Civil and Administrative Tribunal

New South Wales

Case Name:	Project 4301 Pty Ltd v Buildcarp Constructions Pty Ltd
Medium Neutral Citation:	[2022] NSWCATCD 30
Hearing Date(s):	10 November 2022
Date of Orders:	17 February 2022
Decision Date:	17 February 2022
Jurisdiction:	Consumer and Commercial Division
Before:	D Goldstein, Senior Member
Decision:	1. Buildcarp Constructions Pty Ltd must pay Project 4301 Pty Ltd $55,158.00 immediately. 2. Buildcarp Constructions Pty Ltd must carry out the work referred to in [98] of the reasons within 8 weeks of the date of this order. 3. The parties are at liberty to apply for an extension of the time referred to in order 2, such application to be supported by brief submissions and appropriate evidence. 4. Project 4301 Pty Ltd has leave to renew these proceedings if order 2 is not complied with within the period specified. 5. In the event that a party wishes to bring a costs application, the costs application must be lodged in the Tribunal and served on the costs respondent within 14 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application. 6. The costs respondent will have 14 days after the date it receives the application to lodge in the Tribunal and serve on the costs applicant its submissions, if any, in response to the costs application, such submissions either attaching or referring to the documents relied upon.

	7. The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing. 8. Subject to the parties' submissions, the Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.
Catchwords:	BUILDING and CONSTRUCTION – Parties to contract – Ostensible authority – Extension of time claims – Practical Completion - Notices – Compliance – Liquidated damages
Legislation Cited:	Home Building Act 1989 (NSW)
Cases Cited:	Dante De Grazia trading as All Sydney Building Services v Nicholas Solomon & Ors [2010] NSWSC 322 Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd [2015] NSWSC 354 Junker v Hepburn [2010] NSWSC 88 Kapeller v BH Australia Constructions Pty Ltd [2019] NSWCATAP 40 Northside Developments Pty Ltd v Registrar-General [1990] HCA 32; (1990) 170 CLR 146 Torbey Investments Corporated Pty Ltd v Ferrara [2017] NSWCA 9
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Project 4301 Pty Ltd (Applicant) Buildcarp Constructions Pty Ltd (Respondent)
Representation:	Counsel: B. Ilkovski (Project 4301 Pty Ltd) M. Klooster (Buildcarp Constructions Pty Ltd) Solicitors: Tom Howard Legal (Project 4301 Pty Ltd) New South Wales Lawyers (Buildcarp Constructions Pty Ltd)
File Number(s):	HB 21/02938

HB 21/10258

Publication Restriction: Nil

REASONS FOR DECISION

1 In these proceedings Project 4301 Pty Ltd entered into a NSW Fair Trading Home building contract with Buildcarp Constructions Pty Ltd on 19 November 2018 for a dual occupancy strata title subdivision in Goulburn.

2 In these reasons I will refer to Project 4301 Pty Ltd as the owner and to Buildcarp Constructions Pty Ltd as the contractor.

3 As a result of the building work carried out by the contractor pursuant to the terms of the contract, the owner commenced proceedings HB 21/02938 initially claiming $499,000.00 against the contractor. The contractor filed a cross application, proceedings HB 21/10258 claiming $188,710.00 from the owner.

4 The hearing took place on 10 November 2022. At the hearing the parties provided a 3 volume bundle of documents which was marked exhibit A.

5 As ordered, the parties filed final written submissions and the documents referred to in the Tribunal's order dated 11 November 2021.

The owner's case as stated in final written submissions

6 In its final written submissions, counsel for the owner states that the contract works are not complete and the contract remains on foot.

7 The owner's submissions state that the most significant of the owner's claims is for liquidated damages. The balance of the owner's claim is said to be for a work order for incomplete work, certificates which the contractor has not handed over, and a minor claim for damages incurred in supervising or addressing the contractor's work.

The contractor's case as stated in final written submissions

8 In its final written submissions, the contractor responds to the owner's position. It addresses its extension of time claims, which leads to a submission as to when practical completion occurred. The contractor also makes submissions about the rate of liquidated damages and the calculation of liquidated damages. Ultimately the contractor claims to be entitled to $33,445.01.

Was Mr Rosasqui a joint contracting party?

9 Before commencing a determination of this issue and other issues concerning Mr Rosasqui, it is worth recording that he did not appear as a witness in these proceedings. As a result the contractor is unable to contradict the owner's evidence about what was said to and agreed with Mr Rosasqui, except if contemporaneous documents provide contrary evidence.

10 A central issue in these proceedings is whether Mr Rosasqui was a party to the contract or had the necessary authority to bind the contractor.

11 Page 34 of exhibit A is the 'Owner and Contractor details' page of the contract. The 'Contractor' is stated to be 'Buildcarp Constructions Pty Ltd'. Page 31 of exhibit A is the signing page of the contract. Unusually in this form of contract the signing page is at the very front of the contract after the index. The contractor's signature block contains two signatures, one of which has written under it 'Elias Younan Director'. It is common ground that the second, or other signature is that of Mr Rosasqui.

12 Under the signatures the following is in typed form 'Paul Rosasqui Partner Buildcarp Constructions Pty Ltd'.

13 The owner submits that because Mr Rosasqui signed the contract as stated in the preceding paragraphs, he was a joint contracting party with the contractor.

