

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1047/2015

CATCHWORDS

Proceeding brought by Owners Corporation in respect of defective building works in a three-storey residential apartment building in Caroline Springs. Claims initially brought against the Builder and the Relevant Building Surveyor. Architect joined as a respondent to the proceeding. Apportionment claims under Part IVAA of the Wrongs Act 1958 as between respondents. The proceeding between the applicant and the Architect settled prior to the hearing. The proceeding between the applicant and the Surveyor settled after the hearing commenced. The Builder did not appear at the hearing. *Domestic Building Contracts Act 1995*. Breach of section 8 warranties, especially in relation to plumbing, cladding and fire safety works. Assessment of damages. As the Builder did not appear to prosecute its defence, no findings as to apportionment of responsibility to other respondents, and no reduction in Builder's liability under the *Wrongs Act*. The hearing concluded on 29 October 2018, with closing written submissions from the applicant received 16 November 2018. Liquidator appointed to builder on 20 November 2018. Findings set out in reasons. By reason of the appointment of a liquidator to the builder, order made that the proceeding is struck out with a right to apply for reinstatement.

Five related proceedings brought by owners of five units in the apartment building. The Architect joined as a respondent, for the purpose of an apportionment claim, in four of the proceedings. *Domestic Building Contracts Act 1995*. Breach of section 8 warranties. Assessment of damages. No apportionment of responsibility in circumstance where builder did not appear to prosecute its defence. In the proceeding BP164/2016, consideration of appropriate measure of damages having regard to the applicants' sale of the unit in 2016, and a finding that it is appropriate to apply the general rule for assessment of damages for breach of contract. The proceeding BP 1071/2015, damages for inconvenience and distress assessed as appropriate. By reason of the appointment of a liquidator to the builder, order in each related proceeding that the proceeding is struck out with a right to apply for reinstatement.

APPLICANT	Owners Corporation PS 630765
FIRST RESPONDENT	Ascot Constructions Pty Ltd ACN 006 753 224 (in liquidation as of 20 November 2018)
SECOND RESPONDENT	BCG (AUST) Pty Ltd (ACN 114 332 017) t/as Checkpoint Building Surveyors (Dismissed by order 8/11/2018)
THIRD RESPONDENT	Gavin Casey (Dismissed by order 8/11/2018)
FOURTH RESPONDENT	DKO Architecture (Victoria) Pty Ltd (ACN 120 782 729) (Struck out by order 12/10/2018)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	22, 23, 24, 25 and 29 October 2018

DATE OF ORDER

30 November 2018

CITATION

Owners Corporation PS 630765 v Ascot
Constructions Pty Ltd (Building and Property)
[2018] VCAT 1884

ORDERS

1. The applicant's proceeding against the first respondent, Ascot Constructions Pty Ltd ACN 006 753 224 (in liquidation as of 20 November 2018)) is struck out with a right to apply for reinstatement.
2. **I direct the Principal Registrar to send a copy of these reasons to the liquidator of the first respondent, namely:**

Mr Andrew Juzva
GS Andrews Advisory, 22 Drummond Street, Carlton VIC 3053

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:	Mr Reid of Counsel
For the First Respondent:	No appearance
For the Second and Third Respondents:	Mr Whelen of Counsel

PROCEEDING NO. BP1065/2015

APPLICANTS	Mr Tjerk Ter Haar, Mrs Antonietta Ter Haar
FIRST RESPONDENT	Ascot Constructions Pty Ltd ACN 006 753 224 (in liquidation as of 20 November 2018)
SECOND RESPONDENT	DKO Architecture (Victoria) Pty Ltd (ACN 120 782 729) (Struck out by order 12/10/2018)
DATE OF ORDER	30 November 2018

ORDER

The applicants' proceeding against the first respondent is struck out with a right to apply for reinstatement.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicants:	Mr Reid of Counsel
For the First Respondent:	No appearance
For the Second Respondent:	No appearance

PROCEEDING NO. BP1071/2015

APPLICANT	Mr Nenad Stojic
FIRST RESPONDENT	Ascot Constructions Pty Ltd ACN 006 753 224 (in liquidation as of 20 November 2018)
SECOND RESPONDENT	DKO Architecture (Victoria) Pty Ltd (ACN 120 782 729) (Struck out by order 12/10/2018)
DATE OF ORDER	30 November 2018

ORDER

The applicant's proceeding against the first respondent is struck out with a right to apply for reinstatement.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:	Mr Reid of Counsel
For the First Respondent:	No appearance
For the Second Respondent:	No appearance

PROCEEDING NO. BP1072/2015

APPLICANTS	Mr Zoran Stojic, Ms Zorica Lakic Stojic
FIRST RESPONDENT	Ascot Constructions Pty Ltd ACN 006 753 224 (in liquidation as of 20 November 2018)
DATE OF ORDER	30 November 2018

ORDER

The applicants' proceeding against the first respondent is struck out with a right to apply for reinstatement.

SENIOR MEMBER M. FARRELLY

For Applicants:	Mr Reid of Counsel
For the First Respondent:	No appearance

PROCEEDING NO. BP1073/2015

APPLICANT	Pavlovski Properties Pty Ltd (ACN: 158 365 096)
FIRST RESPONDENT	Ascot Constructions Pty Ltd ACN 006 753 224 (in liquidation as of 20 November 2018)
SECOND RESPONDENT	DKO Architecture (Victoria) Pty Ltd (ACN 120 782 729) (Struck out by order 12/10/2018)
DATE OF ORDER	30 November 2018

ORDER

The applicant's proceeding against the first respondent is struck out with a right to apply for reinstatement.

SENIOR MEMBER M. FARRELLY

For Applicant:	Mr Reid of Counsel
For the First Respondent:	No appearance
For the Second Respondent:	No appearance

PROCEEDING NO. BP164/2016

APPLICANTS	Mr Brett Farley, Ms Chantelle Farley
FIRST RESPONDENT	Ascot Constructions Pty Ltd ACN 006 753 224 (in liquidation as of 20 November 2018)
SECOND RESPONDENT	DKO Architecture (Victoria) Pty Ltd (ACN 120 782 729) (Struck out by order 12/10/2018)
DATE OF ORDER	30 November 2018

ORDER

The applicants' proceeding against the first respondent is struck out with a right to apply for reinstatement.

SENIOR MEMBER M. FARRELLY

For Applicants:	Mr B. Powell, solicitor
For the First Respondent:	No appearance

REASONS

INTRODUCTION - PROCEEDING BP 1047/2015

- 1 In 2010 and 2011 the first respondent, Ascot Constructions Pty Ltd (**‘the builder’**) constructed a three-storey residential apartment building, comprising 19 residential units and common property including a ground floor car park, at Monckton Place in Caroline Springs (**‘the works’** and **‘the premises’**).
- 2 The works were carried out pursuant to a building contract with the owner/developer of the property, Boom Properties Pty Ltd (**‘the developer’**). The fourth respondent, DKO Architecture (Victoria) Pty Ltd (**‘the architect’**), was engaged by the developer to provide the design construction drawings for the works. The architect also acted as the developer’s agent in the development project.
- 3 Through the agency of the architect, BCG (AUST) Pty Ltd trading as ‘Checkpoint Building Surveyors’ (**‘Checkpoint’**), was engaged to provide building surveyor services. Through that engagement, the third respondent, Mr Casey, a director of Checkpoint, became the relevant building surveyor (**‘the RBS’**) for the purpose of issuing permits and undertaking inspections in respect of the works.
- 4 On 28 June 2010, the RBS issued a ‘*Stage 1*’ building permit, following which the works commenced. The permit included conditions in respect of fire services, some of which had not, at that time, been finally confirmed and approved.
- 5 On 28 October 2011, at which time the works were close to completion, the RBS issued a second ‘*Stage 2 Fire Services*’ building permit which confirmed approval for fire protection and fire services elements of the works.
- 6 An Occupancy Permit for the works was issued by the RBS on 30 November 2011.
- 7 On about 8 December 2011, the plan of subdivision for the premises was registered with Land Victoria, and the applicant, the Owners Corporation PS 630765 (**‘the OC’**) came into existence.
- 8 In December 2018, residents, who were either the owners of units or tenants under lease arrangements with owners of units, began occupying the units at the premises. Many of the owners had purchased their units “off the plan”. That is, they had entered sale contracts with the developer for their unit some time before the works were completed, and settlement of those sale contracts occurred shortly after the registration of the plan of subdivision.
- 9 It did not take long for residents to express concerns and complaints about the works, and for the OC, through its manager, to seek remedial action

from the builder. The OC's records indicate that as early as February 2012 complaints were made, and passed on to the builder by the OC manager, in respect of water leaks, blocked pipes and various other complaints including the malfunctioning of the essential services alarm system.

- 10 On 25 June 2013, the OC held its annual general meeting. Mr Gatt, a representative for the builder, attended that meeting. The minutes of that meeting¹ confirm the builder's agreement, through Mr Gatt, to address concerns raised in respect of the works.
- 11 Despite further notifications from the OC manager, the builder failed to address the growing list of concerns, many of which related to water leaks and water ingress into units.
- 12 In mid-2014, the OC resolved to engage a building consultant to investigate and report on the works. Mr Beck of JWB & Associates Pty Ltd, an expert building consultant, inspected the premises on 24 July 2014 and produced a report, the first of many, dated 24 August 2014. The report identifies numerous concerns in respect of the works, particularly in relation to water ingress throughout the works and the consequential damage caused by the water ingress.
- 13 In June 2015, following further investigations by Mr Beck and other building consultants, the OC resolved by special resolution to commence this proceeding claiming damages against the builder in respect of defects in the works. Proceeding BP 1047/2015 (**'the OC proceeding'**) was commenced in this Tribunal on around 20 August 2015.

BRIEF HISTORY OF THE OC PROCEEDING

- 14 On 5 November 2015, on the application of the builder, Mr Lionel Ainsworth was joined as a party to the proceeding. Mr Ainsworth was a plumbing sub-contractor engaged by the builder to carry out roof plumbing and related plumbing works. In the event the builder was found liable to pay damages to the OC, the builder sought contribution/indemnity from Mr Ainsworth to the extent that the builder's liability related to the plumbing works carried out by Mr Ainsworth.
- 15 Further investigations of the premises by Mr Beck revealed further defective works, particularly in relation to fire safety. The OC engaged further consultants to investigate these matters, and their investigations revealed significant deficiencies in the works in respect of fire safety measures (**'fire safety works'**).
- 16 On 20 December 2016, on the application of the OC, Checkpoint and the RBS were joined as respondents to the proceeding. The OC claimed that in issuing the building permits and the occupancy permit, and carrying out inspections of the works, Checkpoint and/or the RBS owed a duty of care to the OC, and that that duty of care had been breached, resulting in damages

¹ Tribunal book pages 163 – 166

to the OC. Amongst other things, the OC claimed that the RBS failed to properly initially assess, and subsequently inspect, the adequacy of the fire safety works.

