

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP118/2016

CATCHWORDS

Scope of Tribunal's power under s130 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) to make further orders in a later proceeding and when functus officio: *Varnavides v VCAT* [2005] HCA 231; *Woollard v Newland International (Vic) Pty Ltd* [2017] VCAT 163. Whether within the scope of s130 of the VCAT Act to make further orders in aid of previous orders in the nature of specific performance made under s53(2)(h) of the *Domestic Building Contracts Act 1995: Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, considered. Submission made after the hearing without leave: *Frugniet v Law Institute of Victoria* [2012] VSCA 178, considered.

FIRST APPLICANT	Thi Ngoc Loan Tran
SECOND APPLICANT	Cong Hoan Nguyen
RESPONDENT	Carlisle Homes Pty Ltd (ACN 106 263 209)
WHERE HELD	Melbourne
BEFORE	MJF Sweeney, Member
HEARING TYPE	Hearing
DATE OF HEARING	22 June 2017
DATE OF ORDER	4 July 2017
CITATION	Tran v Carlisle Homes Pty Ltd (No 2) (Building and Property) [2017] VCAT 967

ORDER

1. Leave granted at the hearing to the First and Second Applicants to withdraw purported additional grounds of defence, filed on 21 June 2017 in their entirety.
2. In respect of the First and Second Applicants' Further Amended Points of Defence to Amended Points of Counterclaim, dated 19 June 2017:
 - (i) leave granted at the hearing to withdraw the last sentence of paragraph 5(b);
 - (ii) leave granted at the hearing to withdraw the last sentence of paragraph 12;
 - (iii) leave granted at the hearing to withdraw paragraph 14, sub paragraph M;

- (iv) leave granted at the hearing to withdraw paragraph 14, sub paragraph S (formerly mischaracterised as ‘O’), save as to the last 4 sentences.
3. In respect of the First and Second Applicants’ Further Amended Points of Defence to Amended Points of Counterclaim, dated 19 June 2017, on the application of the Respondent for strike out of certain grounds made at the commencement of the hearing, pursuant to s75 of the *Victorian Civil and Administrative Tribunal Act* s75, I made the following orders:
- (i) paragraph 5, sub paragraphs (a)(ii) and (a)(iii) are struck out;
 - (ii) paragraph 5, sub paragraph (b), save as to the last sentence of 5(b) which is withdrawn, is struck out;
 - (iii) paragraph 9 is struck out;
 - (iv) paragraph 14, sub paragraphs A, B, C, E, F, H, I, Q (formerly mischaracterised as ‘M’), and sub paragraph R (formerly mischaracterised as ‘N’) are struck out.
4. In respect of the First and Second Applicants’ Further Amended Points of Defence to Amended Points of Counterclaim, dated 19 June 2017, and having heard the evidence and submissions of the parties, I order as follows:
- (i) paragraph 5, sub paragraph (e) is struck out;
 - (ii) paragraph 12, save as to the last sentence which is withdrawn, is struck out;
 - (iii) paragraph 14, sub paragraphs D, G and J are struck out.
 - (iv) paragraph 14, sub paragraph S (formerly mischaracterised as ‘O’), save as to the last 4 sentences which are withdrawn, is struck out.
5. In respect of the Respondent’s Amended Points of Counterclaim, dated 29 March 2017, paragraph 13(e), leave was granted at the hearing to withdraw.
6. Pursuant to s130 of the *Victorian Civil and Administrative Tribunal Act*, and being satisfied:
- (a) of the completion or achievement of the matters ordered under Order 4 and Order 6 of the Orders made on 7 November 2016;
 - (b) that the First and Second Applicants have failed to pay amounts found to be due and payable under Order 5(c) of those orders,
- the First and Second Applicants, Thi Ngoc Loan Tran and Cong Hoan Nguyen, must pay the Respondent, Carlisle Homes Pty Ltd, \$76,867.20 calculated as follows:
- (i) the final claim amount of \$68, 480.70;
 - (ii) interest of \$4,257.80;
 - (iii) damages for costs of security of \$3,696.00, and
 - (iv) damages for cost of insurance cover of \$432.70.

7. The First and Second Applicants' claims for set off are dismissed.
8. Having heard the parties, no order as to costs.
9. Pursuant to s115B(1) and s115C of the *Victorian Civil and Administrative Tribunal Act*, being satisfied that the Respondent has substantially succeeded in its application, the First and Second Applicants, Thi Ngoc Loan Tran and Cong Hoan Nguyen, must reimburse the Respondent, Carlisle Homes Pty Ltd, the application fee paid by the Respondent of \$79.90.
10. The Principal Registrar is directed to send a certified copy of this order to the respondent.