14 It is also put by the owner that Mr Rosasqui had implied actual authority to deal as agent for the contractor.

15 The contractor's position is that Mr Rosasqui was not a party to the contract and if he was, it was necessary that he was joined as a party to the proceedings.

16 The question of the correct identity of a contracting party was considered in the Appeal Panel of this Tribunal in *Kapeller v BH Australia Constructions Pty Ltd* [2019] NSWCATAP 40. After considering the most recent relevant authority, *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2015] NSWSC 354 the Appeal Panel stated at [28]:

> 'The principles set out above relevant to this appeal are in our view, the following:

1. The identity of the contracting party is to be determined looking at the matter objectively, examining and construing any relevant documents in the factual matrix in which they were created and ascertaining between whom the parties objectively intended to contract;

2. Identification of the parties to a contract must be in accordance with the objective theory of contract. That is the intention that a reasonable person, with the knowledge of the words and actions of the parties communicated to each other, and the knowledge that the parties had of the surrounding circumstances, would conclude that the parties had;

3. There is also a question of whether, and if so how, the Court may have regard to the conduct of the parties after the date of the contract to identify the intended parties. Except to the extent that subsequent conduct of the parties constitute admissions by one or other party they are largely equivocal;

4. post-contractual conduct is admissible on the question of whether a contract was formed but not as an aid to the construction of the contract; and

5. The legitimacy of the Court's taking into account conduct after the date of the contract to determine the identity of the parties has been accepted in some cases.'

17 I have had regard to the factual matrix to the time the contract was signed. I find that looking at the matter objectively, the parties intended that the owner would contract with the contractor, not the contractor and Mr Rosasqui. I have reached this conclusion primarily because the contract identified the contractor as Buildcarp Constructions Pty Ltd.

18 There is also the fact that when being cross examined the owner's representative conceded that she was aware at the time of signing the contract that the owner was contracting with the contractor and not a partnership. In light of such a concession I find that the owner cannot maintain that Mr Rosasqui was a joint contracting party.

Did Mr Rosasqui have authority to act as agent for the contractor?

19 The facts in these proceedings establish that Mr Rosasqui made some agreements with the owner purportedly changing the terms of the contract. The contractor's position is that Mr Rosasqui had no authority to make the agreements and that they are not binding on it.

20 The critical agreements were that:

(a) The rate of liquidated damages would increase from $103.00 per day to $309.00 per day;

(b) The owner would be permitted to pay sub-contractors and suppliers direct in which case it would be relieved from paying the contractor 10% overhead and margin on the amount of the invoices so paid.

21 In order to make a finding regarding Mr Rosasqui's authority, it will be necessary to make findings of material facts based on the evidence in the proceedings.

22 When she was cross examined Ms How, a director of the owner stated that before she signed the contract, she was aware that Mr Rosasqui was not a director of the contractor and also not a nominated supervisor of the contractor. Ms How also stated that she was aware that she was signing a contract with a company, and not a partnership. Ms How did say that Mr Rosasqui was an authorised representative of the contractor.

23 The contractor's evidence was that Mr Rosasqui met the owner and in effect brought the contract and the work to the contractor. I accept that evidence. The contractor submits that there is no evidence of Mr Younan meeting Ms How before the contract was signed, a submission soundly based on Mr Younan's evidence. The contractor's evidence was also that it agreed that Mr Rosasqui would project manage the project since he had brought the work to the contractor. I find that there is no evidence that before the contract was signed, either Mr Rosasqui or Mr Younan, a director of the contractor, informed the owner that Mr Rosasqui would be acting in a project management role.

24 I have also had regard to the contractor's tender to the owner dated 15 November 2018 contained in annexure A as an annexure to one of its witness statements. The tender was on the letterhead of the contractor and was signed on behalf of the contractor in the printed names of Mr Rosasqui and Mr Younan.

25 The contractor's signature block in the contract contains two signatures, one of which has written under it 'Elias Younan Director'. It is common ground that Mr Younan signed the contract and the second, or other, signature is that of Mr

Rosasqui. Under the signatures the following is in typed form ‘Paul Rosasqui Partner Buildcarp Constructions Pty Ltd’.

26 I find based on the evidence referred to that either before or at the time the contract was signed:

(1) the owner was aware that Mr Rosasqui was not a director of the contractor;

(2) the owner was aware that Mr Rosasqui was not a nominated supervisor of the contractor;

(3) the owner was aware that it was signing a contract with a company, and not a partnership;

(4) the owner was of the view that Mr Rosasqui was an authorised representative of the contractor;

(5) Mr Rosasqui had met the owner and in effect brought the contract to the contractor;

(6) The contractor agreed with Mr Rosasqui that he would project manage the contract with the owner;

(7) Neither the contractor nor Mr Rosasqui informed the owner that Mr Rosasqui’s role was as a project manager;

(8) Mr Younan had no contact with Ms How before the contract was signed;

(9) The contractor submitted a quote to the owner signed on behalf of the contractor in the printed names of Mr Rosasqui and Mr Younan; and

(10) Mr Rosasqui (as well as Mr Yournan) signed the contract in the place designated for the contractor and underneath his signature appeared the words, ‘Paul Rosasqui Partner Buildcarp Constructions Pty Ltd’.