- 17 On 20 December 2016, on the application of the builder, the architect was joined as the fourth respondent to the proceeding for the purpose of an apportionment claim. That is, the builder claimed that the OC's claim was 'apportionable' within the meaning of Part IVAA of the *Wrongs Act 1958*, and in the event the builder was found liable to the OC, its liability should be limited having regard to the responsibility which should be borne by the architect as a *concurrent wrongdoer*. The architect's status as a concurrent wrongdoer, says the builder, arose from the deficiencies in the construction drawings prepared by the architect.
- 18 Also, as part of its defence to the claims brought against it by the OC, the builder raised an apportionment claim against Checkpoint and the RBS, alleging that they too were concurrent wrongdoers whose responsibility for the OC's loss and damage should be taken into account when assessing the liability of the builder.
- 19 Following the joinder of the architect as a party to the proceeding, the OC amended its Points of Claim to include a claim against the architect. To the extent the architect might be found responsible as a concurrent wrongdoer, the OC sought damages from the architect.
- 20 The architect subsequently filed a defence which included apportionment claims as against the builder, Checkpoint and the RBS, and Mr Ainsworth.
- 21 Checkpoint and the RBS also subsequently filed a defence which included apportionment claims as against the builder, the architect and Mr Ainsworth.
- 22 In February 2017, the Tribunal, on its own motion, joined as parties to the proceeding the owners, as they then were, of the units in the building. They were joined as parties whose interests would be affected by the proceeding.
- 23 On 13 September 2017, the builder's proceeding as against Mr Ainsworth was settled, and consent order was made that the proceeding [brought by the builder] against Mr Ainsworth was struck out with a right to apply for reinstatement and no order as to costs.
- 24 In October 2018, the Tribunal was notified of settlement of the proceeding as between the OC and the architect, and consent order was made on 12 October 2018 striking out the portions of the OC's claim which raised allegations against, and sought relief from, the architect.
- 25 The hearing commenced before me on 22 October 2018.
- 26 On 29 October 2018, the morning of the fifth and final day of the hearing, the OC and Checkpoint and the RBS confirmed that they had reached settlement agreement, and consent orders were subsequently made that the

OCs proceeding as against Checkpoint and the RBS was dismissed with no order as to costs.

- 27 On 20 November 2018, before these reasons were published and any final orders made, a liquidator was appointed to the builder. As a result, in my view I cannot proceed to make orders against the builder. It is appropriate, in my view, that an order be made in the OC proceeding and each of the related proceedings that the proceeding is struck out with a right to apply for reinstatement. The right to apply for reinstatement might be exercised if an applicant obtains leave from the Supreme Court or Federal Court to continue the proceeding against the builder in liquidation.
- 28 Although the order in each proceeding will be that the proceeding against the builder is struck out with a right to apply for reinstatement, I consider it appropriate, having regard to the fact that the hearing of evidence was concluded prior to the builder being placed into liquidation, that I set out my findings and assessments as to damages.

THE OC'S CLAIM AGAINST THE BUILDER

- 29 The OC says the builder is liable to pay damages to the OC in respect of a substantial number of defective building works in the common property at the premises.
- 30 The OC relies on sections 8 and 9 in the *Domestic Building Contracts Act 1995* ('**the DBC Act**'). Section 8 sets out a number of mandatory warranties implied into all domestic building contracts ('**the S8 warranties**'), including:
- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
 - (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
 - (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;
 - (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date or within the period) specified by the contract;
 - (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a state suitable for occupation, the home will be suitable for occupation at the time the work is completed;

31 Section 9 of the DBC Act provides:

In addition to the building owner who was a party to a domestic building contract, any person who is the owner of the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract.

32 The OC says that the S8 warranties apply to the works, and that the defects in the works amount to a breach of the warranties. The OC says that, as the owner of the common property portion of the works, it is entitled to bring a proceeding against the builder for breach of the S8 warranties in respect of the common property portion of the works.

33 In its Points of Defence filed in the proceeding, the builder admits the application of the S8 warranties to the works. It also admits that by reason of section 9 of the DBC Act, the OC is entitled to the benefit of the S8 warranties. The builder denies the alleged breaches of the S8 warranties.

34 Further or alternative to the claim alleging breach of the S8 warranties, the OC asserts that the builder owed the OC a duty of care to ensure that the works were carried out with due care, skill and diligence and that the works would comply with all relevant legal requirements. The OC says that that duty of care was breached, as evidenced by the defects in the works.

35 The OC claims damages as follows.

36 \$2,080,837.51 is claimed as the sum assessed by Mr Beck as the cost the OC will incur to rectify defects in the common property portions of the works, and consequential damage caused by such defective works. Much of that cost, around \$1,106,157, is allocated to removing and replacing poorly installed exterior cladding, and rectifying the water damage that has been caused by the defective cladding. Around \$769,131 is allocated to rectify defects and deficiencies in the fire safety works. An alternative methodology to rectify the fire safety deficiencies, together with an alternative costing in respect of this aspect of the works, has also been provided.

37 \$13,068 is claimed as the cost of remedial works - the application of sealant to areas of the works - arranged by the OC in November 2016 to stem the problem of water leaks.

38 \$24,565.20 is claimed as the service charges of Binks and Associates Pty Ltd (**'Binks'**), the OC manager engaged by the OC, in respect of actions taken by Binks allegedly related to the defective building works.

39 The OC also claims interest on expense already incurred, namely the cost of the above-mentioned remedial works carried out in November 2016 and the OC management fees.

THE RELATED PROCEEDINGS

- 40 The owners of five of the units in the premises each bring a proceeding against the builder claiming damages in respect of alleged defective building works in their respective units.
- 41 In four of those proceedings, the relevant owner/s' claim is made on similar basis to the OC's claim. That is, a claim is brought for damages arising as a result of the builder's breach of the S8 warranties (and the owner/s bring the claim pursuant to section 9 of the DBC Act), and a further or alternative claim is brought for damages arising from breach of duty of care owed by the builder. In each proceeding, the relevant owner/s relies upon one or more reports of Mr Beck which identify defective building works in the respective unit, and the assessed cost of rectification. The four proceedings are:
- a Proceeding BP 1072/2015 brought by the owners of unit 1, Zoran Stojic and Zorica Lakic Stojic (**'the unit 1 proceeding'**). This proceeding commenced on 14 August 2015. The owners claim \$12,956 as the cost, assessed by Mr Beck, to rectify defects in the building works in unit 1. They also claim interest and costs.
 - b Proceeding BP 1071/2015 brought by the owner of unit 13, Nenad Stojic (**'the unit 13 proceeding'**). This proceeding was commenced on 14 August 2015. The owner claims
 - \$40,743 as the cost, assessed by Mr Beck, to rectify defects in the building works in 13;
 - \$5000 as damages for inconvenience and distress at living in the water damaged unit;
 - interest and costs.
 - c Proceeding BP 1065/2015 brought by the owners of unit 14, Ms Antonietta Ter Haar and Mr Tjerk Ter Haar in his capacity as trustee of the deceased estate of Mr Jason Ter Haar (**'the unit 14 proceeding'**). This proceeding was commenced on 13 August 2015. The owners claim:
 - \$33,597 as the cost, as assessed by Mr Beck, to rectify defects in the building works in unit 14;
 - \$1372.12 as expense they have incurred in the past to rectify a range of miscellaneous alleged building defects;
 - interest and costs.
 - d Proceeding BP 1073/2015 brought by the owner of unit 19, Pavlovski Properties Pty Ltd (**'the unit 19 proceeding'**). This proceeding was commenced on 14 August 2015. The owner claims:
 - \$76,482 as the cost, assessed by Mr Beck, to rectify defects in the building works in unit 19;

- \$1054 as cost it has incurred in the past to rectify several building defects; and
- interest and costs.

42 The fifth related proceeding, proceeding BP 164/2016, is brought by the owners of unit 18, Brett Farley and Ms Chantelle Farley (**‘the unit 18 proceeding’**). The owners claim for damages arising as a result of breach of the S8 warranties by the builder. There is no further or alternative claim in negligence. This proceeding was commenced on 11 February 2016. Initially only Mr Brett Farley was the named applicant. At the commencement of the hearing before me on 22 October 2015, I made an order adding Ms Chantelle Farley, who is the co-owner of unit 18, as the second named applicant to the proceeding. The owners claim:

- \$12,760 expense incurred by them in March 2016 to rectify defects in the ensuite bathroom;
- \$1732.61 as the cost of alternative accommodation arranged for the tenants of the unit whilst the ensuite repairs were carried out; and
- \$42,218 as the cost, assessed by Mr Beck, to rectify other defects in the building works in unit 18; and
- interest and costs.

43 In each of the related proceedings, except for the unit 1 proceeding, the architect was, on the application of the builder, joined as a respondent to the proceeding for the purpose of an apportionment claim as part of the builder’s defence.

THE HEARING

44 The hearing of the OC proceeding and the related proceedings commenced before me on 22 October 2018, and continued on 23, 24, 25 and 29 October 2018. Closing written submissions were subsequently received from the applicants by 16 November 2018.

45 In the OC proceeding, the OC was represented by Mr Reid of Counsel, and Checkpoint and the RBS were represented by Mr Whelen of Counsel.

46 Each of the applicants in the unit 1 proceeding, the unit 13 proceeding, the unit 14 proceeding and the unit 19 proceeding were represented by Mr Reid of Counsel.

47 The applicants in the unit 18 proceeding were represented by Mr Powell, solicitor.

48 Up until 14 August 2018, the builder was represented by lawyers in the OC proceeding and the related proceedings. On 14 August 2018, the Tribunal received notices in each of the proceedings that the lawyers ceased to act for the builder.

- 49 Prior to the hearing, on 19 October 2018, the builder's representative, Mr Gatt, sent an email to the Tribunal advising that the builder would not be attending the hearing because it did not have the means to fund it. That same day, 19 October 2018, the Tribunal sent a response email to Mr Gatt advising that, although the builder may not have the means to fund a lawyer to represent it at the hearing, an authorised representative of the builder could attend the hearing to represent its interests.
- 50 There was no appearance by any person on behalf of the builder at any time throughout the hearing.
- 51 A view of the premises, which included a view of units 1, 13, 14, 18 and 19 (the units in the related proceedings) was conducted on the second day of the hearing.
- 52 As noted earlier, at the commencement of the fifth day of the hearing I was advised of settlement agreement reached as between the OC and Checkpoint and the RBS.
- 53 At the time of the settlement, I had heard evidence only from witnesses for the applicants. For the remainder of the hearing, and with no appearance by the builder, I heard further evidence from witnesses called by the applicants only.
- 54 In the OC proceeding I heard evidence from:
- Mr Beck. Mr Beck produced multiple reports he had prepared following his numerous inspections of the premises between August 2014 and February 2018. Mr Beck also produced cost estimates for rectification works. Mr Beck was also of considerable assistance to me at the view of the premises on the second day of the hearing, where he was able to point out in detail the defects referenced in his reports.
 - Mr Julian Louey, an employee of Binks which has been the manager of the OC since the inception of the OC. Mr Louey has, since 9 May 2017, been the employee of Binks and Associates Pty Ltd responsible for the management of the OC. Mr Louey produced, and gave evidence in respect of, documentary records maintained by Binks and associates Pty Ltd in respect of the OC.
 - Mr R Quick of 'QP Consulting', a building consultant who gave expert opinion evidence in respect of plumbing works at the premises, the roof plumbing works in particular. Mr Quick produced a report he had prepared following his inspections of the premises on 24 July 2014 and 27 November 2014.
 - Mr R Black of Roland Black & Associates Pty Ltd, an engineering consultant who gave expert opinion evidence mainly in respect of the portion of the works to the ground floor car park at the premises. Mr Black produced a report he had prepared following

his inspections of the premises on 8 December 2015 and 28 April 2016.

- Mr S Kip of 'Skip consulting Pty Ltd', a qualified builder and surveyor, who gave expert opinion evidence primarily in respect of the fire safety works. Mr Kip reviewed the construction drawings and related documents and inspected the premises on several occasions. Mr Kip produced several reports.
- Mr Muggleton, a project manager with Sherwood Construction Solutions. He gave evidence in respect of the two fire sprinkler installation quotations provided to Mr Beck.