MJF Sweeney
Member

APPEARANCES:

For the Applicants

Ms J. Anthony-Shaw of Counsel

For the Respondent

Ms D. Abu-Elias, Respondent's Corporate
Counsel

REASONS

INTRODUCTION

- 1 The respondent, Carlisle Homes, seeks payment of \$68,480.70 plus interest and damages of \$8,386.50 from the first and second applicants, Ms Tran and Mr Nguyen (Owners), as the final claim for completion of the Owners' new home in Keysborough.
- 2 The application, in respect of the final claim arising under the terms of a construction agreement between the parties (Construction Agreement), is made as a result of the hearing before me on 7 November 2016¹ (2016 hearing) where I made a number of orders (2016 orders).²
- 3 The 2016 orders, amongst other matters, ordered that Carlisle Homes complete the Construction Agreement by constructing a balustrade for rear balcony No. 2 in compliance with relevant regulations and Rescode requirements relating to overlooking into a neighbouring property. It was ordered that the balustrade be constructed to particular specifications. These specifications complied with the relevant regulations and Rescode requirements.
- 4 Pursuant to the 2016 orders, once the balustrade was completed, together with completion of all remaining works under the Construction Agreement, including obtaining an Occupancy Permit, the Owners were ordered to pay all amounts due in accordance with the Construction Agreement. Carlisle Homes say that the amounts, referred to in paragraph 1, are amounts in respect of works ordered to be completed and paid under the 2016 orders.
- 5 The Owners, particularly Ms Tran, who presented the case on behalf of the Owners at the 2016 hearing, were extremely unhappy about having the rear balustrade built with screening so as to prevent their property overlooking the neighbouring property. Ms Tran maintained at the 2016 hearing that the rear balustrade was not, and should not be, subject to the regulations and Rescode requirements governing overlooking. The Owners' argument at the 2016 hearing included that if the balustrade was, or became subject to overlooking regulations, that situation only arose because of Carlisle Homes long delay in completing the works, in breach of the Construction Agreement.
- 6 Prior to the 2016 hearing, the Owners had previously applied to the City of Greater Dandenong (Council) for a dispensation from overlooking requirements, but the application was rejected.
- 7 The Owners were unsuccessful in maintaining their arguments following which the 2016 orders were made which required, amongst other matters,

¹ *Tran v Carlisle Homes Pty Ltd* (Building and Property) [2016] VCAT 1873.

² Refer to relevant 2016 orders, restated at paragraph 18.

that the rear balustrade be constructed in the manner described in paragraph 3 above.

- 8 In the present proceeding, the Owners admit that the rear balustrade has now been built in accordance with the specification stated in the 2016 orders. However, they assert that shortly after the 2016 orders and reasons for decision were issued by the Tribunal on 7 November 2016, the Council, in response to a request of the Owners, allegedly advised that incorrect information had been submitted to it by Carlisle Homes, including measurements identifying the neighbouring secluded private open space.
- 9 The Owners allege that if they provide the correct measurements, together with a new application for dispensation, the Council will provide a compliance dispensation in respect of required height and material for the balustrade³ to the rear balcony.
- 10 The Owners further say that Order 4(b) of the 2016 orders, which directed Carlisle Homes to complete all remaining works in accordance with the Construction Agreement (apart from the rear balcony/balustrade works), have not been done in accordance with the Construction Agreement.
- 11 They also say that work in respect of the rear balustrade, admitted by them as being constructed in accordance with the 2016 orders, was nevertheless not done in a proper and workmanlike manner⁴ or was not reasonably fit for purpose, constituted by not being able to see into the garden⁵ as they had originally envisaged.
- 12 The Owners also complain about delay in completion of the works under the Construction Agreement due to false or misleading information⁶ of Carlisle Homes arising from the building surveyor's allegedly incorrect measurements related to secluded private open space.
- 13 The essence of the Owners defence referred to in paragraphs 11 and 12 appears to be that Carlisle Homes have not completed the rear balustrade 'in accordance with the [Construction] Agreement' because the Construction Agreement requires that all works be done in a proper and workmanlike manner and with reasonable care and skill. They assert this position because the Construction Agreement originally specified a rear balcony of 1.0 metre high with clear glass and that any different execution of these works, even in compliance with the 2016 orders, cannot be regarded as having been done 'in accordance with the [Construction] Agreement'.