27 Based on the fact that Mr Rosasqui had met the owner and in effect brought the contract to the contractor and that Mr Younan had nothing to do with the owner until at least 11 May 2020 when he states he took over as project manager, I infer that all pre-contractual communications regarding the project were between Mr Rosasqui and Ms How. I also find that all contractual correspondence meetings and interactions between the contractor and the owner before 11 May 2020 were also between Mr Rosasqui and Ms How.

Some authorities

28 The owner has referred me to *Northside Developments Pty Ltd v Registrar-General* [1990] HCA 32; (1990) 170 CLR 146. This case was concerned with the authority of company directors, not specifically or exclusively the position of

persons who are not directors, but act in some capacity for a company. At [19] Mason J stated:

> ‘Another source of difficulty was the case where the person acting on behalf of the company had not been appointed to the office which he appeared to hold. In such a case the critical question was whether the company had held out or represented that the person occupied the office so as to have authority to bind the company. Thus, in Albert Gardens (Manly) Pty. Ltd. v. Mercantile Credits Ltd. [1973] HCA 60; (1973) 131 CLR 60, it was held that a third party dealing with the company was entitled to assume that acts had been taken by the company to have duly appointed the persons who signed securities as directors on behalf of the company: see at p 65. So, in the present case, there was material on which Barclays would have been justified in assuming Gerard Sturgess was the secretary of the appellant. The company appears to have held him out as such, and his signature on the instrument in the capacity of secretary accompanies that of Robert Sturgess who was a director.’

29 And at [21] and [22] it was stated:

> ’21. So, in Freeman and Lockyer it was held that a director, Kapoor, who had assumed the powers of managing director with the company's concurrence, though he had not been appointed to that office, bound the company by entering into a contract on its behalf with the plaintiff architects. The company was a property company and the act of engaging architects fell within the ordinary scope of the authority of such a managing director so that the plaintiffs were under no necessity of inquiring whether the person with whom they were dealing was properly appointed or was authorized to enter into the contract; it was enough that the directors had allowed him to act as managing director, there being power under the articles to appoint him to that position and power to delegate to a managing director all the powers of the board of directors. By permitting Kapoor to act as the managing director, the board had effectively represented that he had authority to enter into contracts of a kind which a managing director would in the normal course be authorized to enter into on behalf of the company. The company would not have been bound had the contract not been one of that kind. In that event there would not have been a representation by the company that Kapoor had authority to enter into the contract.
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> 22. This Court has accepted that the judgments in Freeman and Lockyer correctly state the relevant principles of law: Crabtree-Vickers Pty. Ltd. v. Australian Direct Mail Advertising and Addressing Co. Pty. Ltd. [1975] HCA 49; (1975) 133 CLR 72, at p 78. The judgments in Freeman and Lockyer, especially that of Diplock L.J., indicate that the rule in Turquand's Case in its application to the acts of a company undertaken through its agents is an exemplification of the law of principal and agent and that the ambit of the operation of the rule is to be ascertained by reference to the actual or ostensible authority of the

agent who purports to act on behalf of the company. Of course, in applying the rule, account must be taken of the doctrine of ultra vires and the constitution of the company and the contents of its public documents as they may affect the actual or ostensible authority of those who purport to act on behalf of the company. Thus, if, according to the constitution of the company, the agent cannot exercise the relevant authority, his act cannot bind the company.'

30 These passages indicate that I must ascertain whether Mr Rosasqui had actual or ostensible authority to act on behalf of the contractor. At [6] of his judgement in *Northside Developments Pty Ltd v Registrar-General* Brennan J stated:

> '6. A company, being a corporation, is a legal fiction. Its existence, capacities and activities are only such as the law attributes to it. The acts and omissions attributed to a company are perforce the acts and omissions of natural persons. A company is bound by an act done when the person who does it purports thereby to bind the company and that person is authorized to do so or the doing of the act is subsequently ratified. (There is no question of ratification in this case.) Authority for the purpose is derived either directly from the constitution of the company or from some antecedent act (typically, a resolution of the governing body) which is itself binding on the company. As between a company and a party who deals with it, a company is bound by an act purporting to bind it not only when the person who does the act has the company's authority to bind it by that act **but also when that person is held out by the company as having that authority and the party dealing with the company relies on that person's ostensible authority**. Conversely, the company is not bound when the person who does the act has neither actual nor ostensible authority to bind the company by doing the act which the other party asserts to be binding on the company. The foundation of ostensible authority is estoppel, as Diplock L.J. pointed out in Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd. (1964) 2 QB 480, at p 503: (emphasis added)
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> > "An 'apparent' or 'ostensible' authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

31 The contractor has referred me to *Junker v Hepburn* [2010] NSWSC 88. At [46] and [47] Hammerschlag J stated:

> '46 Apparent or ostensible authority is conferred where a principal represents that another has authority. The principal will be bound as against a third party by the acts of that other person within the authority which that person appears to have, though the principal had not in fact given that person such authority or had limited the authority by instructions not made known to the third party: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at 466; *Bowstead and Reynolds on Agency*, 17th ed (2001) Sweet & Maxwell par 3-005.
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> 47 Ostensible authority often coincides with, but sometimes exceeds, actual authority. For instance, when a board appoints a managing director, they may expressly limit his authority, but his ostensible authority will include all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation: *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 583 per Lord Denning M.R.'