55 In each of the related proceedings, Mr Beck gave expert opinion evidence, and produced reports he had prepared following his inspections of the respective units. His reports include his cost assessment for rectification works.

56 In the unit 1 proceeding Mr Zoran Stojic, one of the owners of unit 1, gave evidence.

57 In the unit 13 proceeding Mr Nenad Stojic, the owner of unit 13, gave evidence.

58 In the unit 18 proceeding Mr Brett Farley, one of the owners of unit 18, gave evidence.

59 In the unit 14 proceeding Ms Antonietta Ter Haar, one of the owners of unit 14, gave evidence.

60 In the unit 19 proceeding Mr Mario Pavlovski, a director of the owner of unit 19, gave evidence.

BUILDING WORKS

61 The premises are a three-story residential apartment building containing 19 self-contained living units and common property. The ground level includes a concrete slab car park and units 1 to 5. The first level includes units 6 to 14. The second or top level includes units 15 to 19.

62 The exterior walls to the ground floor are concrete block. The first and second levels are clad with horizontally placed 'shiplap' timber boards and lightweight masonry veneer and fibre-cement sheeting. The soffits of projecting balconies and other structures are made of double layers of 16mm 'firestop' plasterboard sheeting. Internally, floors above ground level are particleboard sheets, supported by Posi-trusses. All ceilings, including the car park ceiling, comprise two layers of 'fire stop' plasterboard.

Common Property

63 The plan of subdivision for the premises provides:

COMMON PROPERTY NO 1 IS ALL THE LAND IN THE PLAN EXCEPT THE LOTS. IT INCLUDES ALL WALLS, FLOORS & CEILINGS THAT DEFINE BOUNDARIES. THE

STRUCTURE, ALL INTERNAL COLUMNS, SERVICE DUCTS, PIPE SHAFTS, CABLE DUCTS & SERVICE INSTALLATIONS WITHIN THE BUILDING. THE POSITIONS OF THESE COLUMNS, SERVICE DUCTS, PIPE SHAFTS, CABLE DUCTS & SERVICE INSTALLATIONS HAVE NOT BEEN SHOWN.

- 64 The plan of subdivision also provides that the boundaries of properties within the premises is the unfinished interior floor, walls and ceilings face.
- 65 In *Leung v Harris*, Senior Member Walker commented:²

With a ceiling, you don't get an interior face until you have hung your plaster on the joists, battens or whatever else supports it. I think that the word "ceiling" in the normal sense means more than just the battens and other components that hold the plaster up. The ceiling is the plaster surface that separates the roof space from the room below. That is what you paint and attach your light fittings to.

That view is consistent with s.132 of the *Owners' Corporation Act* 2006, which provides as follows:

Right to decorate interior walls, floors and ceilings

- (1) If a boundary of a lot is shown on a plan of subdivision as being the interior face of the building, the lot owner has the right to decorate or attach fixtures or chattels to that face.
- (2) This section permits works such as curtaining, painting, wallpapering and installing floor coverings, light fittings and other chattels."

Since any screw, masonry anchor or other fixing device would need to penetrate beyond the external finish in order to gain purchase and be able to provide support for whatever is to be fixed, this section permits the common property to be used for the purpose.

I therefore accept Mr Triaca's submission that the upper boundary is the underside of the ceiling and so the affected plasterboard on the ceiling is the property of the Owners' Corporation and not the Applicant.

- 66 This Tribunal has in the past found that, in respect of an apartment balcony in a multi-apartment building, the balcony tiles and the water proof membrane below the balcony tiles falls within individual lot boundary.³
- 67 The applicants in these proceedings say that the voids and space behind interior walls and ceilings is common property, and that rectification of defective plaster walls and ceilings constitutes rectification of defective common property. They say also that responsibility to rectify a leaking balcony in a unit is the responsibility of the unit owner.
- 68 Having regard to the evidence of Mr Beck, the plan of subdivision and the cases referred to above, I accept the applicants' submission.

² *Leung v Harris* [2018] VCAT 1630

³ *Owners Corporation PS 508732B v Fisher* [2014] VCAT 1358

THE OC PROCEEDING

BUILDING DEFECTS AND RECTIFICATION WORKS

Upper levels cladding and related defects

69 Mr Beck's investigations of the works included some invasive investigation (removal of portions of the cladding). Mr Beck says:

- some windows have no head flashings;
- the timber cladding is poorly installed, and water infiltrates at the cladding joints and wall junctures;
- the sarking paper behind the cladding is not permeable or 'breathable', as it was meant to be;
- the sarking paper has been poorly installed. In some locations it is cut short. In some locations it is simply missing;
- there are no flashings in the wall to wall junctions of the timber cladding;
- there are no flashings at the base of walls behind skirting tiles on rooftop balconies;
- the skirting tiles to rooftop balconies have simply been affixed to the timber cladding;
- the waterproof membrane to the rooftop balconies extends onto the timber cladding with no flashing or bond breakers. The membrane is poorly installed and appears to be one coat which extends up the wall by only 50 mm;
- timber parapet cappings have penetrations (screws) and poorly sealed joints which allow for water ingress;
- sections of the non-timber cladding have been poorly installed. In some instances, the sheets are cut short, exposing timber battens. In other instances, the sheets are too long and rest upon flashings, causing water damage to the sheets.
- water staining to plasterboard behind the cladding is noticeable;

70 Having regard to the above matters, Mr Beck says that water finds its way behind the cladding, and through window heads that are not flashed, and has no normal exit points. The non-permeable nature of the sarking adds to the water content in that it facilitates condensation. With missing flashing exit points, water, via gravity, permeates the structure of the building causing damage. At the view, I noticed very clear signs of water damage,

some damage quite severe, in soffits to protruding structures such as the underside of balconies, and in ceilings and walls of some units I viewed.

71 Having read Mr Beck's reports, and having heard evidence from him, and having viewed the premises, I am satisfied that the defective works noted by Mr Beck exist, and that they constitute a breach of the S8 warranties on the part of the builder, in particular the warranties that require the works:

- to be carried out in a proper and workmanlike manner and in accordance with the plans; and
- to be carried out in accordance with all applicable laws and legal requirements; and
- to be carried out with reasonable care and skill.

72 I am satisfied that the defective works are in the common property portion of the works.

73 The OC is entitled to an award of damages. The general rule with respect to damages for breach of contract is that where a party sustains a loss by reason of the breach, that party is, in so far as money can do it, to be placed in the situation he would have been had the contract been properly performed. The general rule is subject to the qualification that it must be a reasonable course to adopt.⁴

74 In a domestic building contract context, where the breach of contract is poor quality works which do not comply with the S8 warranties, damages would be appropriately assessed as the cost to bring the works to conformity, that is the cost to rectify the works so that they comply with the S8 warranties, provided it is not an unreasonable course to adopt.

75 Although the OC was not a party to the building contract (the contract between the developer and the builder), under section 9 of the DBC Act it may pursue a claim against the builder for breach of the S8 warranties. In assessing such claim, the general rule as to damages for breach of contract applies.

76 In my view the OC is entitled to damages measured as the reasonable cost it will incur to rectify the defective works.

77 Mr Beck says that rectification will require removal of the cladding, the proper installation of appropriate permeable sarking paper and flashings, and reinstatement of the cladding. He has reservations as to the suitability of the timber cladding product, even if it had been better installed. In any event, Mr Beck says that the (time) cost involved in attempting to carefully remove cladding so that some of it might be reinstated is prohibitive, and it would be quicker and more economical to replace the cladding.

78 Mr Beck's cost assessment for these rectification works, not including 'preliminaries' (discussed later in these reasons), is \$1,106,157. This

⁴ Bellgrove v Eldridge (1954) 90 CLR 613.

assessment is partly based on a quotation obtained by Mr Beck from Pattersons Insurebuild Pty Ltd trading as 'Commbuild' ('**Commbuild**') for the removal and replacement of the timber cladding. That quotation was recently updated to be current as at 16 October 2018, the quoted sum being \$894,406.61 inclusive of GST. The balance of Mr Beck's cost assessment, \$211,750.61 is made up of:

- (a) removal of non-timber cladding, proper installation of appropriate sarking, and reinstatement of replacement cladding, including the cost of scaffold for such works, \$92,593 (excluding GST);
- (b) allowance for the cost to rectify consequential water damage to ceilings and walls in units, \$50,000 (excluding GST);
- (c) margin allowances of 5% contingency (\$7129.65) and 20% overheads (\$28,518.60) and 10% profit (\$14,259.30) on the items (a) and (b) above; and
- (d) GST, \$19,250.06

79 Although commentary in expert reports filed by the builder during the interlocutory stages of the proceeding raises differing views on some of the defective works and appropriate rectification works, I did not hear any evidence from those experts. On the evidence before me, and my own observations on viewing the premises, I am satisfied that, with one exception, the rectification cost assessment of Mr Beck, including the Commbuild quotation, is reasonable.

80 The one exception is the \$50,000 Mr Beck has allocated for repair to consequential water damage within the units. The water damage to some of the units, particularly unit 13, was apparent at the view. However, as discussed later, the rectification of fire safety works will include, in effect, the removal and replacement of plaster walls and ceilings in all the units at the premises. As such, the allowance for rectification of water damaged plaster, under this head of damage, becomes redundant.

81 After deducting the \$50,000 allowed by Mr Beck for the consequential water damage rectifications, and making the consequential adjustments to the allowances for contingency, overheads, profit margin and GST, Mr Beck's assessment for the cost to rectify the non-timber cladding is reduced by \$69,250. That is, it is reduced from \$211,750.61 to \$142,500.61.

82 With the addition of the Commbuild quotation in respect of the timber cladding, the total assessment for the cost to rectify the cladding and related defects, rounded off to the nearest dollar, which I assess as reasonable, is **\$1,036,907**.

Plumbing works

83 At the request of Mr Beck, Mr Quick inspected the premises on 24 July and 27 November 2014 to inspect the plumbing works at the premises, including roof plumbing works. Mr Quick identified a number of defects in

the plumbing works. The defects, and Mr Quick's estimate of the cost to rectify them, are set out in his report dated 29 December 2014. As I understand it, some of the plumbing issues raised by Mr Quick were subsequently attended to by Mr Ainsworth or the Builder. Set out below are what Mr Quick says are the remaining items of required plumbing rectification works, together with Mr Quick's cost assessment for such works.

84 Again, although commentary in expert reports filed by other parties during the interlocutory stages of the proceeding raises differing views on some of the defective works and rectification works, I did not hear evidence from those experts. I accept the evidence of Mr Quick.

85 I am satisfied that the defective works listed below constitute a breach by the builder of the S8 warranties, in particular the warranties requiring the works to be:

- carried out in a proper and workmanlike manner;
- carried out in accordance with all applicable laws and legal requirements; and
- carried out with reasonable care and skill.

86 Mr Quick's cost assessments to rectify the remaining defective works allow for a 10% contingency sum, and a profit margin of 30% or 35% depending on the nature of the item of work. In my view such allowances are reasonable. Mr Quick's costings also allow for GST. Save as indicated otherwise below, I accept Mr Quick's cost assessments as the reasonable cost the OC will incur to attend to rectification of the remaining defective works identified by Mr Quick.