³ Applicants' Further Amended Points of Defence to Amended Points of Counterclaim, dated 19 June 2017 (Owners' Defence), paragraph 3.

⁴ Owners' Defence, paragraph 5(a).

⁵ Owners' Defence, paragraph 5(d).

⁶ Owners' Defence, paragraph 5(c).

- 14 The Owners also allege the works contain many defects, including a number which are listed in the Completion of Works Certificate, dated 10 January 2017, which remain unrepaired.⁷
- 15 Finally, the Owners claim a ‘deduction’ of \$82,680.16 from the final payment claim made by Carlisle Homes⁸, the subject of the present application. The deduction claim appears to be in the nature of a set off.

POWERS & JURISDICTION

- 18 Carlisle Homes’ application arises out of my 2016 orders made on 7 November 2016. It is necessary to refer to an extract of the relevant part of these orders:

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

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

...

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

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

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

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

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

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

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

⁷ Owners’ Defence, paragraph 8.

⁸ Owners’ Defence, paragraph 14, sub paragraph N.

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

6. If the owners fail to comply with order 5(b), the builder is directed to install to rear balcony No 2 an aluminium louvre type balustrade in the 'surfmist' colour to a height of 1.7m.

- 19 At the 2016 hearing, the claims of the Owners were many. Save for the small sum in Order 2 of the 2016 orders, all other claims of the Owners were dismissed. The Carlisle Homes counterclaim was substantially successful. The Owners did not lodge application for leave to appeal against that decision.
- 20 Carlisle Homes in its present application seeks an order that the Owners be compelled to make the payments referred to in order 5(c) upon proof by it of its compliance with the matters required of it under Order 4 and Order 6.
- 21 The power of the Tribunal to make orders of the type sought by Carlisle Homes arises under s130 of the *Victorian Civil and Administrative Tribunal Act 1998* (Act). Section 130(1) states that the power of the Tribunal to make an order or other decision includes a power to make further orders that the Tribunal thinks fit. Section 130(2)(e) states that the power to make further orders includes an order necessary or desirable to give effect to an order or other decision.
- 22 It is implicit in the 2016 orders, by their very nature, that further orders may be desirable or necessary, such as for the purpose of examining the finished works or determining what amounts may be payable.
- 23 For the reasons below, I am satisfied that s130 gives me the power to make such further orders as are necessary to give effect to the 2016 orders so that, if proven by Carlisle Homes that the works have been properly completed, the Owners can be ordered to make payment of a particular sum.
- 24 However, beyond this, the power bestowed by s130 is confined in accordance with its terms. There is no express intent or power that it have some other wider operation, such as to give power and jurisdiction for the Tribunal to re-open a determination or otherwise give fresh consideration or receive new evidence on matters already finally adjudicated upon. If Parliament had intended the section to qualify settled common law principles of *res judicata* or when a court or tribunal is considered *functus officio*, then that would be clearly stated.

Why it is implicit from my 2016 orders, ordering completion and payment, that further orders may be necessary or desirable

- 25 The 2016 orders were made under the power given to the Tribunal by s53(2)(h) of the *Domestic Building Contracts Act 1996* (DBC Act).⁹ This

⁹ *Tran V Carlisle Homes Pty Ltd* (Building and Property) [2016] VCAT 1872 at paragraph 272.

gives the Tribunal the power to order that a contract be completed. It is a power that is in the nature of, and akin to, an order for specific performance made by a court.

- 26 It was generally submitted by Counsel for the Owners, and it arises from the Owners' Defence, that I should now reconsider issues associated with the balustrade works referred to in the 2016 orders, Orders 4, 5 and 6, given that I am being asked by Carlisle Homes to make further orders. It appears from this submission that I am being asked to interpret s130 of the VCAT Act as enabling me to reopen my decision of 7 November 2016, receive fresh evidence and make new orders. I reject this.
- 27 In support of the Owners' submission, I was referred to a purported, more recent, position of the Council¹⁰ demonstrating a change in the Council's previous position concerning the issue of overlooking under Rescode. The purported change of position by the Council would apparently enable the Owners to construct a balustrade acceptable to them. Counsel submitted that this new evidence enables me reconsider the substantive findings of my original decision.
- 28 The thrust of this submission, consistent with a number of the grounds in the Owners' Defence, is that the power given by s130 of the VCAT Act can be interpreted so as to put to one side that I would be otherwise functus officio. Carlisle Homes solicitor opposed this submission and further sought that several grounds of the Owners' Defence be struck out on the grounds that I had made a final determination on the matters, in effect submitting that I was functus officio. I will return to the strike out application below.
- 29 The scope of the operation of s130 of the VCAT Act, including ss(2)(e), was recently considered by Deputy President Lulham in *Woollard v Newland International (Vic) Pty Ltd*¹¹. He stated that it was not uncommon for the Tribunal to order a proceeding to be adjourned, or struck out with a right of reinstatement, when it orders a respondent to repair goods or building work, so that if there is a dispute over the adequacy of that repair, the Tribunal is still seized of the matter.
- 30 In his considerations, the Deputy President cited the following passage from the Victorian Supreme Court of Appeal in *Varnavides v VCAT*:¹²