32 In *Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation* [2020] NSWCA 144 the Court of Appeal described an agent's actual authority as follows at [63]:

> 'Actual authority requires a consensual agreement between the principal and agent and arises where a principal grants, and an agent accepts, authority for the agent to perform specific tasks on behalf of the principal: *Equitcorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 132 (Clarke and Cripps JJA). Notwithstanding the absence of an express agreement, the parties "may conduct themselves in such a way that it is proper to infer that the relevant authority has been conferred on the agent": *Equiticorp Finance* at 132; *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284; [2013] NSWCA 453 at [32] (Beazley P).'

33 Concepts of ostensible authority were discussed by the Court of Appeal in *Wilh. Wilhelmsen Investments Pty Ltd v SSS Holdings Pty Ltd* [2019] NSWCA 32 at [74] – [78] where the court referred to a passage in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* cited above at [29]. The court went on to state:

> This passage was endorsed by the High Court in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72; [1975] HCA 49 at 78 as compendiously stating the principles governing ostensible authority.
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> As Diplock LJ explained in *Freeman & Lockyer*, ostensible authority operates as an estoppel, preventing a principal from denying an agent's

authority: see generally K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd ed, 2016) at 149 and the cases cited therein.

In *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237; [2006] 1 WLR 2276, Buxton LJ referred, at 2291, to two types of situations where ostensible authority would arise:

> "... ostensible authority covers two types of case: where the agent has been permitted to assume a particular position that carries a usual authority; and where a specific representation is made as to the agent's authority. If either type of conduct on the part of the principal gives rise to an estoppel, that is because of the understanding that it creates in the mind of the ... representee. An alteration on the principal's part of the relationship between himself and the agent cannot, once the estoppel has been created, alter or withdraw the representation if the alteration ... is not communicated to the representee."

However, ostensible authority is not confined to those two types of cases. A course of conduct or dealing may constitute a relevant representation. Diplock LJ said as much in *Freeman & Lockyer*, at 503–504:

> "The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into."

34 The owner submits that ostensible authority will be established by:

(1) The contractor representing by conduct that Mr Rosasqui had authority, and standing by and allowing that person to act may be enough;

(2) The representation or conduct emanated from someone who had the actual authority of the contractor; and

(3) The person making the representation must have intended it to be relied upon.

35 The owner relies on the fact that:

(1) Mr Rosasqui was described as a partner;

(2) that Mr Younan a director of the contractor signed the contract which had the typed words 'Paul Rosasqui Partner Buildcarp Constructions Pty Ltd' below the signature;

(3) the contractor stood by and allowed Mr Rosasqui to act on its behalf; and

(4) the contractor conceded that Mr Rosasqui acted as the project manager and had direct dealings with it.

36 Finally it is submitted that the owner relied upon the contractor's representation as to Mr Rosasqui's authority.

37 The contractor submits that Mr Rosasqui was not one of its directors, a fact which the owner was aware of before the contract was signed. Secondly the submission is that no questions were put to Mr Younan, a director of the contractor to establish implied actual authority. In connection with ostensible authority, the contractor submits, among other things, that there is no evidence of dealings between the owner's director and Mr Younan before the contract was signed and that the owner's director was aware that Mr Rosasqui was neither a director nor a nominated supervisor of the contractor.

38 So far as actual authority or implied actual authority is concerned, I find that the only evidence of actual authority is Mr Younan's evidence that it was agreed that Mr Rosasqui would be a project manager. There was no evidence at the hearing about the scope of a project manager's functions and the authority that a project manager would ordinarily possess.

39 To the extent that the owner relies on express authority, I find that the evidence does not establish that Mr Rosasqui had express authority to negotiate changes to the formal written contract. Nor does the evidence establish that the contractor conducted itself in such a way that it is proper to infer that the relevant authority to change the terms of the contract had been conferred on Mr Rosasqui.

40 To the extent that the owner relies on ostensible authority, the only evidence that there is to establish ostensible authority is the contractor's tender which included Mr Rosasqui as a signatory and the contractor's signature bloc on the contract, signed by Mr Rosasqui as well as Mr Younan under which appeared the words ''Paul Rosasqui Partner Buildcarp Constructions Pty Ltd'. As well there is the fact that the contractor stood by and allowed Mr Rosasqui to act on its behalf.

41 Although the owner stated in evidence that she knew that she was not contracting with a partnership, the fact remains that the contractor's act in

allowing Mr Rosasqui to be seen as a signatory of the contractor in important documents such as the tender and the contract in circumstances where Mr Rosasqui had the only contact with the owner in connection with the building work was a representation by the builder that Mr Rosasqui was its representative in connection with the building contract and the building work. This representation was I find confirmed by the fact that in the period to 11 May 2020 Mr Rosasqui was the only representative of the contractor to have any direct involvement in the project, so far as contact with the owner was concerned. The contractor allowed this state of affairs.

42 In *Northside Developments Pty Ltd v Registrar-General* Brennan J. also stated at [13] (page 176), a passage relied upon by the owner's counsel in the submission that standing by and allowing a person to act in a particular way may be enough to establish ostensible authority:

> 'To found an estoppel as to the authority of an officer or agent who is engaged in a transaction for the purposes of the company's business or otherwise for the company's benefit and who is purporting to exercise an authority which an officer or agent in that position would ordinarily be expected to have, the mere carrying on of the company's business with officers and agents performing particular functions on its behalf and in its interest is a sufficient representation by the company. Although such representations by the company seem a slender foundation on which to build an estoppel, the indoor management rule treats them as sufficient unless the party relying on the rule is put on notice to inquire into the authority of the officers or agents to do what they did in the transaction. The slenderness of the foundation enhances the importance of the qualification. In transactions other than those engaged in for the purposes of a company's business or otherwise for the benefit of the company, and in transactions where the officer or agent has purported to exercise an authority over and beyond the authority which an officer or agent in that position would ordinarily be expected to possess, a party seeking to bind the company by estoppel must rely on particular representations of authority made by the company - that is, by officers or agents of the company having actual or ostensible authority to make those representations.'