- a. 50 mm UPVC drains from the balconies, running through the exterior timber cladding on the western side of the building, are poorly installed. They need to be reinstalled clear of the flashing beneath them. Mr Quick's cost assessment for rectification works is \$3,814.52. However, much of this cost relates to the removal of timber cladding to access the UPVC drains, the rectification of flashings where necessary and the reinstatement of the cladding. As the removal and replacement of the cladding, including installation of flashings, will be done as part of the cladding repair works discussed above, I do not allow for the doubling up of these costs in Mr Quick's assessment. After removing Mr Quick's cost assessment for these items, the cost to carry out the rectifications to the UPVC drains, including contingency and profit margins and GST, is \$1301.30
- b. Drains from air-conditioners discharge onto roofing rather than into downpipes. The drains should be extended to discharge into downpipes. The condensate drain, installed at the front of the property in a poor location which causes it to continually break,

needs to be relocated. Mr Quick's cost assessment for these works, which I allow, is \$2091.

- c. The flashing to air-conditioning pipes and conduits do not meet the requisite standard which requires that they be flashed individually where they penetrate the roof. Condenser conduits will need to be individually flashed. Mr Quick's cost assessment for these rectification works, which I allow, is \$8429.
- d. Timber/plaster stops at the end of parapets are exposed to the weather and are required to be flashed. In my view these works will be included within the general cladding removal and replacement works discussed above. Accordingly, I make no extra allowance for these works.
- e. The exterior cladding, in some sections, has been installed without sufficient gap between the flashing and the cladding. The base of the nontimber lightweight cladding has not been sealed. In my view, this problem will be remedied as part of the general removal and reinstatement of the cladding works discussed above. Accordingly, I make no extra allowance.
- f. A water sluice valve cover installed in the road on the eastern side of the property is too high. To avoid damage to the valve or its connections, it will be necessary to reduce the height of the valve shaft. Mr Quick's costing for these works, which I allow, is \$727.
- g. Mr Quick noticed in-ground water leaks to the northern and western boundaries of the property. He believes the leaks are in the sprinkler system and this needs to be rectified. His cost assessment, which I allow, is \$481.
- h. The sewer drain inspection shaft has an unsuitable vent cap. A removable sealed cap and a protective concrete cover is required. Mr Quick's cost assessment, which I allow, is \$710.
- i. Mr Quick was unable to locate the Overflow Relief Grate (ORG) for the sewer drain serving the premises. Given the height of the sewer drain at the rear of the property, Mr Quick does not believe that an ORG can be installed at an appropriate level having regard to the lowest ground floor waste outlet. In place of an ORG, he recommends a 150 mm check valve be installed at the connection of the premises drain with the relevant authority's sewer reticulation. His cost assessment, which I allow, is \$4,350.

87 The total rectification cost for the above items, rounded off to the nearest dollar, which I assess as reasonable, is **\$18,089**.

Fire safety works

- 88 Mr Kip, Mr Black and Mr Beck have identified numerous defects and deficiencies in fire safety works. I was shown many of these deficiencies when I attended the view of the premises.
- 89 Again, although commentary in expert reports filed by other parties during the interlocutory stages of the proceeding raises differing views on some of the defective works and rectification works, I did not hear evidence from those experts. I am satisfied, on the expert evidence before me, together with my observations when I viewed the premises, that the defects and deficiencies which I list below constitute breaches of the S8 warranties on the part of the builder, in particular the warranties that the works were to be:
- carried out in a proper and workmanlike manner and in accordance with the plans;
 - carried out in accordance with all applicable laws and legal requirements; and
 - carried out with reasonable care and skill.
- 90 The deficiencies and defects in the fire safety works include the following:
- Inadequate fire sealing of wall and ceiling penetrations throughout the premises, such as light fittings and power outlets;
 - Inadequate sealing and blocking of ceiling voids and cavities between units. Mr Beck's invasive investigations revealed the lack of fire blocking, within walls and ceilings, between the units investigated. In my view it is reasonable to assume that this problem exists throughout the premises;
 - Inadequate fixing of fire rated plaster. Pursuant to the manufacturers specifications, plasterboard sheets are to be fixed with screws at 200 – 300 mm spacings. In many areas, the plasterboard has been affixed only with glue;
 - Missing smoke seals to fire rated doors, and inadequate functioning (automatic closing) of fire doors;
- 91 I am satisfied that these are defects/deficiencies in the common property portion of the works, and that damages be measured as the reasonable cost to carry out rectifications to remedy the defects and deficiencies.
- 92 Two methods of rectification have been suggested.
- 93 The first suggested method is to rectify the defects and deficiencies in the works themselves (**'the fire safety rectification works option'**). That is, carry out rectifications to bring the fire safety works to the standard, meeting the S8 warranties, that should have been achieved by the builder. Because the defects and deficiencies exist in large numbers and in every unit throughout the premises, this method of rectification will include the removal and reinstatement of plaster walls and ceilings throughout the

premises, including all the units. Mr Beck has assessed the cost of the works as \$716,305, inclusive of margin allowances for contingency (5%), overheads (20%) and profit (10%), and including GST.

- 94 Mr Kip says that, as an alternative, a fire sprinkler system could be installed throughout the premises (**‘the sprinkler system option’**). By this method, the defects in the fire safety works as constructed by the builder would not be rectified. Instead, the installation of a fire sprinkler system throughout the premises would, from a fire safety viewpoint, compensate for the defects in the fire safety works. I accept Mr Kip’s evidence that the sprinkler system, properly designed and certified by a fire engineer, would adequately compensate for the defects in the fire safety works.
- 95 Mr Kip considers that the sprinkler system option would likely be simpler, and cheaper, than the fire safety rectification works option. However, Mr Kip’s opinion in this regard is not founded on any proper cost analysis. This is not a criticism of Mr Kip because he was not engaged to provide costings for rectification works. But it does mean that Mr Kip’s opinion as to the cost of the sprinkler system option, relative to the fire safety rectification works option, holds little probative value.
- 96 Mr Beck obtained alternative quotations from ‘Sherwood Construction Solutions’ (**‘Sherwood’**) for the installation of a fire sprinkler system throughout the premises. Mr Muggleton, project manager for Sherwood, gave evidence in respect of the quotations.
- 97 The first Sherwood quotation is \$1,131,061.80 (inclusive of GST). Mr Muggleton confirmed in evidence that this quotation was prepared on the assumption that the residents would not be required to vacate the premises. The works would be in stages, and in the hours 7:30 am to 4 pm, Monday to Friday. It would take approximately 36 weeks to complete the works.
- 98 The alternate Sherwood quotation is \$778,936 (inclusive of GST). Mr Muggleton confirmed that this quotation was prepared on the assumption that the premises would be vacant, such that the works could be completed in approximately 9 weeks.
- 99 The alternate Sherwood quotation was obtained partly in response to a quotation obtained by Checkpoint and the RBS from ‘Alfiefire Services Pty Ltd’ (**‘Alfiefire’**) dated 15 August 2018 which provides for the installation of a sprinkler system at the premises at a cost of \$594,000 (inclusive of GST), assuming the premises would be vacant.
- 100 However, the Alfiefire quotation carries the significant rider that, while it was referenced in opening submissions, it was not tendered into evidence through a witness. This is because the OC and Checkpoint and the RBS settled the proceeding as between them before any witnesses were called by Checkpoint and the RBS.
- 101 I note also that the Alfiefire quotation includes numerous express ‘exclusions’, some of which are unclear as to their meaning or scope. One

such exclusion states *'we have made no allowance for fire detection in the ceiling voids'*.

- 102 In my view, I may consider the Alfiefire quotation. However, without formal proof as to its provenance, and with reservations as to its clarity, I consider it has no significant probative value.
- 103 I prefer the fire safety rectification works option to the sprinkler system option for several reasons.
- 104 There is no evidence before me as to the possibility or likelihood of the premises becoming vacant for a period of nine weeks to allow for the sprinkler system option to be carried out at the lower Sherwood quotation price.
- 105 As discussed earlier, the cladding rectification cost, as assessed by Mr Beck, includes an allowance for consequential repair to water damaged ceilings and walls in the units. If these consequential repair works are removed from the cladding repair works cost, there is a saving of \$74,250.01. As confirmed by Mr Beck when giving evidence, these consequential repairs will not be required if walls and ceilings are to be replaced in any event as part of the fire safety rectification works. Accordingly, the fire safety rectification works option brings with it a consequential reduction or saving of \$74,250.01 in the cladding repair cost.
- 106 On the weight of evidence before me, the fire safety rectification works option is the cheaper option.
- 107 And in my view, it is appropriate to assess the damages as the reasonable cost to rectify the defective works in question, in preference to an assessment based on compensatory works outside the scope of the original contract works. The OC may utilise damages awarded as it sees fit. It may choose the sprinkler system option, in which case it is not, in my view, unfair that it should bear any extra cost of such option.
- 108 For the above reasons, I assess damages in the sum of **\$716,305** for the fire safety rectification works.

Further fire safety works related to cladding replacement

- 109 Mr Beck notes that when the sarking is replaced as part of the cladding replacement works, it will be necessary to ensure that an appropriate firewall is installed behind the external cladding to meet compliance requirements identified by Mr Kip. It will be necessary to screw off and seal all penetrations.
- 110 Mr Beck also identifies that it will be necessary, when the cladding rectification works are being carried out, to install coverings over exposed steel lintels, another item identified by Mr Kip.
- 111 I am satisfied on the evidence before me that these are necessary works to rectify defects in the common property portion of the works.

- 112 Mr Beck assesses the cost of these rectification works as \$52,826, including allowances for contingency (5%), overheads (20%) and profit (10%) and including GST. I accept this is a reasonable, and I assess damages for this item as **\$52,826**.
- 113 I note for completeness that it is not clear to me whether these works would still be required if the sprinkler system option was chosen instead of the fire safety rectification works option. In any event, even if all of these works were not necessary under the sprinkler system option, the fire safety rectification works option remains, on the weight of evidence before me, cheaper. And as discussed above, I consider the fire safety rectification works option as the appropriate method to assess damages.

Testing and certification

- 114 Mr Kip says that, to ensure requisite fire safety measures are met, it will be necessary to obtain a number of certifications, including:
- a. Certification, following testing, that the smoke detection system, including sound pressure levels in units and public areas in the premises, meets Australian Standard (AS1670. 1:2005) compliance requirements. Mr Beck estimates the cost of these works, including his margin allowances for contingency (5%), overheads (20%) and profit (10%), and including GST, as \$2228.
 - b. Certification by an independent technician that the fire rated doors and smoke seals meet the requisite Australian Standard (AS 1905.1 – 2005) requirement. Mr Beck estimates the cost of these works, including his margin allowances and GST, as \$2970.
 - c. Approval confirmation from the CFA as to the location and shielding of the fire hydrant that services the premises. The fire hydrant is located in a central position at the front of the premises, and it is shielded from the premises by a cement block wall. Mr Kip says that the CFA is the appropriate authority to approve the adequacy of fire hydrant, in terms of location and shielding, and such approval should be obtained. Mr Beck provides a costing for this task, which includes an allowance for architectural drawings to be obtained as part of the material to be submitted to the CFA. Mr Beck's costing, including margin allowances and GST, is \$3564.
- 115 I accept the evidence of Mr Kip that the above items are a necessary component to ensure the fire safety of the premises. In my view, they are part of the general fire safety works that were not adequately carried out by the builder. I accept Mr Beck's costings as reasonable. Accordingly, for the above items I assess damages as **\$8762**.
- 116 Mr Beck has allowed a further sum of \$5000, plus his margin allowances and GST, as the estimated cost to the owners to obtain legal advice as to the status and validity of the building and occupancy permits issued by the RBS. This costing was provided on the back of Mr Kip's opinion that the

RBS, on the information available to him and on matters he could have inspected, should not have issued the permits. By reason of the settlement between the OC and the RBS and Checkpoint, this issue was not ventilated in evidence before me. This item is unproven and speculative, and I am not, in any event, satisfied that it has relevance to the liability of the builder. I make no allowance for this item.