Section 130 confers upon the tribunal what can reasonably be described as the commonplace incidental powers necessary to ensure the efficacy of its ordinary operations. There is no reference or suggestion in the terms, context, or the evident purpose of section 130, that it has any relevance to the power of VCAT to address acts of contempt which are specifically dealt with in another division of the Act. The possibility that the legislature would, through the granting of

¹⁰ Refer paragraphs 8 and 9 above.

¹¹ [2017] VCAT 163.

¹² [2005] VSCA 231, paragraph 26, per Vincent JJA and Harper AJA

normal incidental powers, have intended to confer powers of punishment beyond those specifically enacted is altogether unlikely.

- 31 The Court of Appeal stated that the scope of s130 is limited to commonplace incidental powers necessary to ensure the efficacy of its ordinary operations. I adopt the expression of Deputy President Lulham that the cited passage supports the view that s130 does not sweep aside the consequences of the Tribunal being *functus officio*.
- 32 In my view, Carlisle Homes' application springs directly from what might fairly be described as an application for the Tribunal to exercise incidental powers necessary to ensure the efficacy of VCAT's orders, when it acts under the powers given to the Tribunal under s53(2)(h) of the DBC Act.
- 33 In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*,¹³ when considering what is meant by 'supervision' by a court arising from an order for specific performance, it was held 'that supervision would in practice take the form of rulings by the court, on application made by the parties, as to whether there had been a breach of the order.'
- 34 The Court continued: 'Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order.'
- 35 In the present application that is what is being asked of me. The task for me is to examine if the work pursuant to the 2016 orders has been completed and paid for. The application of Carlisle Homes and the task before me spring directly out of those 2016 orders, orders akin to an orders for specific performance.
- 36 Under the power given by s130 of the VCAT Act, my deliberations are confined to those matters directly touching on compliance by Carlisle Homes with the 2016 orders, Orders 4(a) to 4(c) and Order 6, and by the Owners with Order 5(c).
- 37 Beyond this, I have no power, being *functus officio*, to reopen the substantive matters already adjudicated upon by me and on which the 2016 orders were made and authenticated pursuant to s116 of the VCAT Act and Rules.¹⁴

STRIKE OUT OF GROUNDS OF THE OWNERS' DEFENCE

- 38 At the commencement of the hearing of Carlisle Homes' application, Carlisle Homes sought to have several grounds of the Owners' Defence struck out, pursuant to s75 of the VCAT Act. I heard the parties' submissions and made findings and orders for a number of the grounds to be struck out.¹⁵ These reasons are given from paragraph 40 below.

¹³ [1998] AC 1, per Lord Hoffmann.

¹⁴ *Victorian Civil and Administrative Rules*, Rule 4.17.

¹⁵ For these grounds struck out, refer to Order 3.