43 The above passage supports a finding that because Mr Rosasqui was acting as the contractor's representative in the contract with the owner for the purposes of the contractor's business and for the benefit of the contractor, there being no evidence that his role was limited to that of a project manager, and exercising the authority that a sole company's representative would

ordinarily be expected to have, is a sufficient representation by the contractor of his authority.

44 For the reasons provided I find that Mr Rosasqui's actions in agreeing to changes to the building contract would ordinarily fall within a contractor's representative's authority in overseeing a building contract on behalf of a contractor and would bind the contractor.

The agreements reached with the owner

45 The owner's case includes claims that the contract was changed in the ways set out below.

Direct payments to subcontractors

46 First, the owner states that there was an agreement that if the owner paid subcontractor's direct it would save 10% on the builder's margin. Ms How of the deals with this at [57] of her 12 April 2021 affidavit. She refers to an email from Mr Rosasqui dated 16 September 2019 which referred to payments to the gyprocker, the bricklayer and electrician. Mr Rosasqui stated that if the owner paid these trades direct, it would be entitled to *'take 10% off my margin'*

47 The owner states that it paid contractor invoices in the amount of $207,471.38 direct to the sub-contractors and suppliers and was reimbursed $64,749.26 by Mr Rosasqui, leading to a net figure of $142,722.12. A schedule of the invoices is at page 94 of exhibit A.

48 The contractor's submission is that the agreement is not evidenced in writing and that Mr Rosasqui did not possess the necessary authority to bind the contractor. As I have found that Mr Rosasqui did have the necessary authority to bind the contractor, this submission is rejected. The fact that the agreement was not reduced to writing is not sufficient to defeat Ms How's un-contradicted evidence.

49 The builder also claims that the owner obtained an input GST tax credit and the builder was unable to do so. It claims that there should be an adjustment to the total amount paid by the owner to contractors to take into account the tax input credit obtained by the owner. I reject this submission. As there was an agreement between the owners and Mr Rosasqui on behalf of the contractor, I

do not consider it appropriate or necessary to change the parties' agreement to negate what is a collateral benefit obtained by the owner. In addition I accept that the owner would most likely have obtained a GST input credit if the relevant invoices had been part of a builder's claim for payment. I accept the owner's submissions on this issue.

50 I find that the owner is entitled to a credit of $14,272.21 on this item of its claim.

Liquidated damages

51 The contract contained a special condition that the builder would pay liquidated damages at the rate of $103.00 per calendar day if there was a delay in reaching practical completion by the end of the building period.

52 The owner submits that there were a number of agreements made with Mr Rosasqui regarding liquidated damages. First, that liquidated damage would accrue until the property was tenanted or sold which was a change to the special condition that liquidated damages would be payable from the date for completion to the date of practical completion, or the date the contract was ended, or the date the owner took possession of the site or any part of the site. The owner also submits that there was an agreement between Ms How and Mr Rosasqui whereby the rate of liquidated damages would change from $103 per day to $309 per day.

53 In her evidence Ms How states that there was a conversation to the following effect on 4 May 2020:

> 'Me: Paul I can't stand this ongoing delay. I'm losing money every day. I am going to have to go to Fair Trading if we can't resolve the issue of LDs. We need to agree to change the contract to increase the liquidated damages to $309 per day.
>
> Rosasqui: Please do not take the matter to Fair Trading. We agree to the variation for $309 LDs per day.'

54 This conversation is not contradicted. I accept Ms How's evidence. The builder submits that the Tribunal should not accept Ms How's evidence for three reasons. First, since the substance of the conversation has not been evidenced in writing when other less important matters were evidenced in writing. Secondly, because Mr Rosasqui did not have the authority to increase the rate of liquidated damages. I have found that Mr Rosasqui did have ostensible

authority to make this agreement. Thirdly, the change fails due to an absence of consideration.

55 I find that the agreement to change the rate of liquidated damages was supported by consideration, namely the owner agreeing not to make a complaint to Fair Trading, a process that if followed would involve the contractor in a potential investigation by Fair Trading and the possibility of disciplinary action, fines and sanctions. As a result I find that the agreement to increase the amount of liquidated damages to $309 per day is binding on the contractor. I do not accept the contractor's submission that I should not accept Ms How's evidence because the substance of the agreement was not reduced to writing. I have accepted Ms How's un-contradicted evidence. The lack of writing is not sufficient for the evidence to be rejected.

56 I find that any agreements by Mr Rosasqui to change the time when the payment of liquidated damages would end are unenforceable because there was no consideration emanating from the owner to support such an agreement or promise.

Extensions of time

57 Clause 7 of the contract provides for extensions of time. The clause nominated causes of delay which would entitle the builder to claim an extension of time. The clause then stated:

> 'If the contractor wishes to claim an extension of time the contractor must notify the owner in writing of the cause and estimated length of the delay within 10 business days of the occurrence of the event or in the case of a variation from the date of agreement to the variation.'