Car Park

- 117 Mr Black gave evidence and produced a report which focused on the works in the car park at the premises. There are several areas of the plaster ceiling that are water damaged. Mr Black considers that rectification works will necessarily include rectification of water damaged timber structural elements within the ceiling space, and mould remediation works.
- 118 Having viewed the car park, I accept Mr Black's evidence. I find that the rectification works Mr Black recommends are required to rectify defects in the common property portion of the works carried out by the builder. I also accept Mr Beck's cost estimate, \$33,358 inclusive of margin allowances and GST, as reasonable.
- 119 In his most recent report dated 1 March 2018, Mr Beck also allows a sum of \$1010 (inclusive of margin allowances and GST) to rectify broken/dropped cornice in the car park. Having viewed the broken cornice, I accept that it is defective work for which the builder is responsible. Accepting also that Mr Beck costed this item separately from the above-mentioned car park ceiling works, and that the costing is reasonable, I allow \$1,010 for this item of rectification work.
- 120 Accordingly, I assess damages in respect of this item as **\$34,368**.

Security

- 121 Mr Black says that the security for the premises is unsatisfactory. The security doors, including the large roller doors at the rear of the building, have a large gap between the top of the door and the ceiling above them which Mr Black says allows for intruder access to areas containing sensitive equipment such as the main switchboard, the fire panel and the communications cupboard. He says the doors need to be extended and strengthened.
- 122 Having viewed the premises, I accept that the security doors may be breached by an intruder. However, this does not, of itself, lead to a conclusion that the builder has, in supplying and installing the doors, breached any of the S8 warranties. It may be that doors reflect poor design choice, by someone other than the builder, rather than defective or inadequate works on the part of the builder.
- 123 During the interlocutory stage of the proceeding, a conclave of experts was conducted, following which a 'Scott Schedule' was produced. The Scott Schedule briefly sets out opinions of the experts who attended the conclave,

along with occasional comments of the Senior Member of the Tribunal who conducted the conclave. It is apparent from the comments in the Scott Schedule, including the Senior Member's comments, that it cannot be said conclusively that the builder departed from the design documentation when supplying and installing the security doors.

- 124 On the evidence before me, I am not satisfied that the perceived deficiency in the security doors constitutes defective works carried out by the builder.
- 125 The same can be said in respect of Mr Black's concern as to the adequacy of the fire warning/alarm security system and the location of the communications cupboard. He considers the security system may need to be upgraded with superior software. He considers the communications cupboard and cabling needs to be reconstructed with vandal proof cupboards. It may be that an upgrade to the security system and the communications cupboard is sensible, but on the evidence before me I am not satisfied that the installations carried out by the builder constitute defective works for which the builder is liable.
- 126 For completeness, I note that amongst his cost assessments, Mr Beck assesses the cost to install Perspex to security gates/doors to improve security. As I do not accept that the builder is liable in respect of the security gates/doors, I do not allow this cost as assessed by Mr Beck.

Handrails to passageways

- 127 At the view I noticed handrails in the common property passageways at the premises have been poorly painted, in that the paint coverage is uneven and some areas of the handrails have very little, if any, paint coverage. I accept this is defective work, a breach of the S8 warranties, for which the builder is liable. I accept Mr Beck's cost estimate in the sum of **\$2073** (inclusive of margin allowances and GST) as the reasonable cost to carry out this item of rectification work.

Intercom system

- 128 The OC's claim includes the cost, estimated by Mr Beck, to inspect and rectify the intercom system throughout the premises. The evidence on the intercom system is minimal.
- 129 In one of Mr Beck's early reports⁵, he states:

It is my understanding the intercom system has never correctly worked throughout the complex. I have not completed any testing of the system as it is beyond my area of expertise. It is my opinion that the system should have worked from the time of Occupancy and there should not have been any required maintenance so early after installation.

⁵ Page 18 in Mr Beck's report dated 24 January 2015

A fully qualified contractor is to be engaged to test and repair the system as required.

- 130 In his most recent costing report, Mr Beck has provided a broad cost estimate of \$7500 (plus his typical allowances) to inspect and rectify the intercom system throughout the premises to ensure its proper working order.
- 131 Mr Louey, the employee of Binks and Associates Pty Ltd (“**Binks**”) who is the current manager for the OC, notes in his witness statement that the OC records indicate that in January 2012, shortly after the construction of the premises was completed, there were ‘problems with the intercom keypad’. The log of events kept by Binks, referred to later in these reasons when discussing the OC’s claim for recompense of fees paid to Binks, includes a number of references to ‘*intercom faults*’ without providing any details as to the alleged faults.
- 132 The evidence before me is insufficient. Mr Beck’s “understanding” that there were problems with the intercom, and that he carried out no testing of the intercom, coupled with brief references to intercom faults in records maintained by Binks, is insufficient for me to be satisfied that the builder should bear the cost of works in respect of the intercom system proposed by Mr Beck.

Preliminaries allowance

- 133 As part of his recent cost assessment, Mr Beck allows a substantial sum, \$94,871, for ‘preliminaries’ expenses he would expect to be incurred by a new builder engaged to carry out all the above discussed rectification works. He allows for the expense of preliminary items including:
- initial site investigation;
 - engagement of engineer to prepare construction drawings;
 - preparation of management plan/scope of works, including traffic management plan, site safety and other and OHS responsibilities;
 - obtaining all necessary permits and certifications,
 - obtaining required insurances.
- 134 It is clear that carrying out all the rectification works will be a major operation, and I accept that a significant allowance for preliminaries, the sum allowed by Mr Beck, is appropriate. Although, as discussed above, I have made some deductions to Mr Beck’s cost assessments, in my view such deductions will have negligible impact on the expense of preliminaries. I accept Mr Beck’s allocated sum for preliminaries, **\$94,871**.

Total cost of rectification works - OC claim

- 135 In summary, I assess the reasonable cost the OC will incur to rectify defects in the works carried out by the builder as \$1,960,043, calculated as follows:

- Preliminaries	\$94,871
- Cladding and related works	\$1,036,907
- plumbing works	\$18,089
- Fire safety rectification works	\$716,305
- Fire works related to cladding replacement	\$52,826
- Fire works testing and certification expense	\$8,762
- car park works	\$34,368
- passageway handrails painting	<u>\$2,073</u>
Total	\$1,964,201

OC PAST RECTIFICATIONS EXPENSE

136 I accept, on Mr Louey's evidence, that in November 2016 Binks arranged for the engagement of Commbuild to carry out extensive sealant application works at the premises to stem the water leaks problem. Mr Louey produced an invoice from Commbuild dated 24 November 2016 in the sum of \$13,068 in respect of these works. I accept that this invoice was paid by the OC around the end of November 2016.

137 I accept that the OC had tried, without success, to have the builder attend to rectify the increasing water leaking issues. With the problem worsening, and no remedial action from the builder, the OC took what I consider to be a reasonable step to at least mitigate the water leaks problem. I am satisfied that the OC should be reimbursed this expense as a reasonable cost incurred arising as a result of the builder's breach of the S8 warranties.

138 The OC seeks also that it be paid interest on the sum.

139 Section 53 of the DBC Act provides a wide range of orders which the Tribunal may make in resolving a domestic building dispute. Under subsection 53 (1), the Tribunal may make any order it considers fair. Subsection 53(2)(3) provides:

In awarding damages in the nature of interest, VCAT may base the amount awarded on the interest rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** or on any lesser rate it thinks appropriate.

140 In the circumstance where the OC has reasonably incurred the expense following a failure or refusal of the builder to attend to the water leaks problem, I think it is fair that the OC be awarded interest on the sum. I think it fair that the interest be calculated at the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983* for the period commencing when the expense was incurred (which I nominate as 30 November 2016) until the date of this decision. I calculate that as \$2605.

141 Accordingly, I assess damages in a total sum of **\$15,673** in respect of this item.

OC MANAGEMENT CHARGES

142 The OC claims, as damages, recompense of fees paid to Binks (the engaged professional OC manager) for ‘*its time relating to the management of the assessment of and management of the repair of defects*’⁶. The total sum claimed is \$24,565.20 for the period 1 January 2012 to 31 December 2017. The sum is made up of annual sums as follows:

- | | | |
|-----|------------------------------------|------------------|
| (a) | 1 January 2012 – 31 December 2012, | \$3412.20 |
| (b) | 1 January 2013 – 31 December 2013, | \$1718.20 |
| (c) | 1 January 2014 – 31 December 2014, | \$2347.40 |
| (d) | 1 January 2015 – 31 December 2015, | \$5650.70 |
| (e) | 1 January 2016 – 31 December 2016, | \$7078.50 |
| (f) | 1 January 2017 – 31 December 2017, | <u>\$4358.20</u> |
| | Total | \$24,565.20 |

143 Mr Louey says that these fees were charged by Binks as “*additional management services relating directly to the building defects*” at an hourly rate of between \$122 per hour, the rate as at January 2012, and \$154 per hour, the rate as at 2017.⁷ Annexed to Mr Louey’s witness statement is Binks’ log of events which Mr Louey says records the events and respective time charges in respect of these additional services.

144 The log of events records, in chronological order, the date of an event, the number of ‘CU’s’ (chargeable six-minute units) for the event, and a brief explanation of the event. The log runs for 90 pages and most pages contain around 20 to 25 entries. For many events, there is no charge (zero CU). I set out hereunder a sample of entries for which chargeable units are recorded:

- 17/02/2012, 3CU, Email to Ascot constructions re: water leak into Lot 6
- 04/04/2012, 1CU, Email from owner, lot 4 re: cargate
- 16/04/2012, 1CU, Email from Ascot constructions re: response to the defect items
- 16/04/2012, 3CU, Circular to committee re-: outstanding building matters
- 01/05/2012, 4CU Circular to committee re-: Telstra phone lines
- 10/05/2012, 1CU, Email to [the developer] re-: a quotation for public lighting
- 29/05/2012, 1CU, Email to Ascot constructions re: locks
- 18/07/2012, 1CU, Re: Intercom faults
- 05/02/2013, 3CU, Lot 13 – continuing water leak

⁶ paragraph 16 (a), page 8, OC’s Second Further Amended Points of Claim

⁷ Mr Louey’s witness statement paragraphs 41 and 42

- 13/11/2013, 1CU, Re: Building defect – assessment and legal advice
- 25/11/2013, 1CU, Gutter cleaning
- 28/06/2014, 1CU, Re: Professional defect assessment
- 29/08/2014, 1CU, Re-: Quote Request
- 10/03/2015, 3CU, U13 - Rainwater leaks
- 13/05/2015, 3CU, Cladding repairs
- 23/06/2015, 4CU, Postal Ballot to take legal action
- 07/09/2015, 1CU, Lot 11 – report attached
- 18/12/2015, 1CU, OC Plan No630765 v Ascot Constructions Pty Ltd
- 23/12/2015, 1CU, Cladding repairs – quotation from Pattersons Commbuild
- 27/05/2016, 1CU, Stop gap water leak repairs,
- 06/06/2016, 3CU, Temporarily sealing works, Prompt Instruction Sought
- 11/07/2016, 1CU, Received phone call, Lot 6
- 08/08/2016, 3CU, Defects case – instruction sought
- 20/09/2016, 2CU, Evo seal to balconies 15, 18 and 19
- 23/11/2016, 1CU, On-site meeting – 30 November 9:30 AM
- 25/01/2017, 1CU, downlights at 19/11 Monckton Place, Caroline Springs
- 08/02/2017, 1CU, VCAT orders
- 16/03/2017, 3CU, Private balconies, private defect claims
- 11/04/2017, 1CU, Balcony inspection
- 11/09/2017, 3CU, VCAT Compulsory Conference
- 05/12/2017, 3CU, Invoice approval – destructive investigations.