- 39 In relation to certain other grounds, there was insufficient evidence on which to make findings justifying strike out orders. In relation to whether these other grounds should or should not be struck out, I reserved any decision to enable the receipt of relevant evidence in the course of the conduct of the hearing. Following the conclusion of the hearing, I determined that additional grounds of the Owners' Defence should be struck out. My reasons are given, from paragraph 41 below.
- 40 The reasons for my strike out orders of several grounds of the Owners' Defence at the commencement of the hearing¹⁶ pursuant to s75 of the VCAT Act are as follows:
- (a) paragraph 5, sub paragraphs (a)(ii): the height of the rear balustrade and associated materials for the works were the subject of the 2016 orders, Orders 4 and 6. The matter has been finally determined and cannot be reopened;
 - (b) paragraph 5, sub paragraphs (a)(iii): the overlooking issue stated in this ground was finally determined by the 2016 hearing and reasons for decision, including paragraphs 155 to 189;
 - (c) paragraph 5, sub paragraph (b), save as to last sentence of 5(b) which was withdrawn, these grounds, generally stated and without particularisation, were finally determined by the 2016 hearing and reasons for decision, including paragraphs 155 to 181;
 - (d) paragraph 9: these grounds concern whether the rear balustrade/balcony has been constructed in accordance with the Building Agreement, as that matter was finally determined at the 2016 hearing by the making of the 2016 orders, ordering the completion of the balustrade as directed in those orders. The matter has been finally determined and cannot be reopened;
 - (e) paragraph 14, sub paragraphs A, B and C: these are the Owners claims for interest on home loans and liquidated damages respectively, the subject of the 2016 hearing. They were finally determined and dismissed by the 2016 hearing;
 - (f) paragraph 14, sub paragraphs E and F: these are the Owners claims for liquidated damages for a variation No.4 and alteration of the building facade respectively, both the subject of the 2016 hearing. They were finally determined and dismissed by the 2016 hearing;
 - (g) paragraph 14, sub paragraphs H and I: these are the Owners claims for damages for gas and water costs respectively, both the subject of the 2016 hearing. They were finally determined by the 2016 hearing and reasons for decision, including paragraphs 244 to 248;
 - (h) paragraph 14, sub paragraph Q (formerly mischaracterised as 'M'): this ground seeks to reopen issues which were finally determined at

¹⁶ For these grounds struck out, refer to Order 3.

the 2016 hearing. Further, final orders for specific performance were made by the 2016 orders;

- (i) paragraph 14, sub paragraph R (formerly mischaracterised as ‘N’) : this ground seeks to reopen issues relating to the rear balustrade which were finally determined at the 2016 hearing.

41 The reasons for my strike out of other grounds¹⁷ referred to in paragraph 39 above following the hearing are as follows:

- (a) paragraph 5, sub paragraph (e): these grounds are generally stated with particulars of incomplete and defective work to be provided by the Owners at the hearing, together with expert reports. No particulars and no expert reports were provided. To the extent that these claims for incomplete or defective works are for works outside the scope of those referred to by the Owners in the Certificate of Works tendered by Carlisle Homes, they are matters that were finally determined by the 2016 hearing and cannot be reopened. To the extent they refer to works complained of in the Certificate of Works, they have been considered and decided in paragraphs 61 to 67 below;
- (b) paragraph 12, save as to the last sentence which is withdrawn: these grounds, to the extent they relate to allegedly incorrect plans, seek to reopen matters finally determined at the 2016 hearing and cannot be reopened. To the extent that one aspect of the grounds relates to an alleged change of position by the relevant Council concerning overlooking regulations, these have been considered and decided, including in paragraphs 52 to 67 below;
- (c) paragraph 14, sub paragraphs D: this concerns the Owners’ liquidated damages claim under the Building Agreement in respect of matters already finally determined at the 2016 hearing and cannot be reopened;
- (d) paragraph 14, sub paragraph G: the claim for an application fee is misconceived, or has already been finally determined at the 2016 hearing and cannot be reopened;
- (e) paragraph 14, sub paragraph J: this ground, to the extent not already considered and determined in this application below, seeks to reopen a matter finally determined at the 2016 hearing;
- (f) paragraph 14, sub paragraph S (formerly mischaracterised as ‘O’), save as to the last 4 sentences which are withdrawn: three grounds are particularised. They are the facade issue, the ‘zero lot line’ issue and the balustrade issue. These matters have been finally determined at the 2016 hearing and cannot be reopened.

¹⁷ For these grounds struck out, refer to Order 4.

OWNERS'S SUBMISSION AFTER HEARING CONCLUDED

- 42 The day after the end of the hearing, without leave, the Owners sent a further submission to the Tribunal dated 23 July 2017, copied to Carlisle Homes. I received this submission on 28 July. The Owners submitted that there had been some confusion about instructions they gave to their Counsel and that the Owners' Defence, at paragraph 5, should be retained in its entirety, with additional evidence to be adduced in support. The Owners' evidence in support was referred to by reference to evidence already tendered and considered at the 2016 hearing.
- 43 Given my findings below, it is unnecessary for me to seek a reply submission from Carlisle Homes on the question of whether leave should be granted and, if so, a response to evidence sought to be put by the Owners. Before dealing with the Owners submission, made without leave, I refer to and repeat my reasons for decision and the authorities following the 2016 hearing, particularly at paragraphs 34 to 39. From those reasons, the Owners ought be aware of the procedure, including the clear view of the Victorian Supreme Court of Appeal in *Frugtniet v Law Institute of Victoria*¹⁸ on the necessity to seek leave.
- 44 However, as the matter can be disposed of shortly and without prejudice to Carlisle Homes, I will address the Owners' submission made without leave. At the hearing, Counsel for the Owners, advised that she was instructed to seek leave of the Tribunal to withdraw several grounds of the Owner's Defence. These are referred to in my orders, Order 2 above. In Order 2, I granted leave for the Owners to withdraw paragraph 5, sub paragraph (b), as to the last sentence only. Leave was not sought by Counsel to withdraw the remainder of paragraph 5. Subject to my later orders in this mater, the remainder of paragraph remained as part of the Owners' Defence.
- 45 In so far as the Owners' submission seeks the retention of paragraph 5(b), including the last sentence, it is seeks some redress for an alleged breach of s136 of the VCAT by Carlisle Homes. Section 136 of the VCAT Act concerns a person knowingly giving false or misleading information to the Tribunal or a registrar for which a penalty may be imposed.
- 46 I find that, if this ground of the Owners' Defence had not been withdrawn, I would have struck it out for want of jurisdiction. The Tribunal does not have power to make an order under s136 because it has no criminal jurisdiction.¹⁹
- 47 The Owners also submit that they wish to press their grounds as stated in the remainder of paragraph 5(b). As I have said, it was not withdrawn in the first place. However, for the reasons I have given in paragraph 40(c), I have

¹⁸ [2012] VSCA 178 (13 August 2012) per Warren CJ, Nettle JA and Beach AJA.

¹⁹ *Al-Hakim v Monash University* [2000] VCAT 2301.

ordered that the grounds be struck out for the reasons stated there. There is no basis for me to consider the submission further.

THE CURRENT APPLICATION

48 At the hearing, the Owners either conceded or did not oppose the following matters:

- (a) that the works identified and ordered to be carried out under the 2016 orders, Order 4(a), ordering construction of the rear balustrade to particular specifications in compliance with relevant regulations, have been done in accordance with the 2016 orders;
- (b) that the Occupancy Permit has been issued and the Completion of Works Certificate been signed and issued;
- (c) that, subject to the Owners' set off, the Owners are obliged under the Building Agreement to pay the final claim of \$68,648.70 and take possession of the premises;
- (d) that interest is payable by the Owners under the Construction Agreement from 10 January 2017 to 22 June 2017 and that it is agreed in the sum of \$4,257.80;
- (e) that damages for cost of insurance are payable by the Owners and agreed at \$432.70;

49 The Owners' Defence, at paragraph 14 N, states the sum of \$82,680.16 is also claimed as a deduction from the final claim sought by Carlisle Homes. Whilst the nature of the 'deduction' claim was not clear, it was effectively treated by the Owners as a claim for set off. After allowing for the grounds either struck out or withdrawn, the sum claimed as a set off is reduced.

50 However the Owners' claim may be described, for the reasons given above, I can only make such further orders under s130 of the VCAT Act in respect of matters that arise from whether the orders in the nature specific performance have been complied with. Thus, subject to the Owners being able to prove that the works ordered under the 2016 orders were defective, and provided the claims giving rise to a set off have not already be adjudicated in the 2016 hearing, only then can such a set off be considered.

51 Thus, the issues that arise for decision in this proceeding are as follows:

- (a) whether the balustrade works, conducted pursuant to Orders 4(a) and 6 of the 2016 orders, were completed in accordance with the Construction Agreement;
- (b) whether all remaining works, conducted pursuant to Order 4(b) of the 2016 orders, were completed in accordance with the Construction Agreement or are defective;
- (c) if there are defective works, whether the Owners are entitled to set off the costs;

- (d) whether the Owners are entitled to set off an amount against the claim for damages for cost of providing security to the property;
- (e) whether the Owners are entitled to set off the amounts sought under sub paragraphs 14 D, G, H, I, J, K, and L.

Were the balustrade works, conducted pursuant to Orders 4(a) and 6 of the 2016 orders, completed in accordance with the Construction Agreement?