58 It is conceded by the contractor that it did not comply with the contractual provision referred to because its claim for an extension of time was not made within the ten (10) day period referred to. The owner submits that the claim for an extension of time was made 5 months after the contractor asserted that practical completion had been achieved.

59 I find that the extension of time claim was made on behalf of the contractor by its solicitors on 15 June 2021 and stated that the contractor had claimed practical completion on 14 January 2021, some 5 moths beforehand as

submitted by the owner. The claim for an extension of time was made after both parties had commenced proceedings in the Tribunal.

60 The contractor submits that a failure to comply with contractual provisions with respect to notice is not a bar to recovery. *Dante De Grazia trading as All Sydney Building Services v Nicholas Solomon & Ors* [2010] NSWSC 322 is cited as authority for that submission, although the precise passage that is being relied upon is not identified. In those proceedings, there was a difference between the parties as to the adjusted date for Practical Completion: the plaintiff contended for March 2003, the defendants contended for February 2003.

61 At [26] Einstein J stated:

> 'The plaintiff contends and I accept that the Court may and should adjust the completion date of this contract. Contract clause 9.2.2 provides that 'Should progress of the Works be delayed due to causes beyond the control of the Builder, then the Builder shall be entitled to a reasonable extension of time for Practical Completion'

62 No rationale or authority for this conclusion was provided. However I am not in the same position as Einstein J. The Tribunal has the jurisdiction to determine the parties' claims pursuant to the provisions of the *Home Building Act* 1989 ('the Act'). My jurisdiction to make orders under the Act is conferred by s48O which states:

> '(1) In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate--
>
> (a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
>
> (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,
>
> (c) an order that a party to the proceedings--
>
> (i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or
>
> (ii) do or perform, or refrain from doing or performing, any specified act, matter or thing.

(2) The Tribunal can make an order even if it is not the order that the applicant asked for.

(3) Sections 79R and 79T- 79V of the *Fair Trading Act 1987* apply, with any necessary modifications, to and in respect of the determination of a building claim.'

63 I find that I do not have the power under s48O of the Act to make orders which extend the date for completion under the contract. I have had regard to the decision in *Dante De Grazia trading as All Sydney Building Services v Nicholas Solomon & Ors* which is a lengthy decision of 352 paragraphs. I cannot find any support in it for the submission that a failure to comply with contractual provisions with respect to giving a notice is not a bar to recovery.

64 The builder submits that the first paragraph of clause 7 gives the contractor a right to a reasonable extension of time, which is separate and distinct to claiming an extension of time.

65 I reject that construction of clause 7. If the builder was given that right to an extension of time, there would be no need or purpose for the clause to be drafted in the way that it has been, namely that if the contractor wanted to claim an extension of time, a notice for an extension of time was to be given to the owner and the owner had the right to object to the time claimed as being unreasonable, in which case the dispute between the parties regarding the claim for time must be dealt with in accordance with the dispute procedures in clause 27 of the contract.

66 At best clause 7 operates to *entitle* the contractor to an extension of time if:

(1) a delay of a type referred to in clause 7 has occurred and which has delayed the work;

(2) the parties or one of them has taken steps to minimise the delay;

(3) the contractor has notified the owner of the cause and estimated length of the delay within 10 business days of the occurrence of the event; and

(4) the owner does not within a further 10 business days of such notification, notify the builder that the extension sought is unreasonable.

67 The question that arises is whether the contractor's liability to liquidated damages should be reduced to have regard to an extension of time that the contractor has claimed. Such an exercise would in my view fall within s48O of

the Act, in the event that the contractor was found to be entitled to claim and receive the extension of time.

68 The contractor has referred the Tribunal to the case of *Torbey Investments Corporated Pty Ltd v Ferrara* [2017] NSWCA 9 in connection with another aspect of these proceedings.

69 This decision discussed giving notices in context of a different clause, namely one relating to ending the contract for breach. The clause was worded differently to clause 7 in that there was no mandatory obligation to give a notice within a specified period of time.

70 The judgement in *Torbey Investments Corporated Pty Ltd v Ferrara* indicates that provisions requiring a notice to be given may be thought of as either facultative or obligatory. At [34] Basten JA stated:

> 'Other clauses in mandatory terms raise similar difficulties: see the discussion of cl 36 below. In these circumstances, there is much to be said for adopting a flexible construction of the language, so as to give effect to its commercial purpose. That was the approach adopted by the Tribunal and accepted by the District Court as giving rise to no error of law. Thus, in circumstances where it was established that the relevant information had in fact been received, and a purpose of the mandatory language had been achieved, any formal non-compliance should not be seen as rendering the notice ineffective under the contract.'

71 I find that clause 7 imposes a mandatory obligation on the contractor in claiming an extension of time in that it states:

> 'If the contractor wishes to claim an extension of time the contractor **must** notify the owner in writing of the cause and estimated length of the delay within 10 business days of the occurrence of the event' (emphasis added)

72 However where a mandatory requirement has not been followed and the purpose of the mandatory language had not been achieved, I do not consider that formal non-compliance should be found to be irrelevant or, as saving the notice from being ineffective.