145 The entries listed above constitute a small sample of the chargeable events recorded in the Binks' log, but it is sufficient to illustrate the nature of the log entries. In my view, the log does not satisfactorily establish the applicant's entitlement to the so-called 'damages' being claimed.

146 In my view, the entries up to December 2013 do little more than evidence that Binks was going about its job dealing with a range of tasks, including numerous day-to-day complaints made by residents, in respect of services and some building works. Many of those issues and complaints have, on the basis of the recorded entries in the log, nothing to do with the builder's breach of the S8 warranties (or breach of duty of care) raised in this proceeding.

147 And while I accept that some of the entries relate to defective building works which are the subject of this proceeding, I do not accept that the charges constitute claimable 'damages' arising from the builder's breach of the S8 warranties (or breach of duty of care). What, for example, does one

make of the above-mentioned entry dated 5 February 2013 where Binks has recorded 3 chargeable units in respect of ‘*Lot 13- continuing water leak*’. As discussed above in these reasons, the water leaks to unit 13 are noted in Mr Beck’s reports and it was apparent at the view that the apartment has had serious water leaks into it for some time. But that tells me nothing about the Binks’ charge recorded on 5 February 2013, and nothing as to why the OC is entitled to damages in respect of such charge.

- 148 As noted above, Mr Louey says that the log records additional management services relating directly to the building defects. I do not accept that Mr Louey can know that. He has been employed by Binks since 2 May 2016, and he took over the role managing the OC on about 9 May 2017. How can Mr Louey possibly know, for example, that the event of ‘*gutter cleaning*’ recorded 25 November 2013 (one of the example events set out above) is a charge relating directly to building defects?
- 149 Many of the entries from 2014 onwards relate directly to this proceeding in terms of seeking legal advice, obtaining investigative reports, issuing proceedings and managing the litigation process. Perhaps these charges, or some of them, might be claimable as costs associated with the proceeding, but they are not, in my view, a separate head of ‘damages’ arising from the builder’s breach of the S8 warranties (or breach of duty of care).
- 150 On the evidence before me, I am not satisfied that the OC is entitled to the reimbursement, as damages, of the Bink’s charges as claimed.

CONCLUSION - THE OC PROCEEDING

- 151 For the reasons set out above, I assess the OC’s total damages arising as a result of the builder’s breach of the S8 warranties as \$1,964,201, calculated as:

- rectification works cost, as assessed above	\$1,964,201
- past remedial works expense, including interest	<u>\$15,673</u>
TOTAL	\$1,979,874

- 152 The damages arise from the builder’s breach of the s8 warranties. It is not necessary that I consider the OCs alternative claim founded in negligence.
- 153 As discussed earlier, as part of its defence to the claims brought against it by the OC, the builder raised apportionment claims as against Checkpoint and the RBS, and the architect. That is, the builder asserted a limitation on its liability to the OC having regard to the responsibility of Checkpoint and the RBS and the architect as ‘concurrent wrongdoers’. Having regard to:
- (a) the settlement between the OC and the architect and the settlement between the OC and Checkpoint and the RBS, which meant no evidence was led at the hearing by the architect or Checkpoint and the RBS, and

- (b) the fact that the builder did not appear at the hearing to prosecute its defence,

I make no finding as to the apportionment claim, or any reduction in the damages assessed as against the builder.

- 154 As confirmed in opening submissions, the OC concedes that the sum of damages recoverable from the builder should be reduced by the settlement sum, \$150,000, the OC received under its settlement with the architect. I am unaware of the details of the OC's settlement with Checkpoint and the RBS, however I assume the OC would make a similar concession in respect of any settlement sum received.

THE UNIT 1 PROCEEDING – PROCEEDING BP 1072/2015

- 155 The owners of unit 1, Mr Zoran Stojic and Mrs Zorica Stojic, purchased the unit under an '*off the plan*' sale contract dated 8 December 2009, with settlement of the contract occurring on 22 December 2011. It is an investment property which they rent out. Zoran Stojic and Mr Beck gave evidence in this proceeding.

- 156 Mr Beck inspected the property on 27 November 2014 and produced a report dated 24 January 2015. He identified a number of items of defective work:

- a. Water leaks through several windows, with consequential water damage to plaster walls. He identified the cause of the leaks as the defective plumbing (flashing) and cladding works discussed earlier in these reasons.
- b. A significant crack in the kitchen stone bench top. Having regard to the size of the crack, Mr Beck considers it was caused by poor installation, or the stone itself is faulty. The benchtop needs to be removed and replaced.
- c. Leaking shower enclosure in the ensuite. Mr Beck considers the shower screen has not been properly sealed, and rectification will involve removing the screen and refitting it.
- d. The laundry bifold doors jam during operation. Rectification will require adjustment to the doors to ensure they operate as intended, together with rectification of minor consequential damage to the door pelmet caused by the poor functioning of the door.
- e. Various of the downlights throughout the unit were not functioning. Mr Beck considered the downlights to be of poor quality and installation. Rectification will require replacing the downlights with a suitable product.
- f. Mr Beck considers the quality of the painting of the plaster walls and ceilings to be generally of a low standard, and some repainting works are required.

- 157 Mr Beck assessed the cost of rectification for the above items, save for the item (a), the damage to plaster caused by water leaks, as \$12,956. This costing includes Mr Beck's margin allowances for contingency (5%), overheads (20%) and profit (10%). It also includes allowance for GST.
- 158 Mr Beck did not provide a costing for damage to plaster caused by window leaks because he considers the cause of the leaks to be the defective plumbing (flashing) and cladding works discussed earlier in these reasons. As such, he considers the cost to rectify such damage as part of the common property rectification works.
- 159 Having viewed the unit, and having heard evidence from Mr Beck, I find that the items identified in Mr Beck's report constitute defective works and a breach of the S8 warranties for which the builder is liable.
- 160 Save for one item, I accept Mr Beck's cost assessment as the reasonable cost to rectify the defective works. The one exception is the interior repainting. As discussed earlier in these reasons, replacement of the interior walls and ceilings to all of the units is allowed for as part of the fire safety rectification works cost. As such, I do not consider the owners of this unit should be further compensated for works included as part of the OC rectification works.
- 161 After deducting Mr Beck's cost assessment for the interior repainting works, \$2,673, the rectification cost estimate, which I allow, is \$10,283. As this is the assessed cost to attend to rectification works not yet done or paid for, it is not appropriate in my view to award interest on the sum.
- 162 The damages arise from the builder's breach of the S8 warranties. It is not necessary to consider the alternative claim founded in negligence.
- 163 In conclusion, in this proceeding BP 1072/2015, I assess the applicants' damages arising as a result of the builder's breach of the S8 warranties as **\$10,283**.

THE UNIT 13 PROCEEDING – PROCEEDING BP 1071/2015

- 164 The owner of this unit, Mr Nenad Stojic, purchased the unit under an '*off the plan*' sale contract dated 22 November 2009, with settlement of the contract occurring on 22 December 2011. Nenad Stojic and Mr Beck gave evidence in this proceeding.
- 165 Mr Stojic lived in the unit up until around the middle of this year, 2018. He says he had constant significant water ingress issues for the whole time he lived in the unit, which made living there very unpleasant at times. Having viewed the unit, I accept Mr Stojic's evidence in this regard.
- 166 Of the units I inspected at the view, this unit was, by far, in the worst condition by reason of water damage. It was apparent that significant amounts of water have, for some time, infiltrated this unit and seriously damaged plaster ceilings and walls. The unit smelled mouldy. So bad was the state of the unit that I was surprised to learn that a person was still living

in it. Mr Stojic informed me that the person living in the unit is a friend living there free of charge.

- 167 This unit suffers from water ingress caused partly by the cladding and plumbing issues discussed earlier in these reasons, and partly by leaking balconies located above this unit, discussed later in these reasons. Mr Stojic says that a representative of the builder attended on a number of occasions to address the problem, but, as was apparent at the view, the remedial measures taken by the builder, whatever they were, did not solve the problem.
- 168 Mr Beck first inspected this unit on 15 April 2015 and he produced a report dated 25 April 2015. He carried out further invasive and water testing inspections in December 2015 and May 2017. In addition to the serious water ingress and mould issue, Mr Beck identifies the following items of defective work in this unit:
- (a) Leaking balcony. Mr Beck water tested the balcony to this unit which resulted in the ingress of water into the unit 2 below. Mr Beck considers the balcony to be part of the unit 13 works, that is not part of the common property. He says the balcony will need to be stripped, properly graded, re-waterproofed and retiled. The rectification works will also include removal and replacement of the water damaged soffit situated underneath the balcony, and mould remediation works.
 - (b) Bathroom tap. The builder apparently reconstructed the two showers in this unit after it was discovered they were leaking. Although these particular leaks appear to have been rectified, the mixer tap servicing the vanity in the main bathroom has the hot and cold taps around the wrong way. That is, when the tap is in the cold water position, hot water flows, and when it is in the hot water position, cold water flows. Mr Beck says that wall tiles will need to be removed to rectify this problem.
 - (c) Grout has dislodged in the floor tiles in a number of areas. Mr Beck considers this to be the result of poor installation, in particular poor grouting at the time the tiles were installed. Mr Beck says the tiles need to be properly re-grouted.
 - (d) The main bedroom window has been poorly installed and does not close properly on the left-hand side of the window. The window needs to be properly re-installed.
 - (e) A number of the internal doors have poorly installed door hardware that is loose and functioning poorly. The door hardware requires rectification.
 - (f) Handles to overhead cupboards in the kitchen have been incorrectly installed. The handles have been installed in a horizontal position instead of the correct vertical position. The incorrect installation

means that the handles can damage adjacent joinery when the cupboard doors are opened. Rectification will, in effect, require replacing the cupboard doors.

- (g) The stone kitchen benchtop has a crack in it. Mr Beck considers the crack to have been the result of poor installation, or poor stone material. It is unlikely that the crack can be satisfactorily repaired, and a replacement benchtop will be required.
- (h) Doors and architraves have been poorly painted. In respect of the doors, the paint is patchy and they have not been painted on all six sides which is particularly important for doors in the wet areas.

169 Having viewed the unit, and having heard evidence from Mr Beck, I find that the items identified by Mr Beck constitute defective works for which the builder is liable.

170 Mr Beck has provided a cost assessment for rectification of the defective works, save for the rectification of the severely water damaged interior plaster walls and ceilings. Mr Beck excludes the cost of rectifying the walls and ceilings because he considers the cause of such damage is the defects in common property works and the leaking balconies located above this unit. As such, he allocates the cost of rectifying this consequential water damage partly to rectifying defects in the common property works, and partly to rectifying defects in the above located units.

171 Mr Beck assesses the cost of rectifying the remaining defective works as \$40,743, including margin allowances and GST. I am satisfied that this is a reasonable assessment of the cost to rectify the defective works, and I allow damages in the sum of \$40,743. As this sum is the assessed cost to attend to rectification works not yet done or paid for, it is not appropriate, in my view, to award interest on the sum.