- 52 As referred to in paragraphs 8 and 48(a) above, the Owners admit that the balustrade works were carried out in accordance with the 2016 orders. However, as referred to in paragraph 11 above, the Owners also assert that these works do not comply with the Construction Agreement because the Construction Agreement originally provided for a balustrade of 1.0 metres in height. Further that the only reason any change in height had been required was due to Carlisle Homes' allegedly poor performance, which the Owners assert is a performance or standard that is not 'in accordance with the [Construction] Agreement'.
- 53 In support of this proposition, the Owners say that the balustrade could have been and should have been constructed, as originally provided for in the Construction Agreement, so as to avoid any overlooking, and the recent evidence confirming that the Council would now approve a lower balustrade is proof of the failure of Carlisle Homes to do the works in accordance with the Construction Agreement.
- 54 In my view, this proposition seeks to reopen matters already exhaustively and finally determined in the 2016 hearing²⁰ and, secondly, is a proposition that is directly contrary to the 2016 orders. In any event, the issue raised by the Owners asks the wrong question. It is not a question of whether the balustrade works have been completed 'in accordance with the [Construction] Agreement' but rather whether they have been completed as ordered under the 2016 orders. Nevertheless, I will deal with the proposition as argued by the Owners.
- 55 First, concerning any impact of delay as the cause of the Owners property later becoming subject to overlooking regulation²¹ following the 2016 hearing, I found that Carlisle Homes was not responsible for any delay, including the delay complained of by the Owners, occurring in the period from the Owners signing of a sales quotation up to the issue of a building permit.
- 56 As this matter has already been finally determined following the 2016 hearing, and is the subject of the 2016 orders, I am unable to reconsider it for the reasons already given about being *functus officio*.

²⁰ *Tran v Carlisle Homes Pty Ltd* (Building and Property) [2016] VCAT 1873, paragraphs 9 to 10 and 202 to 235.

²¹ Refer to paragraph 5 above, argument of the Owners at the 2016 hearing.

- 57 Secondly, the proposition of the Owners that the works were not completed ‘in accordance with the [Construction] Agreement’ is directly contrary to the 2016 orders. The 2016 orders are clear. The balustrade works are to be carried out in accordance with the 2016 orders. The works are not to be carried out in accordance with the Construction Agreement but carried out in the manner expressed in Order 4(a) and Order 6 of the 2016 orders.
- 58 In circumstances where the Owners have admitted that the balustrade works were in fact carried out in accordance with the 2016 orders, and where no complaint is made about the intrinsic quality or workmanship of the balustrade construction itself, the Owners claim is not proved and is dismissed.
- 59 For completeness, if it was necessary for me to decide, which it is not for the above reasons, the Owners’ assertion that the Council now adopts a position where they will approve a balustrade built to 1.0 metres in height was not borne out by the evidence. The email of Mr George Drakopoulos, Planning Surveyor with the City of Greater Dandenong, dated 15 May 2017, states the Council’s reasons for refusing a dispensation from the Rescode regulations governing overlooking. There was insufficient evidence from the Owners to show the Council’s position has changed since 15 May 2017. In any event, if it had changed, that is a matter for the Owners and not concerned with the issues I have to determine in this hearing.
- 60 For these reasons, I find that Carlisle Homes has completed the balustrade works as specified under the 2016 orders and has done so to an acceptable standard of workmanship.

Were all remaining works, conducted pursuant to Order 4(b) of the 2016 orders, completed in accordance with the Construction Agreement or are they defective?

- 61 The Owners admit that they signed the four page Completion of Works Certificate on 10 January 2017 (Certificate). The Certificate detailed 65 items noted as requiring attention. At the time that the Owners signed the Certificate, all items were noted as having been satisfactorily completed.
- 62 Mrs Tran said however that she signed the Certificate only because she was told by a representative of Carlisle Homes that if she signed, this would not force her to take possession of the property. She said she signed even though the rectification of some defects was not completed. She said the matters were minor and included some skirting boards and power points.
- 63 Mrs Tran, in evidence in chief, said that despite there being some defects not yet remedied under the Certificate, she could still take possession and occupancy, as an Occupancy Permit had been issued. She acknowledged under cross examination that she could take possession and then claim rectification of the defects.