73 I find that under clause 7 the contractor's entitlement to an extension of time is enlivened by a notification to the owner of the cause and estimated length of the delay in the time frame stated in the clause, namely within 10 business days of the occurrence of the event which is relied upon as supporting the

application. The reason behind this is no doubt to allow the owner to consider the notification and if necessary to have regard to or consider the cause of delay being relied upon. In that regard I find that it is a mandatory requirement of clause 7 indicated by the word 'must' that the notice is to be given within the time stated.

74 I find that the contractor's notification of a claim for an extension of time was required to be, but was not given within 10 business days of the occurrence of the events which are relied upon. For that reason I find that it should not be taken into account in calculating the liquidated damages payable to the owner. In addition I find that the claim for the extension of time was made after both sets of proceedings had been commenced and after the pleadings had been filed and served. Such is an indication that the claim has been made for the purposes of enhancing the contractor's position in litigation and not for the purpose of proper contract administration.

Has practical completion been achieved and if so, when?

75 The contract provided for the commencement of work in clause 5 and in clause 6 stated that the contractor was to bring the work to completion within 30 weeks from the commencement date.

76 The contract was dated 19 November 2018. The contractor submits that it is common ground that the start date was 3 December 2018 and the works were required to reach practical completion by 1 July 2019. I accept that these dates are agreed between the parties.

77 Clause 8 of the contract which deals with completion stated that the work will be complete when the contractor has finished the work in accordance with the contract documents and any variations, and there are no omissions or defects that prevent the work from being reasonably capable of being used for its intended purpose. It also states that when the contractor believes the work is complete it must notify the owner in writing, certifying that the work has been completed in accordance with the contract. The clause goes on to state that within 10 business days of receipt of the written notice from the contractor, the owner must advise the contractor in writing of any items of work the owner

considers to be incomplete or defective. If the owner does not so notify the contractor, the work will be taken to be complete.

78 The contractor states in Mr Younan's affidavit of 6 April 2021 that it issued a Notice of Practical Completion to the owner and its director, Ms How on 14 January 2021. The manner of giving the notice did not comply with clause 28 of the contract. In her affidavit of 21 May 2021 Ms How denies having received the 14 January 2021 Notice of Practical Completion.

79 The contractor's position is that:

(1) by reason of Mr Younan's affidavit of 6 April 2021, the owner became aware of the 14 January 2021 Notice of Practical Completion which was an annexure to the affidavit;

(2) the owner did not follow clause 8 of the contract on receipt of the affidavit, by advising the contractor in writing of items of work the owner considered to be incomplete or defective; and

(3) in the absence of the owner notifying the contractor within the 10 business days provided for, the work is to be taken to be complete as provided for in clause 8.

80 The builder has cited *Torbey Investments Corporated Pty Ltd v Ferrara* in support of its position. That decision was, inter alia, to the effect that in the circumstances of the case, a termination notice which did not strictly comply with the relevant clause did not invalidate a purported termination of a contract.

81 The case does not stand as authority for the proposition that a document exhibited to an affidavit which was a notice that was not effectively served at the time it was purportedly issued or mailed, is effectively served by reason of it being exhibited to the affidavit and requires a response strictly in accordance with a contractual provision.

82 I find that the contractor's 14 January 2021 Notice of Practical did not become effective as from 6 April 2021 because it was exhibited to Mr Younan's 6 April affidavit. I further find that a notice of Practical Completion to be given under clause 8 of the contract is an important document which must come to the owner's attention in a clear manner as a document given under the contract. Whether it is served in accordance with clause 28 or in another facultative manner, I find it should be served plainly and unmistakably as a notice under clause 8. I find that a document served in a 65page exhibit should not be

characterised as a contractual notice which although not served in accordance with the contract, has been properly served albeit in a facultative manner and which requires a response within the strict confines of clause 8.

83 Alternatively the contractor submits that as a matter of fact, practical completion had been reached by 11 January 2021. Mr Younan's evidence is that a rectification report was issued by New South Wales Fair Trading on 23 December 2020 and the contractor completed all work under the contract and the rectification report by 11 January 2021. These facts apparently precipitated the Notice of Practical Completion which was sent by the contractor to the owner on 14 January 2021, although the owner does not admit having received it on that day or soon after it was sent. On 13 January 2021 Mr Younan wrote to the owner telling her that the '*job is complete'.* Again on 18 January 2021 Mrs Younan wrote to the owner stating that *'The job is complete'*. The contractor's evidence is that the owner has refused to meet the contractor on site to take possession of the site. I infer that the contractor did not remain on site carrying out work after it informed the owner that the job was complete.

84 The term 'practical completion' was not defined in the contract. Reading clause 8 and the special condition together, I find that the term 'practical completion' meant when the works reached the condition when there were no omissions or defects that prevented the works from being reasonably capable of being used for its intended purpose. Ordinarily by following the procedure in clause 8, a date of practical completion would be ascertainable by reference to the notices that would be given under that clause. Such a course is not available because the first step, the contractor's Notice of Practical Completion was not served in accordance with clause 28 and the owner denies having received it, before receipt of Mr Younan's affidavit.

85 I find that the owner engaged a company handovers.com to inspect the premises on 6 April 2021. That organisation stated that both units had achieved Practical Completion, although a large number of defects were noted. The experts engaged by the owner and contractor did not express opinions whether the work under the contract had achieved practical completion. They

had differing opinions about the cost to complete the works and the cost to rectify defects.