Inconvenience and distress damages

172 Generally, damages for disappointment and distress are not recoverable in an action for breach of contract, however an award of damages might be made to a building owner in respect of physical inconvenience and distress suffered as a direct result of the builder's breach of contract.⁸

173 As noted above, of the apartments I inspected at the view, unit 13 was, by some considerable way, the most severely damaged from water ingress.

174 I accept Mr Stojic's evidence that in the period February 2012 to March 2015 he contacted the builder on numerous occasions because of significant water ingress into the apartment. The builder's attempts at rectification were wholly unsuccessful.

175 I accept that Mr Stojic was, in the time he lived in the unit up to mid-2018, significantly inconvenienced and distressed by the water leaks. Having

⁸ See *Boncristiano v Lohmann* [1998] VSC 228

viewed the unit, I accept that the inconvenience became so great that, eventually, Mr Stojic was forced to no longer reside in the unit. Such inconvenience was the direct result of the builder's breach of the S8 warranties.

- 176 Mr Stojic seeks \$5,000 as compensation for the inconvenience and distress. It is submitted that this is an appropriate award, having regard to the Tribunal's decision to award such sum, in similar circumstances, in *Anderson & Anor v Wilkie*⁹.
- 177 I agree that it is appropriate to make such award in this case, and I award the sum of \$5000.

Total damages re unit 13

- 178 For the above reasons, I assess damages in a total sum of \$45,743.
- 179 The damages arise from the builder's breach of the S8 warranties. It is not necessary to consider the alternative claim founded in negligence.
- 180 In respect of the apportionment claim as against the architect raised in the builder's Points of Defence, as the builder did not appear at the hearing to prosecute its defence, I make no finding as to the apportionment claim, or any reduction in the damages assessed as against the builder.
- 181 In conclusion, in this proceeding BP 1071/2015, I assess the applicant's damages arising as a result of the builder's breach of the S8 warranties as **\$45,743**.

THE UNIT 14 PROCEEDING – PROCEEDING BP 1065/2015

- 182 Antonietta Ter Haar and her husband Tjerk Ter Haar purchased this unit under an '*off the plan*' sale contract dated 2 February 2010, with settlement of the contract occurring on 30 December 2011. In July 2016, Mr Ter Haar passed away and his estate is represented by Mr Jason Ter Haar. Mrs Ter Haar and Mr Beck gave evidence in this proceeding.
- 183 This unit is an investment property which has been rented to various tenants since around January 2012. Since the time it was first rented, the owners received complaints from tenants in relation to a number of issues, in particular water leaking into the unit.
- 184 Mr Beck first inspected this unit on 27 November 2014 and he produced a report dated 24 January 2015. He carried out further invasive inspection in December 2015, and a further investigation in May 2017, with an updated report dated 5 June 2017.
- 185 Like unit 13, this unit suffers from water ingress caused partly by the cladding and plumbing issues discussed earlier in these reasons, and partly by leaking balconies located above this unit. The water damage is, however, not as severe as it is in the unit 13.

⁹ [2012] VCAT 432

186 Mr Beck identifies the following further items of defective work in unit 14:

- (a) Leaking balcony. Like unit 13, the balcony to this unit is not watertight and, as a result, water damage occurs to the soffit located below on the ground level. This balcony will need to be stripped, properly graded, re-waterproofed and retiled. The rectification works will also include removal and replacement of the water damaged soffit situated underneath the balcony, and mould remediation works.
- (b) There is cracking in the grout to the shower base, indicative of movement. Mr Beck considers the shower base should be sealed with a liquid clear membrane.
- (c) The problem with the overhead kitchen cupboard door handles in unit 13 is replicated in this unit. Rectification will require replacement of the cupboard doors.
- (d) Like unit 1, a number of the downlights throughout the unit are not functioning properly and will need to be replaced.
- (e) Also like unit 1, Mr Beck considers the quality of the painting of the plaster walls and ceilings to be generally of a low standard, and sanding and repainting is required.

187 Mr Beck has assessed the cost to rectify the above items, save for the water damage to the internal walls and ceilings, as \$33,597, inclusive of margin allowances and GST.

188 As with unit 13, the cost assessment does not include the cost to rectify the water damaged ceilings and walls because Mr Beck considers the cause of such damage is the defects in common property works and the leaking balconies located above this unit, and as such, he allocates the cost of rectifying this consequential water damage partly to rectifying defects in the common property works, and partly to rectifying defects in the above located units.

189 Having viewed the unit, and having heard evidence from Mr Beck, I find that the items identified by Mr Beck constitute defective works and a breach of the s8 warranties for which the builder is liable.

190 Save for one item, I accept Mr Beck's cost assessment as the reasonable cost to rectify the defective works. As with unit 1, the exception is the interior repainting. As discussed earlier in these reasons, replacement of the interior walls and ceilings to all of the units is allowed for as part of the fire safety rectification works cost. As such, I do not consider the owners of this unit should be further compensated for works included as part of the OC rectification works.

191 After deducting Mr Beck's cost assessment for the interior repainting, \$3564, the cost assessment for rectification works is \$30,033.

- 192 In addition to the matters raised in Mr Beck's reports, the applicants seek compensation in the sum of \$874.12 for past expense in respect of a number of miscellaneous items:
- (a) rectification of basin tap handle in May 2014, \$168.03;
 - (b) rectification of mixer tap handle in May 2014, \$88;
 - (c) repair of door lock in May 2014, \$50;
 - (d) repair front door handle in June 2014, \$130.03
 - (e) kitchen drawer reconstruction/adjustment in September 2014, \$88
 - (f) repair of kitchen draw in October 2014, \$160.03;
 - (g) replacement of letterbox in June 2015, \$135.03;
 - (h) replace letterbox lock May 2015, \$55
- 193 These miscellaneous items are not referenced at all in the applicants' latest pleading, the Amended Points of Claim dated 21 February 2018. They are referenced in the applicants' opening written submissions, but I am unable to say whether the builder received formal notification in respect of these miscellaneous items.
- 194 There is very little evidence in respect of these miscellaneous items. They are not included in Mr Beck's reports or evidence. They are not mentioned in the witness statement of Mrs Ter Haar.
- 195 The applicants' Tribunal book of documents includes a copy of the invoices confirming the sums claimed. Most of these invoices are invoices from the managing agent of the property. The invoices, themselves, provide little detail other than what I have referenced above. The managing agent of the unit was not called to give evidence.
- 196 When giving evidence, Mrs Ter Haar confirmed that the invoices had been paid, but she gave no other evidence as to the alleged faulty items. This is not surprising because, as confirmed by Mrs Ter Haar in her witness statement, her evidence is based largely upon a record of emails sent and received by her late husband.
- 197 If there is other documentary evidence in respect of these miscellaneous items, it is not referenced in Mrs Ter Haar's evidence.
- 198 There is little evidence before me other than the invoices themselves. The invoices may evidence expenditure on items, but they do not, on their own, prove liability on the part of the builder in respect of alleged defective works.
- 199 On the evidence before me, the applicants' claim in respect of these miscellaneous items fails.
- 200 The applicants' opening written submissions include two further items of expenditure in respect of which the applicants are seeking compensation. \$165 is claimed for the cost of a 'property report' in June 2015, and \$333 is

claimed as the cost of a 'water leak report' in August 2015. Again, these items are not referenced in the applicant's Amended Points of Claim.

- 201 In respect of the 'property report', an invoice from WT carpentry dated 28 June 2015 has been produced. The invoice confirms the charge of \$165 for a 'property report' for unit 14. The invoice provides no other information. Mrs Ter Haar gave no evidence in respect of the report, other than that the invoice had been paid. I do not know why the report was obtained or what it contains, or why it is said that the builder should bear the cost of obtaining it. On the evidence before me, the claim in respect of this item fails.
- 202 As to the 'water leak report', an invoice from the managing agent for the cost of obtaining the report (including the agent's management fee) has been produced. I am unclear as to the nature of the report and why it is said that the builder should bear the cost of it. It may be that the report is one of Mr Beck's reports referenced in Mrs Ter Haar's witness statement. If such is the case, the cost of such report might be considered as part of the applicants' cost of the proceeding. On the evidence before me, I am not satisfied that the cost of the report is a head of damage for which the builder is liable. I leave open the possibility that the cost of the report might be included in a future costs application.
- 203 For the above reasons, I assess the applicants' damages, for which the builder is liable, as \$30,033. As this sum is the assessed cost to attend to rectification works not yet done or paid for, it is not appropriate in my view to award interest on the sum.
- 204 The damages arise from the builder's breach of the S8 warranties. It is not necessary to consider the alternative claim founded in negligence.
- 205 In respect of the apportionment claim as against the architect raised in the builder's Points of Defence, as the builder did not appear at the hearing to prosecute its defence, I make no finding as to the apportionment claim, or any reduction in the damages assessed as against the builder.
- 206 In conclusion, in this proceeding BP 1065/2015, I assess the applicants' damages arising as a result of the builder's breach of the S8 warranties as **\$30,033.**

THE UNIT 19 PROCEEDING – PROCEEDING BP 1073/2015

- 207 The applicant, Pavlovski Properties Pty Ltd, purchased unit 19 by sale contract dated on or about 21 June 2012, with settlement of the contract occurring on or about 17 August 2012. The unit was purchased as an investment property. Mario Pavlovski, a director of the applicant, and Mr Beck gave evidence in this proceeding.
- 208 Mr Beck first inspected this unit on 27 November 2014 and he produced a report dated 24 January 2015. He carried out further invasive and water testing inspections in December 2015 and May 2017. He provided an updated report dated 5 June 2007. This unit has two balconies.

209 Mr Beck identifies the following items of defective work:

- (a) the balconies leak, causing consequential damage to units 13 and 14 located underneath unit 19. The balconies will need to be stripped, properly graded, re-waterproofed and retiled.
- (b) The shower in the main bathroom leaks. Mr Beck considers it will be necessary to strip, re-waterproofed and retile the shower. Rectification will also include rectification to nearby water damaged door jamb, architrave and skirting board.
- (c) Air-conditioning pipes extend through the external wall of this unit. The penetration hole is too large and is unsealed. Mr Beck says this penetration requires rectification.
- (d) There is cracking in the rendered balcony walls, particularly at wall junctions. The cracks should be properly sealed.
- (e) A number of internal and external doors collide with light fittings when fully opened. Doorstops are required to protect the light fittings.
- (f) Like other units, a number of the downlights throughout the unit are not functioning properly and will need to be replaced.
- (g) Also like other units, Mr Beck considers the quality of the painting of the plaster walls and ceilings to be generally of a low standard, and sanding and repainting is required.

210 Mr Beck has assessed the cost to rectify the above items as \$76,482, inclusive of margin allowances and GST.

211 Having viewed the unit, I find that the items identified by Mr Beck constitute defective works and a breach of the s8 warranties on the part of the builder. However, for a number of reasons, I do not allow all of Mr Beck's cost assessment.

