suspension as prescribed in the Agreement and in the notice.

262 Interim liquidated damages are claimable at the present time from 6 April 2016 to the date of these orders, being to 7 November 2016, a period of 215 days. Applying the contractual rate of $250 per week, I find total interim liquidated damages to 7 November 2016 is $7,657.53.

263 Damages pursuant to the notice and clause 34.3 of the Agreement continue to accrue beyond the interim damages found above, until the suspension is removed in accordance with the notice and the Agreement.

Is the builder entitled to damages for costs incurred in maintaining the property until an occupancy permit is issued?

264 I have found the owners have acted in breach of their contractual obligations by preventing the builder from completing the works.

265 Costs suffered by the builder for security and maintenance are costs resulting from the owners' refusal to allow the works to proceed to completion and are time related costs.

266 As time related liquidated damages are claimed by the builder under clause 34.3 and are intended to be full recovery for loss due to extension of time, a

claim for further general damages is not allowable. The builder's claim to this extend is dismissed.

Claims seeking specific performance

267 The builder seeks orders for specific performance. The builder faced with repudiation by the owners has an election to accept the owners' repudiation, terminate the Agreement, and sue for damages. However, the builder has not elected to do so and instead has sought to hold the owners to the Agreement and to seek the completion of the works. The builder is entitled to make such an election.

268 I am satisfied that the Rescode requirements under the Building Regulations are applicable, in particular the requirement to take steps to avoid overlooking in to a habitable room and into private open space. I am satisfied from the report of the independent building surveyor, DJM referred to above, and from the letter dated 9 April 2015 from the responsible authority, the City of Greater Dandenong, that, in the present circumstances, screening to a minimum height of 1700mm is required.

269 The responsible authority's letter refused to give consent for the reduction in height of the proposed first floor balcony screening from 1700mm to 1000mm. I find that the screening is required under the regulations to screen to a height of 1700mm from the finished floor level in accordance with the plans that were submitted to the responsible authority.

270 The owners continue to refuse to sign variation No 11, issued by the builder on 10 November 2015, which provides selection of the 'Surfmist' colour for the already approved louvre for the balcony.

271 I am satisfied that the owners through their actions in agreeing to variations for the balcony, for either louvres or frosted glass to a height of 1700mm, and their subsequent position of seeking to undo their consents and prevent completion, constitute a repudiation by the owners of the Agreement. I am satisfied about the owners' repudiation being proved, including the matters summarised from paragraph 213 and following.

272 Under s 53 of the DBC Act, the Tribunal has broad powers to make orders, including, under s 53(2)(h), the power to order that a contract be completed. The builder seeks certain orders for specific performance. The power of the Tribunal to make orders in the nature of specific performance is not in question. However, the appropriateness and efficacy of making such orders should be considered.

273 The courts are reluctant to make orders for specific performance if constant supervision of the contract is required to ensure obedience by the defendant. However, the problem of supervision is a problem of human nature, that is, the impracticability of forcing or controlling persons about the conduct of particular kinds of activities *CH Giles & Co Ltd V Morris* per Megarry J [1972] All ER 960 at 969. In *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286 9CA), Lord Hoffmann drew a

distinction between where a court order is sought to achieve a particular outcome, in which case, so long as the outcome can be sufficiently precisely stated, specific performance will be more readily available. Where the order is for specific performance of a continuing series of acts or tasks, the old bar to specific performance presents a practical obstacle to its availability.

274 The High Court of Australia in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, referred to Lord Hoffmann's decision in *Argyll* and commented that the difficulty of supervision is a matter of degree rather than an absolute restriction.

275 In the present case, the party with the more complex obligations is the builder and is the party actively seeking specific performance; the owners, with the simple obligation of making the site available are not.

276 The outcome to be ordered in all these circumstances is capable of being made with sufficient precision and definition. There is in my view no reason not to make orders in the nature of specific performance.

277 Further, it is appropriate to order the completion of the works where the house has been in a substantially complete state since December 2015, but has not proceeded to the grant of an occupancy permit due to non-completion of rear balcony No 2.

278 In respect of rear balcony No 2, the clear and defined issue is ultimately referred to in two contractual documents. The last document in the series of post contractual variations dealing with screening to avoid overlooking is post-contract variation No 6, dated and signed by the owners on 16 February 2015 and referred to in paragraph 216.

279 Given the refusal of the City of Greater Dandenong of a dispensation, it relevantly provides: '… the clients will be required to pay $3,461 to supply either Aluminium Louvre Screens or Frosted Glass to Balcony No.2 to comply with Rescode Requirement.'

280 The last document in the series of building variations is Building Variation No 4, dated and signed by the owners on 20 May 2015 and referred to in paragraph 219. It provides: 'If dispensation is rejected, clients will be required to pay $3,461.00 to supply either Aluminium Louvre Screens or Frosted Glass to Balcony No. 2 to comply with Rescode Requirement.'

281 The contractual obligation above and which the owners must be directed to comply with is the installation of either type of screen to rear balcony No 2. It is reasonable that the owners be given one last opportunity to confirm to the builder their final selection of the type of balustrade for the balcony, namely, either frosted glass type or aluminium louvre type, but no other type.

282 It is reasonable that the owners should notify the builder, without delay, of their selection of which of the balustrade type, and, in the case of selecting the aluminium louvre type, to advise the builder at the same time of their

colour selection for the louvre type, with colour limited to one that is presently available. A reasonable time for the owners to confirm their notification of either the frosted glass balustrade or aluminium louvre, and colour, is by 4.00pm, 15 November 2016.

283 If the owners fail to confirm to the builder their selection of balustrade as above, the builder is to be directed to install the aluminium louvre type in the 'surfmist' colour to a height of 1700mm, in accordance with the Agreement and Building Variation No 11, dated and signed by the builder on 10 November 2015, but not signed by the owners.

284 The second part of orders in the nature of specific performance is the completion of the works to enable obtaining an occupancy permit. In all the circumstances of these proceedings, it is appropriate to make an order that the house be completed by the builder at the earliest reasonable date and to obtain an occupancy permit.

MEMBER MJF SWEENEY