- 64 The Owners' Defence, at paragraph 14 N, claims \$82,680.16 in what appears to be a claim for set off. This amount was reduced, consequent upon certain grounds being struck out or withdrawn.²²
- 65 Mrs Tran said that she wanted to move into the property. However, she said that she was concerned to move in because, in addition to the above mentioned minor defects, there remained the issue of the balcony/balustrade height, the issue of a gap between the garage and the boundary, the potential for downpipes to flood and the potential for the slab to move with resultant potential for cracking.
- 66 The only evidence given by the Owners as to defective works was of a generalised nature unsupported by reports, quotes or other evidence such as photographs. Further, the gap between the garage and the boundary issue was finally determined by me at the 2016 hearing when I dismissed this part of the Owners' claim²³ and, for the reasons given above, cannot be reopened in this application.
- 67 To the extent that the Owners claim a set off for other defective works said to arise out of the works ordered to be completed under Order 4(b) of the 2016 orders, the evidence before me is insufficient to prove the claims on the balance of probabilities. The claims were generalised with no particularisation of what amounts are claimed for each generalised head of claim. Even if a set off could be properly put as arising out of Order 4(b) of the 2016 orders, insufficient evidence to support the claims was presented. Further, there was insufficient evidence to impugn the veracity of the Certificate such that I am persuaded that the works ordered in Order 4(b) were properly completed. To the extent that the Owners' Defence seeks a set off, the claim is dismissed.

If there are defective works, are the Owners entitled to set off the costs?

- 68 For the reasons given in paragraphs 61 to 67 above, I repeat the above comments.

Are the Owners entitled to set off an amount against the claim of Carlisle Homes for the cost of providing security to the property?

- 69 Carlisle Homes seeks damages for the cost of providing security in the sum of \$3,696.00. This was supported by several invoices from a security organisation, ICU.
- 70 Ms Tran, on behalf of the Owners, gave evidence that the full security fencing was not supplied and that she was entitled to set off the sum of \$697.50. She said that half of the fence was missing and that this was demonstrated by a photo she took in 2015. She did not have a more recent photo and it was not clear if she was of the view that the fence section was missing for the full period of the works from 2015 up to the present time.

²² *Tran v Carlisle Homes Pty Ltd* (Building and Property) [2016] VCAT 1873 at paragraph 42.

²³ Above, at paragraphs 191 to 197.

- 71 Carlisle Homes objected to the claim as the Owners' Defence and set off relates to a matter, temporary fencing, either decided upon or not raised at the 2016 hearing. Further, that to the knowledge of their solicitor appearing at the hearing, no section had been missing and that the several invoices of ICU for use of cameras tendered to the Tribunal were not disputed. Further, the Owners had not produced any evidence for the cost claimed to have been incurred of \$697.50.
- 72 On the evidence before me, it is not apparent how the Owners' claim for temporary fencing arises out of the 2016 orders directing completion of the remaining works. But, even if the set off could be properly put as arising out of the 2016 orders, Order 4(b), insufficient evidence to support the claim was presented. The Owners' claim in this respect is dismissed.

Are the Owners are entitled to set off the amounts sought under sub paragraphs 14 D, G, J, K, and L?

- 73 These claims arise under paragraph 14 of the Owners' Defence. For the reasons given above, whether each of these claims can be set off is dependent upon whether each of the claims arise out of compliance by Carlisle Homes with the 2016 orders. To the extent that they do not, I am functus officio.
- 74 In respect of each of the claims:
- (a) paragraph 14 D, liquidated damages for \$7,657.53 as an 'unnecessary expense': no evidence was given and it appears to arise out of matters already determined. The claim is dismissed;
 - (b) paragraph 14 G, reimbursement of an application fee of \$1,081.20: insufficient evidence was given to establish any entitlement for reimbursement of fees, especially where this fee appears to have been paid in respect of the 2016 hearing, previously finally determined. The claim is dismissed;
 - (c) paragraph 14 K, 'dispensation council fee': no evidence was given to support this claim. Claim dismissed;
 - (d) paragraph 14 L, legal costs: insufficient evidence was given to support a claim for legal costs. Further the Owners, being unsuccessful in their defence of this application, have not demonstrated a basis to support an order for costs. Dismissed.

CONCLUSION

- 75 For the reasons above, Carlisle Homes has proved, on the balance of probabilities, that it has completed the works required of it in accordance with the 2016 orders, including Order 4 and Order 6. As a consequence, Carlisle Homes is entitled to be paid by the Owners in accordance with Order 5(c).

- 76 Further, on the evidence presented, I am satisfied that that Carlisle Homes is entitled to be paid by the Owners, without any set off, the following amounts:
- (i) the final claim amount of \$68, 480.70;
 - (ii) interest pursuant to the Building Agreement of \$4,257.80;
 - (iii) damages for costs of security of \$3,696.00, and
 - (iv) damages for costs of insurance cover of \$432.70
- a total of \$76,867.20.
- 77 For the above reasons, the Owners' claims for set off have not been proved and are dismissed.

MJF Sweeney
Member