212 As discussed earlier in these reasons, unit 13 and unit 14 have both suffered water damage to plaster walls and ceilings as a consequence of water leaks emanating partly from defects in the common property (mainly roof plumbing and cladding defects) and partly from the leaking balconies in units 18 and 19. In assessing the cost to rectify defects in units 13 and 14, Mr Beck makes no allowance for the cost to rectify this consequential water damage, his reasoning being that such cost should fall partly within the cost of rectifying common property defects and partly within the cost of rectifying balconies to units 18 and 19. Doing the best he can, Mr Beck apportions the cost of rectifying the consequential damage to units 13 and 14 as follows:

- 50% allocated to common property defects rectification;
- 25% allocated as part of balconies rectification in unit 18; and
- 25% allocated as part of balconies rectification in unit 19

- 213 The 25% allowance for unit 19 is a sum of \$4583.07, not including margin allowances and GST.
- 214 Although I understand Mr Beck's logic in apportioning the cost, in my view there should be no such allowance. This is because, as discussed earlier, the fire safety works rectification cost allows for the replacement of walls and ceilings in the units throughout the premises. I do not consider it reasonable to make further additional allowance as part of the balcony rectification costs for units 18 and 19. For this reason, I deduct \$4583.07 (plus margin allowances and GST) from Mr Beck's cost assessment.
- 215 I also deduct Mr Beck's allowance, \$1800 (plus margin allowances and GST) to touch up internal painting. Again, this is because the replacement of walls and ceilings is allowed as part of the fire safety rectification works costing.
- 216 I consider also that the cost allocated to rectify the air-conditioning pipes penetration should be deducted. In my view this item will be included as part of the general external cladding replacement works discussed earlier in these reasons. Accordingly, I deduct Mr Beck's allowance of \$400 (plus margin allowances and GST).
- 217 The three deductions, after including margin allowances and GST, total \$10,072. With this deduction, Mr Beck's cost assessment is reduced to \$66,410. As the rectification works have not yet been carried out or paid for, it is not appropriate to award interest on this sum.
- 218 The applicant also seeks recompense for past expense incurred in rectifying the following alleged defects in the building works:
- (a) repair and refitting of towel rail in May 2013, \$40;
 - (b) replacement of faulty downlights in January 2017, \$319;
 - (c) re-sealing of main shower in April 2017, \$695.
- 219 I am satisfied on the evidence given by Mr Pavlovski, set out in some detail in his witness statement, that the above works were required to rectify defects in the works carried out by the builder. Having viewed the invoices, I am also satisfied that the cost for the rectification works is reasonable.
- 220 The claim in respect of these miscellaneous items is not included in the applicant's Amended Points of Claim. However, because they are clearly raised in the witness statement of Mr Pavlovski, which has been filed and served, I am satisfied that the builder received notification of them.
- 221 I allow \$1054 as damages in respect of these miscellaneous items. I think it also fair that the applicant be awarded interest on this sum. Allowing for interest at the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983, and applying the interest from the end of the month in which each expense was incurred as referred to above, I calculate the interest as \$191.

- 222 For the above reasons, I assess damages as \$67,655, calculated as:
- (a) \$66,410 as the reasonable cost to attend to rectification works; and
 - (b) \$1245 for past expense incurred to repair defective works, together with interest on such expense.
- 223 The damages arise from the builder's breach of the S8 warranties. It is not necessary to consider the alternative claim founded in negligence.
- 224 In respect of the apportionment claim as against the architect raised in the builder's Points of Defence, as the builder did not appear at the hearing to prosecute its defence, I make no finding as to the apportionment claim, or any reduction in the damages assessed as against the builder.
- 225 In conclusion, in this proceeding BP 1073/2015, I assess the applicant's damages arising as a result of the builder's breach of the S8 warranties as **\$67,655**.

THE UNIT 18 PROCEEDING – PROCEEDING BP 164/2016

- 226 The applicants, Mr and Mrs Farley, purchased unit 18 by sale contract entered around late December 2012, with settlement around early 2013. The unit was purchased as an investment property and was rented out during the period the applicants owned it. The applicants sold the unit to a third party by sale contract dated 5 July 2016, with settlement of the sale occurring in September 2016. Mr Farley and Mr Beck gave evidence in this proceeding.
- 227 Mr Beck inspected the unit on 8 December 2015 and produced a report dated 9 December 2015. He produced a further report dated 2 June 2017. Mr Beck identified the following items of defective work:
- (a) The balcony leaks, causing consequential damage to unit 13 located underneath unit 18. Photos taken during invasive investigation carried out by Mr Beck reveal a crack extending through the entire Sycon floor substrate of the balcony. The balcony will need to be stripped, including repair or replacement of the substrate, properly graded, re-waterproofed and re-tiled.
 - (b) The shower in the primary bathroom leaks causing damage to skirting, architrave and floor substrate. Rectification requires stripping the bathroom, including the substrate, repairing the substrate, re-waterproofing, re-tiling and repair of consequential damage to timber and plaster surrounds.
 - (c) The rear external door and window unit has warped and no longer functions properly. Rectification will require removal and refitting of the unit.
 - (d) As with unit 13, the overhead kitchen cupboard handles have been installed incorrectly. Rectification will require replacement of the cupboard doors.

- (e) Doors and architraves have been poorly painted. In respect of the doors, the paint is patchy and they have not been painted on all six sides which is particularly important for doors in the wet areas.
- 228 Having viewed the unit, and having heard evidence from Mr Beck and Mr Farley, I find that the items identified by Mr Beck constitute defective works and a breach of the S8 warranties for which the builder is liable.
- 229 In his report of 9 December 2015, Mr Beck provided a cost assessment for rectification works in the sum of \$48,647, inclusive of margin allowances and GST.
- 230 In his subsequent report of 2 June 2017, he provides an updated cost assessment of \$55,201. The reason for the increase is not general inflation in building costs. Rather, by the time of his further report, Mr Beck had reached the view that the cost to rectify the leaking balcony should include a proportion of the cost to rectify the consequential water damage in the units 13 and 14 located below units 18 and 19. I have discussed this aspect of Mr Beck's costing above in relation to unit 19. Mr Beck apportions \$4583.07 (plus margin allowances and GST) as the proportion to be included in the unit 18 cost assessment. For the same reason as discussed above in respect of unit 19, I do not allow this inclusion as part of the cost to rectify the unit 18 balcony. Other than this, I consider Mr Beck's assessment to be reasonable. That is, I consider his original assessment of \$48,647 to be a reasonable assessment of the cost to rectify the defective works.
- 231 Mr Beck's cost assessment includes an allowance of \$12,983, inclusive of margin allowances and GST, to rectify the shower/bathroom.
- 232 Because of the poor state of the bathroom, and complaints received from the then tenant, in January 2016 the applicants arranged for the rectification of the shower/bathroom by 'AMG property solutions' at a cost of \$12,760. While the repairs were being carried out, the applicants arranged alternative accommodation for the tenant, at a cost of \$1732.61 to the applicants. Accordingly, in lieu of Mr Beck's cost estimate for rectification of the shower/bathroom, the applicants seek \$14,492.61 as the actual cost incurred by them.
- 233 Having regard to Mr Beck's assessment, and having heard evidence from Farley who produced quotation, invoice and payment records in respect of the cost of the shower/bathroom repair, I am satisfied that the sum expended by the applicants, \$14,492.61, is a reasonable and necessary expense incurred by the applicants in rectifying the defective shower/bathroom works. I allow that sum.
- 234 For the remaining defective works, the owners claim the sum assessed by Mr Beck, \$42,218. But this figure is based on Mr Beck's June 2017 total cost assessment of \$55,201. As discussed above, I have found that Mr Beck's original cost assessment, \$48,647, is appropriate. After deducting

from this sum Mr Beck's cost allocation to repair the shower/bathroom (\$12,983), the assessed cost to rectify the remaining defects is \$35,664.

- 235 The owners submit that the damages should be measured as the cost expended by them in rectifying the shower/bathroom, \$14,492.61, together with the cost as assessed by Mr Beck to rectify the remaining defective works. They say that, even though they have sold the unit, this remains the appropriate and fair measure of their damages arising by reason of the builder's breach of the S8 warranties.
- 236 Save that I say that, for the reason discussed above, the cost to rectify the defects other than the shower/bathroom repairs is \$35,664, I accept the submission.
- 237 As noted earlier in these reasons, the general rule with respect to damages for breach of contract is that where a party sustains a loss by reason of the breach, that party is, in so far as money can do it, to be placed in the situation he would have been had the contract been properly performed. The general rule is subject to the qualification that it must be a reasonable course to adopt.
- 238 Also as noted earlier in these reasons, in a domestic building contract context, where the breach of contract is poor quality works which do not comply with the S8 warranties, damages would be appropriately assessed as the cost to bring the works to conformity, that is the cost to rectify the works so that they comply with the S8 warranties, provided it is not an unreasonable course to adopt.
- 239 Although the applicants were not parties to the building contract (that is the contract between the developer and the builder), under section 9 of the DBC Act they may pursue a claim against the builder for breach of the S8 warranties. In assessing such claim, the general principles as to damages for breach of contract applies.
- 240 The question, then, is whether it is unreasonable to apply the prima facie measure of damages for breach of contract. That is, would it be unreasonable to measure the applicants' damages as the cost to rectify the defective works?
- 241 The fact that the unit has been sold is a circumstance that may be considered in determining whether it would be unreasonable to apply the prima facie measure of damages.
- 242 Prior to the sale of the unit in July 2016, the applicants had accrued loss and damage arising from the builder's breach of the S8 warranties. They had incurred expense to rectify the leaking shower/bathroom, and their unit had significant other building defects. It would have been appropriate, at that time, to assess the loss and damage as \$50,156.61, calculated as follows:
- \$14,492.61 being the cost expended by the applicants in rectifying the leaking shower/bathroom; and

- \$35,664 as the cost, on Mr Beck's assessment, the applicants would incur to rectify the remaining defects.

243 There is no evidence before me to suggest that it would have been unreasonable, at that time, to assess the applicants' damages otherwise. And there is no evidence before me to suggest that the assessment of the applicants' damages on this same basis has become, by reason of the sale of the unit, an unreasonable course to adopt.

244 It might be different if, for example, after the sale of the unit the builder attended to rectification works or otherwise compensated the new owner of the unit in respect of the defective works. But there is no evidence such as this before me, or any other evidence upon which I might find that the prima facie measure of damages is not a reasonable course to adopt.

Interest

245 By the Amended Points of Claim filed in the proceeding, the applicants include a claim for interest.

246 As discussed earlier in these reasons, section 53 of the DBC Act provides a wide range of orders which the Tribunal may make in resolving a domestic building dispute, including an order for damages in the nature of interest which may be calculated at the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983*.

247 As noted above, the applicants expended \$14,492.61 in early 2016 in respect of the shower/bathroom repairs. In my view it is fair that they receive compensation in the nature of interest on this sum, and I think it fair that the interest be calculated pursuant to the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983*.

248 The date by which the expense was finally and fully paid is not clear, however from the documentation provided, and Mr Farley's evidence, I think it fair to treat the payment as having been completed by around April 2016. I will apply interest from 30 April 2016. On this basis, I calculate the interest, to the date of these reasons, as \$3694.

249 As to the remainder of the damages, \$35,664 as the assessed cost to rectify the remaining defects, I do not consider it appropriate or fair to award interest on this sum because the applicants never actually expended this sum.

Conclusion on the unit 18 proceeding

250 For the reasons discussed above, I assess the applicants' damages, inclusive of interest, as \$53,850.61.

251 In respect of the apportionment claim as against the architect raised in the builder's Points of Defence, as the builder did not appear at the hearing to prosecute its defence, I make no finding as to the apportionment claim, or any reduction in the damages assessed as against the builder.

252 In conclusion, in this proceeding BP 164/2016, I assess the applicants' damages arising as a result of the builder's breach of the S8 warranties as **\$53,850.61**.

CONCLUSION OC PROCEEDING AND THE RELATED PROCEEDINGS

253 As noted earlier in these reasons, by reason of the builder being placed into liquidation on 20 November 2018, I will order in the OC proceeding and each of the related proceedings that the proceeding is struck out with a right to apply for reinstatement. I will also order that a copy of these reasons be sent to the appointed liquidator.

SENIOR MEMBER M. FARRELLY