86 I find that the works achieved practical completion as defined in [80] on 11 January 2021. This finding is based on:

(1) The contractor's evidence that it completed all work under the contract and the New South Wales Fair Trading rectification report by 11 January 2021;

(2) The email evidence that the contractor informed the owner on 13 and 18 January 2021 that the job was complete. I find that this evidence is confirmatory of the matters in (1);

(3) The contractor's notice of practical completion dated 14 January 2021. Putting to the one side whether the owner received this document the fact of its existence, also is confirmatory of the matters in (1); and

(4) The handovers.com inspection report dated 6 April 2021 that stated both units had achieved Practical Completion. I infer that the site and works were on 6 April 2021 in the same state that they were on 11 January 2021 as the contractor had ceased work as it was of the view that practical completion had been reached.

87 I will find that as a matter of fact that practical completion was achieved on 11 January 2021. As a result the contractor is liable for liquidated damages from 2 July 2019 to 11 January 2021, a period of 557 days.

Incomplete works

88 It is common ground that if there is incomplete work, an order should be made by consent under s48O(1)(a) of the Act for the contractor to complete the relevant work.

89 Counsel for the owner has provided a table which sets out the incomplete work that has been agreed by the parties' experts and two items of work which it said were conceded by Mr Younan in cross examination.

90 There is a dispute whether the air conditioners were removed from the contractual scope of work or were not provided by the contractor. The owner's evidence is that the contractor failed to install the ducted air conditioning system. Refer [20a] of Ms How's 15 October 2021 affidavit. The owner's expert report states at item 1 of Appendix A that *'Contracted AC systems not provided'.* Rectification costs are estimated a $38,940.00.

91 These items are agreed by the contractor at item 11.1 of its counsel's submissions. I will make a work order in the terms of table 2 of counsel for the owner's 25 November 2021 submissions plus installation of air conditioners, landscaping, NBN lid and kerb, Gas metre connection, and water meter connection.

92 The contractor also concedes the owner's claim in connection with the modification of development consent and water meter connection. These are money claims and will form part of a money order in the owner's favour.

Reports

93 The owner has claimed $720.00 for a report prepared by Mr Haddock. I reject this claim. The owner was entitled to obtain whatever reports she thought were necessary for advice during the construction of the works. However since this report was not prepared for legal proceedings, I find that there is no basis for the contractor to be found liable to pay for this particular report.

94 The owner has claimed $385.00 for a report prepared by Mr McCulloch. I reject this claim for the same reasons as are given in connection with Mr Haddock's report.

Determination of the claims.

95 Both parties have produced detailed tables which set out the contract details and the outcome of the proceedings.

96 I have used the contract reconciliation table prepared by the builder as a template.

Description	As found
Contract Price	$570,000.00
Less negative variation	$10,790.00
Adjusted contract price	$559,210.00

Less amounts paid by the Owner for progress payments I to 4	$370,500.00
Amounts paid by Owner to subcontractors	$207,471.38
Add back amounts reimbursed to Owner by Mr Rosasqui	$64,749.26
Less Net amount paid direct to the Contractor's subcontractor	$142,722.12
Less 10% margin on amounts paid directly to the Contractor's subcontractors	$14,272.21
Add back further reimbursement received from Mr Rosasqui for the Contractor	$10,000.00
Balance contract price	**$41,715.67**
Date for commencement of Works	3 Dec 2018
Due date for completion of Works	1 July 2019
Date of practical completion	11 Jan 2021
Rate for liquidated damages per day	$103.00 and $309.00 on and from 5.5.2020 0
Total days for which liquidated damages is calculated	557 days 306 days @ $103 251 days @$309
EOTs allowed	Nil

Liquidated damages (refer to above)	$109,077.00
Cost of report prepared by Russell Haddock	Nil
Cost for report prepared by Grahame McCulloch	Nil
Water meter connection	$265.00
Modification to development consent	$685.00
Subtotal	$110,027.00 less $41,715.67
Total Amount found	**$68,311.33**

97 The above amount does not make an allowance for interest which is claimed by the contractor and which is allowed by the contract, clause 14. I find that the contractor's progress claims 5 and its final claim were not paid by the owner in accordance with the contract, enlivening the contractor's right to interest. The amount of $13,153.33 has been calculated by counsel for the contractor. I will deduct that amount from the balance found due to the owner. I will make an order in the owners favour in the sum of $55,158.00.

98 There is also the work order that the parties have stated should be made by consent. I will make an order that the contractor is to carry out and complete the following work 25 November 2021 in accordance with s18B(1) of the Act and otherwise in accordance with the contract entered into between the parties on 19 November 2018:

(a) The work that is referred to in Table 2 of counsel for the owner's submissions;

(b) Installation of air conditioners;

(c) Landscaping;

(d) NBN lid and kerb;

(e) Gas metre; and

(f) Provision of certificates.

Costs

99 In the event that a party wishes to bring a costs application, the costs application must be lodged in the Tribunal and served on the costs respondent within 14 days of the date of the orders in these proceedings either attaching or referring to the documents relied upon in support of the application.

100 The costs respondent will have 14 days after the date it receives the application to lodge in the Tribunal and serve on the costs applicant its submissions, if any, in response to the costs application, such submissions either attaching or referring to the documents relied upon.

101 The parties must state in their submissions whether or not they consent to the costs application being determined on the basis of the parties written submissions and attached documents, if any, without the need for a hearing.

102 Subject to the parties' submissions, the Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar