

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Mackrob Pty Ltd v Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds* [2020] QCAT 262

PARTIES: **MACKROB PTY LTD**
(applicant)

v

OZZIE EXPORTS PTY LTD T/AS ARABIAN HOMES AND SHEDS
(respondent)

APPLICATION NO/S: BDL003-18

MATTER TYPE: Building matters

DELIVERED ON: 16 July 2020

HEARING DATE: 16 July 2019

HEARD AT: Brisbane

DECISION OF: Member Holzberger

ORDERS:

- Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds must pay Mackrob Pty Ltd the sum of \$79,085.71, by:**
4.00pm on 28 August 2020.
- Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds must pay interest on that amount from the date it becomes payable until the day it is paid at the rate of 10 percent.**
- Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds's counterclaim application filed 4 July 2018 is dismissed.**
- Mackrob Pty Ltd must file in the Tribunal two (2) copies and serve on Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds one (1) copy of any written submissions in relation to costs, by:**
4.00pm on 28 August 2020.
- Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds must file in the Tribunal two (2) copies and serve on Mackrob Pty Ltd one (1) copy of any written submissions in relation to costs, by:**
4.00pm on 11 September 2020.
- Mackrob Pty Ltd must file in the Tribunal two (2)**

copies and serve on Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds one (1) copy of any written submissions in response, by:

4:00pm on 18 September 2020.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – OTHER MATTERS - where the parties entered into a contract for the construction of a dwelling - whether the contract is fixed price or cost plus – whether documents constitute the contract where no specification – whether the works undertaken by subcontractors fall within the scope of the contract – whether the doctrine of undisclosed principal applies

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – REMEDIES FOR BREACH OF CONTRACT – DAMAGES - MEASURE OF – where the applicant makes a restitution claim for amounts paid to its subcontractors – where the respondent would be unjustly enriched if allowed to retain the benefit of the subcontractors’ works - whether the applicant’s termination of the contract was lawful – whether the applicant should be entitled to damages

APPEARANCES & REPRESENTATION:

Applicant: M Lewis, solicitor of Lewis and McNamara Solicitors
Respondent: S Gibson of counsel, instructed by Corser Sheldon and Gordon Lawyers

REASONS FOR DECISION

Background

- [1] The background to this dispute is helpfully contained in a document titled ‘statement of agreed and disputed facts and issues to be determined by the Tribunal’, filed by the solicitors representing the parties on 11 July 2019. The agreed facts are supported by the evidence and I make the following findings accordingly.
- [2] Mackrob Pty Ltd (‘Mackrob’) is the owner of a property situated at Lot 1, Southern Sunset Estate, Kingfisher Bay Resort Village on Fraser Island (‘the Property’).
- [3] Peter Mackay is the Director of Mackrob and represented it at all times relevant to these proceedings.
- [4] Ozzie Exports Pty Ltd (‘Ozzie’) is a licensed builder. Gregory Irvine is the Director of that company and also a director of the related entity GMI Homes Pty Ltd (‘GMI’).

- [5] GMI was ‘in the process of developing kit homes for sale to builders who would on-sell and build the kits for their customers’.¹
- [6] On 12 May 2016, Mackrob and Ozzie signed a contract in the form of a master builders residential building contract level 2 – version RBC-L2v07-2015 (‘the contract’) for the construction of a dwelling on the property for a price of \$391,750.00.
- [7] Negotiations prior to the contract were conducted by Mr Mackay on behalf of Mackrob and Mr Irvine and two of his employees, William Warner and Jo Ann White, represented Ozzie.
- [8] The date of commencement of the works was 14 September 2016 and the date for practical completion was 13 February 2017.
- [9] It was agreed that Mr Mackay could obtain quotes from various trades for approval by Ozzie.
- [10] Mackrob paid a deposit of \$19,587.50 and made the following stage payments:
- | | |
|----------------------------------|--------------|
| (a) Base stage | \$39,175.00 |
| (b) Delivery of prefab materials | \$156,700.00 |
| (c) Frame stage | \$58,762.00 |
| (d) Enclosed stage | \$39,175.00 |
- [11] On or about 27 February 2017, Ozzie issued an invoice for the fixing stage in the sum of \$58,762.50.
- [12] Mackrob paid \$25,000.00 on 20 March 2017.
- [13] On 27 March 2017 Ozzie reissued its fixing stage invoice for the unpaid balance of \$33,762.50 and a completion stage invoice claiming \$19,587.50.
- [14] Ozzie ceased work and issued notices to all trades to cease work on 27 March 2017.
- [15] Mackrob paid the balance of the fixing stage invoice, namely \$33,762.50 on or about 6 April 2017.
- [16] On 6 April 2017, Mackrob sent Ozzie a notice of intention to terminate the contract specifying Ozzie’s suspension of the works as a breach of the contract and requiring Ozzie to recommence works immediately.
- [17] On 24 April 2017, Mackrob sent Ozzie a notice of termination. Mackrob retook possession of the property on 30 April 2017.
- [18] The total amount paid by Mackrob to Ozzie pursuant to the contract was \$372,162.50.
- [19] In addition, Mackrob has paid or is being pursued for payment of various amounts owing to subcontractors and suppliers in respect of the works undertaken at the property. Mackrob’s application specifies claims by subcontractors totalling \$72,653.43 and by suppliers a total of \$27,119.14.²

¹ Statement of agreed and disputed facts and issues to be determined by the Tribunal filed 11 July 2019, [2].

² Application for domestic building disputes filed 12 December 2017.

- [20] No variations to the contract have been agreed by the parties.
- [21] On 27 March 2017, Ozzie issued an invoice for ‘extra works as authorised by owner’, in the sum of \$48,392.80 (including GST).³

Claim and counterclaim

- [22] Mackrob’s claim articulated in written submissions is as follows:

Restitution with respect to works organised and paid for by Mackrob	\$80,185.07
Cost of completing the works	\$29,052.00
Loss of rental	\$24,599.74
General damages for inconvenience and distress	\$30,000.00
Total	\$163,836.81

- [23] It also seeks interest on those amounts and wishes to make further submissions as to costs.
- [24] Although originally considerably larger, during hearing Ozzie’s counterclaim was restricted to the sum of \$4,687.50 plus interest for works undertaken by it in the practical completion stage. It abandoned its claim for variations. Leave is also sought to make submissions as to costs.

The contract

- [25] The contract was prepared by Ms White, then an employee of Ozzie and she executed the contract on Ozzie’s behalf. It is not suggested that Ms White was acting without authority.⁴
- [26] Mr Mackay carried out all negotiations on behalf of Mackrob and he executed the contract on its behalf. Ozzie was represented during the negotiation by Ms White and another employee of either Ozzie or GMI, Mr Warner.⁵ The negotiation process does not reflect well on either party. It is not in dispute that the contract was executed prior to the finalisation of plans for the dwelling. While Mr Irvine conceded that the contract is a fixed price contract, he says that it is not reflective of the agreement he originally reached with Mr Mackay. The parties are in dispute as to which documents may or may not be included in the contract. There is also substantial disagreement as to the scope of works contemplated by the contract.
- [27] The construction contemplated by the parties employed ‘a proprietary modular design system’ developed by GMI.⁶
- [28] Mr Irvine describes it as follows:

The system allows homes to be constructed more quickly and cheaply. Essentially a concrete slab or other platform is required as a “base” for the construction of any normal home or building. However, the system provides for the shell of the house, such as the external and internal walls, windows, doors and roof (“the shell”) to be erected and/or installed very quickly.

³ Hearing Bundle received at hearing on 16 July 2019 (‘Trial Bundle’), 187.

⁴ Affidavit of Jo-Ann White dated 19 September 2018, [5].

⁵ Ibid [7].

⁶ Affidavit of Gregory Irvine dated 14 January 2019, [2].

Thereafter the construction proceeds as with the construction of any normal home.⁷

[29] Effectively, Ozzie was to attend to the construction of a kit home provided by GMI.

Cost plus or fixed price

[30] It is Mr Irvine's evidence, after meetings and discussions with Mr Mackay, that it was agreed that he and Ozzie would 'supervise the structural elements of the work and Ozzie would be paid 10 percent of the overall cost of the construction of the premises'.⁸ The contract was prepared because Mackrob needed it to obtain finance and did not displace the agreement he had reached with Mr Mackay. He trusted Mr Mackay to honour their verbal agreement.⁹

[31] He delegated the preparation and execution of the contract to Ms White and in fact did not see the contract before it was executed by Ms White on behalf of Ozzie.

[32] Mr Mackay denies that he agreed to any cost plus arrangement.¹⁰ He did not respond to the assertion that the contract was prepared for the purposes of Mackrob's finance application. He was not cross-examined on that point.

[33] Ms White's evidence is: (numbering omitted)

I was requested by Greg Irvine to prepare the contract for the fixed sum that is shown in the contract which Greg provided me, subject to the prime cost items which Greg also provided me with specifics of.

I recall Greg instructing me to prepare the contract in the same way as a contract that I had recently prepared for his sister, which was a fixed price contract.¹¹

[34] She did not retreat from that position in cross-examination.

[35] Mr Warner's evidence is that he was involved in negotiation of the contract and it was always intended to be a fixed sum contract except for prime cost items.¹²

[36] Even if I accept Mr Irvine's evidence completely, it does not in my view establish that an oral costs plus agreement was ever concluded. At its strongest the evidence is that the negotiations between Mr Mackay were proceeding on that basis but those negotiations were ongoing.

[37] It is common ground that the contract itself was drafted by Ms White, on her evidence, at the direction of Mr Irvine. Even if I accept that the document does not accurately reflect the instructions she received or is contrary to Mr Irvine's understanding of the arrangements the contract constituted an offer to Mackrob which it accepted.

[38] Accordingly, I find that the contract is a fixed price contract.

⁷ Affidavit of Gregory Irvine dated 14 January 2019, [3].

⁸ Ibid [20].

⁹ Ibid [29], [30].

¹⁰ Affidavit of Peter Mackay dated 5 March 2019, [8], [14], [15].

¹¹ Affidavit of Jo-Ann White dated 19 September 2018, [8]-[9].

¹² Affidavit of William Warner dated 9 October 2018, [8].

What documents are included in the contract

- [39] The description of the works in the contract is ‘new residential home’.¹³
- [40] Appendix part C, which contemplates completion or attachment of the specifications, has been left blank.
- [41] It is submitted on behalf of Mackrob that the specifications are contained in three documents which ought to be read as part of the contract, namely:
- (a) The inclusions list;¹⁴
 - (b) GMI Homes Kit document;¹⁵ and
 - (c) Kit build costing template.¹⁶
- [42] The description of works and omission of the specification, Mackrob submits ‘makes the contract ambiguous and the above documents necessary to give the contract meaning’.¹⁷
- [43] It is submitted on behalf of Ozzie that none should be included. The inclusions list did not exist at the time the contract was formed and was prepared for another purpose.¹⁸ The costing template and GMI Homes Kit document, which were precontractual documents, were not incorporated in the contract by reference.¹⁹ In the absence of specifications, the scope of works should be determined by reference to the terms of the contract if that is possible and without reference to extraneous materials and in particular, those three documents.
- [44] It is submitted on behalf of Ozzie, that the contents of appendix part D of the contract, which set out the various stages at which claims may be made by the builder ‘clearly stipulate that Ozzie was responsible for erecting the structural elements of the property such as the foundations frame, walls and roof’.²⁰
- [45] I cannot agree with that. There is nothing in the contract which distinguishes the structural elements from the non-structural elements. It cannot be that Ozzie can satisfy its contractual obligations by delivering the shell of a building unconnected to essential services.
- [46] There is nothing in the contract which requires Ozzie to allow access to trades during the course of construction.
- [47] In any event, that does not assist in determining what is to be built beyond the general description of ‘new residential house’. It does not indicate what the building is to be made from, how many bedrooms or bathrooms it must have or any other particulars.
- [48] It is clear from the documents which were filed in these proceedings that at the time of execution of the contract, both Ozzie and Mackrob had a more or less common

¹³ Residential Building Contract – Level 2 dated 12 May 2016, item 5.

¹⁴ Trial Bundle, 38–40.

¹⁵ Exhibit 1.

¹⁶ Exhibit 2.

¹⁷ Applicant’s submissions filed 4 September 2019, [14]-[20].

¹⁸ Respondent’s submissions filed 28 August 2019, [47], [64]-[69].

¹⁹ Ibid [47].

²⁰ Ibid [59].

concept of what was ultimately to be built and they certainly did not derive that from the terms of the contract document itself. I find that the inclusions list does not form part of the contract. It is uncontroversial that it is a document created some weeks after the contract was signed for the purpose of responding to queries from a valuer appointed by Mackrob's financier. It was not incorporated into the contract by agreement. That is not to say however that it is of no evidentiary value.

- [49] Mr Mackay's evidence in cross-examination was that both the GMI Homes Kit document and the kit build costing template were given to him at the same time as the contract.²¹ Ms White says they were provided sometime prior to that.²² In any event it is not disputed that they were in existence and had been provided to Mackrob prior to its execution of the contract.
- [50] Mr Mackay's evidence is that both formed part of the contract.²³
- [51] Mr Warner's evidence is that the costing sheets (the kit build costing template) was used to determine the fixed price included in the contract by applying a 10 percent margin to the estimates contained in it.²⁴
- [52] He agreed in cross-examination that the various estimates were not based on quotes²⁵ as did Ms White.²⁶ Ms White also opined that the kit build costing template was not a specification.²⁷
- [53] In cross-examination, it was put to Mr Warner that it would be normal practice in the context of a fixed price contract to use costings based on quotes. He responded:
- In a normal situation, a builder would provide a client with a quote and that client – it was up to the builder's discretion to use who he wants to do the kitchen. Most builders will put a margin on top of their own quotes to make sure that they're not below. But it's pretty standard practice for a builder to provide costs on a building before actually going to the trades.²⁸
- [54] Mr Irvine's evidence is that the kit build costing template 'was to provide a budget to Mackrob on best guess estimate of costs for the project (estimate) to give Mackrob an indication of what prices might be on the mainland'.²⁹ The estimate only provided those general items required for a project because the plans and inclusions list had not been completed.³⁰
- [55] In cross-examination Mr Irvine confirmed that he believed the spreadsheets were not a specification and contained a lot of problems.³¹

²¹ Transcript of Proceedings, *Mackrob Pty Ltd v Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds* (Queensland Civil and Administrative Tribunal, BDL003-18, 16 July 2019) 1-12, line 42.

²² Ibid 1-33, lines 40-43.

²³ Affidavit of Peter Mackay dated 9 May 2018, [5]; Transcript of Proceedings, *Mackrob Pty Ltd v Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds* (Queensland Civil and Administrative Tribunal, BDL003-18, 16 July 2019) 1-12, lines 40-43.

²⁴ Affidavit of William Warner dated 9 October 2018, [9].

²⁵ Transcript of Proceedings, *Mackrob Pty Ltd v Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds* (Queensland Civil and Administrative Tribunal, BDL003-18, 16 July 2019) 1-27, line 10.

²⁶ Ibid 1-32, line 19.

²⁷ Ibid 1-33, line 4.

²⁸ Ibid 1-27, lines 13 -18.

²⁹ Affidavit of Gregory Irvine dated 14 January 2019, [26](a).

³⁰ Ibid [26](b).

³¹ Transcript of Proceedings, *Mackrob Pty Ltd v Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds* (Queensland Civil and Administrative Tribunal, BDL003-18, 16 July 2019) 1-39, lines 44-45.

- [56] It is submitted on behalf of Ozzie:
- (a) That the GMI Homes Kit document was a guide only and could not be a detailed specification or part of a specification when the plans for the building had not been finalised; and
 - (b) The kit build costing template did not contain sufficient detail for the works to be considered a specification and contained a number of errors and omissions.
- [57] It was further submitted by the parties that neither document was incorporated by reference. That in itself is hardly surprising. The shortcomings of the contractual process are the primary reason for this matter coming before the Tribunal.
- [58] The evidence is however that these two documents, however imperfect and however inaccurate, are the only documents which existed at the time of the contract that informed the phrase ‘new residential house’ contained in the contract.
- [59] Their inclusion is necessary because without any alternative specifications the contract is so ambiguous as to be meaningless.
- [60] I find that the GMI Homes Kit document and the kit build costing template form part of the contract.
- [61] I also find that the works undertaken by the subcontractors come within the scope of works included in the GMI Homes Kit document and the kit build costing template.
- [62] This is confirmed by the inclusions list. Notwithstanding Mr Irvine’s apparent lack of knowledge of it there is no suggestion that Ms White, who prepared it, was acting beyond the scope of her authority.

Subcontractors

- [63] Mackrob’s restitution claim includes an amount of \$72,653.43 being amounts paid by it claimed against it by eight subcontractors or suppliers (‘the subcontractors’) who carried out work and supplied goods during the construction at the property.
- [64] It is Ozzie’s position (or at least Mr Irvine’s position) that it was only responsible for the structural elements of the construction (referred to in Mr Irvine’s evidence as the shell). The works undertaken by the subcontractors were outside the scope of the contract. They were works organised by Mr Mackay on behalf of Mackrob to be paid for by Mackrob, Mr Irvine says.
- [65] Mr Irvine also says that it was agreed that Mr Mackay, ‘would act as the project manager for Mackrob for the project including obtaining quotes and organising the various trades to undertake the work and I and Ozzie would supervise the structural elements of the work’.³²
- [66] He continued:
- Mackrob was to otherwise find qualified trades it was happy with and obtain quotes and agree pricing with the trades and suppliers. It was hoped that Mackrob might agree to pricing somewhere near the estimate but once accepted it would:
- (i) advise Ozzie of the costs/quotes for those works;

³² Affidavit of Gregory Irvine dated 14 January 2019, [21].

- (ii) introduce the supplier or trades to Ozzie so Ozzie could ascertain the trades, in particular, were [sic] properly licenced by the QBCC and would perform the works to an acceptable standard to Ozzie;
- (iii) Ozzie would then enter into a sub-contract with those trades; and
- (iv) Mackrob would pay these trades and ensure Ozzie had its 10 percent of all costs.³³

[67] Ms White's evidence is that Mr Irvine requested that the trades 'be organised by Peter [Mackay]'³⁴ but believed the trades were within the scope of the contract.³⁵ In cross-examination she said 'Mr Mackay would email her with details of the price and Ozzie would say go ahead or not'.³⁶

[68] Mr Warner's evidence is that Mr Irvine advised Mr Mackay that he could 'obtain quotes directly from the trades which he did'.³⁷ He is of the view that it was 'always intended' that the trades were within the scope of the contract.³⁸

[69] Mr Mackay says that because Ozzie's progress in obtaining quotes was slow, he was advised 'that if I liaised with contractors this would assist the respondent',³⁹ and denies any suggestion that the trades were outside the scope of the contract or were to be paid for by him.⁴⁰ In cross-examination he said, 'I was authorised by Greg or the builder, but it was Greg, to liaise to get quotes on behalf of Greg, to submit quotes to Greg, to get invoices to Greg, which have all been accepted of course ...'.⁴¹

[70] There is little evidence of how any of this was put into practice. Mr Mackay's evidence is that he did submit quotes to Ozzie and gave some examples of that and none of the trades were rejected by Ozzie. Mr Irvine does not give any evidence whatsoever as to whether the trades were considered or investigated.

[71] The fact that all the subcontractors have elected to pursue Mackrob and/or Mr Mackay rather than Ozzie indicates that Mr Mackay did much more than liaise with them or obtain quotes and forward invoices and that Ozzie did not, as Mr Irvine intended, enter into sub-contracts with them.

[72] It is submitted on behalf of Ozzie in the event that the costs of works performed by subcontractors are within the scope of the contract, that Mackrob could not bind Ozzie to third party contracts as its undisclosed principal because Mackrob was acting beyond the scope of its authority.⁴²

[73] It is submitted on behalf of Mackrob that the doctrine of undisclosed principal is in respect of claims by contractors against a principal or vice versa and cannot be relied

³³ Affidavit of Gregory Irvine dated 14 January 2019, [26](d).

³⁴ Affidavit of Jo-Ann White dated 19 September 2018, [13].

³⁵ Ibid [14].

³⁶ Transcript of Proceedings, *Mackrob Pty Ltd v Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds* (Queensland Civil and Administrative Tribunal, BDL003-18, 16 July 2019) 1-33, line 14.

³⁷ Affidavit of William Warner dated 9 October 2018, [11].

³⁸ Ibid [12].

³⁹ Affidavit of Peter Mackay dated 11 October 2018, [9].

⁴⁰ Ibid [10].

⁴¹ Transcript of Proceedings, *Mackrob Pty Ltd v Ozzie Exports Pty Ltd t/as Arabian Homes and Sheds* (Queensland Civil and Administrative Tribunal, BDL003-18, 16 July 2019) 1-19, lines 34-39.

⁴² Respondent's submissions filed 28 August 2019, [33]-[39].

on to determine the existence or otherwise of an agency relationship.⁴³ I accept that submission.

- [74] If it was accepted that Mr Mackay or Mackrob, as Ozzie's agent, acted beyond the scope of his or its actual authority, the doctrine would preclude Ozzie suing or being sued by the subcontractors. It does not prevent an agent claiming indemnity or restitution from a principal.
- [75] It is further submitted on behalf of Mackrob that Ozzie has received the benefit of the subcontractors' works performed and paid for by Mackrob and as these works are included in the works to be carried out by Ozzie under the contract retention of those amounts would unjustly benefit Ozzie.
- [76] It is Mr Mackay's evidence that he submitted quotations to Ozzie and was not told any had been rejected or were over budget.⁴⁴ In any event it is apparent that Ozzie, who had 'free and uninterrupted possession of the site'⁴⁵ permitted the subcontractors to attend onsite to carry out the works. It cannot in those circumstances take objection to any or all of them.
- [77] I find that Ozzie would be unjustly enriched if allowed to retain the benefit of the subcontractors' works. Accordingly I allow Mackrob the amounts it has paid or is liable to pay as a result of proceedings in this Tribunal or the Magistrates Court in the following instances:

Hervey Bay Cabinet Craft	\$10,996.70
Harry Joynson Plumbing	\$20,005.37
Beckn Pty Ltd	\$5,750.00
J and J Denton	\$5,750.00
Total	\$42,502.07 ⁴⁶

- [78] I make no allowance for the claims which have not yet been finalised. These claims have not been paid by Mackrob or Mr Mackay and the basis for failure to pay has not been addressed and cannot be determined.
- [79] Mackrob's claim includes the sum of \$7,874.50 by JW Ross⁴⁷ and the amount appears to be included in calculations contained in its submissions. I cannot find any evidence which supports it.
- [80] The claim also included an amount of \$27,119.14 for payments made by Mackrob and Mr Mackay to various subcontractors. I am satisfied that with some rounding errors, these are the amounts referred to in an email attachment from Mr Mackay to John Hammond, an employee of Ozzie, dated 27 March 2017.⁴⁸ By email response, also dated 27 March 2017, Mr Hammond accepted the amount of \$27,413.53,⁴⁹ I allow the amount claimed of \$27,119.14.

⁴³ Applicant's submissions filed 4 September 2019, [3], [4].

⁴⁴ Affidavit of Peter Mackay dated 5 March 2019, [22].

⁴⁵ Residential Building Contract – Level 2 dated 12 May 2016, cl 7.2.

⁴⁶ Statement of agreed facts and disputed facts and issued to be determined by the Tribunal filed 11 July 2019, [18]-[25].

⁴⁷ Application for domestic building disputes filed 12 December 2017, [16].

⁴⁸ Trial Bundle, Affidavit of Peter Mackay dated 9 May 2018, [17], annx "PDM 10".

⁴⁹ Trial Bundle, Affidavit of Peter Mackay dated 9 May 2018, [22], annx "PDM 12".

Termination of the contract

- [81] On 27 February 2017, Ozzie issued an invoice in the amount of \$58,762.50 for the fixing stage.⁵⁰
- [82] Mackrob says that fixing stage had not been reached because doors had not been hung and tiling had not been finished.⁵¹
- [83] Mackrob paid \$25,000.00 on 20 March 2017,⁵² and the balance when it was satisfied fixing stage had been reached on 6 April 2017.⁵³
- [84] On 27 March 2017, Mr Hammond emailed Mr Mackay ‘by way of account reconciliation’ and spreadsheet, a copy of the fixing stage invoice, a practical completion invoice in the amount of \$19,587.50 and an invoice for ‘extra works authorised by owner’ for \$48,392.80.⁵⁴
- [85] Mr Mackay sent a text to Mr Irvine⁵⁵ after receipt of those documents which contained an open offer of settlement. Mr Hammond sent an email to Mr Mackay which:
- (a) Rejected the proposed settlement;
 - (b) Advised Ozzie had ceased all work and directed all trades to cease work; and
 - (c) Advised that Ozzie was closing the site and instructed Mr Mackay and any other parties not to access it.⁵⁶
- [86] On 6 April 2017, Mackrob’s solicitors emailed correspondence to Ozzie which:
- (a) Asserted that the fixing stage invoice had been issued prematurely;
 - (b) Confirmed payment of the balance of the fixing stage;
 - (c) Asserted that the suspension of works was unlawful as a result of Ozzie having failed to comply with clause 16.2 of the contract;
 - (d) Required Ozzie to resume work immediately and advised if it failed to do so Mackrob would terminate the contract pursuant to clause 20.1(b); and
 - (e) Demanded withdrawal of the practical completion invoice until notice required by clause 17.1(a) of the contract had been issued and the property inspected by the parties.⁵⁷
- [87] On 24 April 2017, Mackrob’s solicitors emailed correspondence to Ozzie terminating the contract for Ozzie’s failure to resume works.⁵⁸

⁵⁰ Statement of agreed and disputed facts and issues to be determined by the Tribunal filed 11 July 2019, [12]; Trial Bundle, annx “PDM12”.

⁵¹ Application for domestic building disputes filed 12 December 2017, [7].

⁵² Statement of agreed and disputed facts and issues to be determined by the Tribunal filed 11 July 2019, [13].

⁵³ Ibid [16].

⁵⁴ Trial Bundle, Affidavit of Peter Mackay dated 9 May 2018, annx “PDM12”, 182-187.

⁵⁵ Ibid annx “PDM14”, 189-190.

⁵⁶ Ibid.

⁵⁷ Ibid annx “PDM15”, 191-192.

⁵⁸ Trial Bundle, Affidavit of Peter Mackay dated 9 May 2018, annx “PDM15”, 194.

- [88] Clause 17 of the contract required Ozzie to give Mackrob at least five business days' notice of anticipated practical completion and set a time and date for inspection by the parties. That did not occur. Ozzie cannot simply by issuing a practical completion notice establish that practical completion has occurred. Non-payment of that invoice is not a substantial breach and does not permit suspension of the works.
- [89] Ozzie's claim for extra work or variations has been withdrawn. No variations to the price have been agreed by the parties.⁵⁹ Non-payment of the extra invoices is not a substantial breach and does not permit suspension of the works.
- [90] Clause 16 entitled Ozzie to suspend works only if:
- (a) Mackrob was in substantial breach; and
 - (b) Had failed to remedy that breach within 10 business days of notice of the breach.
- [91] No notice of substantial breach was given and that is in my view sufficient to make Ozzie's suspension of works unlawful.
- [92] In any event, if it could be said that Ozzie had until 10 April 2017 to pay the fixing stage invoice. Ozzie paid on 6 April 2017. Ozzie would have been obliged to resume works by 24 April 2017 which it did not do.
- [93] I find that Mackrob's termination of the contract on 24 April 2017 was lawful.

Damages

- [94] In addition to its restitution claim, Mackrob claims damages as follows:
- (a) \$29,052.00 being the cost of completing the works after termination;
 - (b) \$24,599.74 being loss of rent; and
 - (c) \$30,000.00 for general damages.

Cost of completion

- [95] Mackrob claims electrical work of \$14,332.00 in respect of the supply and installation of air-conditioning units contained in two invoices from New Tech Electrical and an invoice for the supply for a rangehood by Hotondo Hervey Bay for \$200.00.⁶⁰
- [96] It is submitted on behalf of Ozzie that the supply and installation of air-conditioning units is outside the scope of works. I am satisfied that it is incorporated in the scope of works by its inclusion in the GMI kit build costing template.
- [97] I award damages in the sum of \$14,530.00 in respect of those items.
- [98] Mackrob also claims for \$14,250.00 being the cost to obtain a certificate of classification. I accept that such costs are within the contracts scope of works.
- [99] By a document titled 'amendment to point 44 (page 7) of Mackrob's affidavit' filed in the Tribunal on 31 January 2019, Mr Mackay says the actual cost of obtaining certification was \$14,250.00 and attached a tax receipt for that amount from Jeffrey

⁵⁹ Statement of agreed and disputed facts and issued to be determined by the Tribunal filed 11 July 2019, [38].

⁶⁰ Trial Bundle, Affidavit of Peter Mackay dated 9 May 2018, [41], annx "PDM25", 218-20.

Hills and Associates together with other documents relating to the certification. I award \$14,520.00 as damages in respect of that amount.

Late completion – loss of rent

- [100] Pursuant to the contract, practical completion was to occur on 13 February 2017.⁶¹
- [101] Earlier I made findings that the construction had not reached practical completion when Mackrob terminated the contract on 24 April 2017.
- [102] I agree with the submission on behalf of Mackrob that as works had not reached practical completion prior to termination, Mackrob has no entitlement to liquidated damages. That does not prevent Mackrob from proving actual damage.
- [103] To make any award of damages for late completion I must be satisfied that Ozzie is the cause of the delays and I am not so satisfied.
- [104] I have found that Mackrob and/or Mr Mackay, contrary to the contract and beyond the scope of its or his authority as Ozzie’s agent, contracted directly with the subcontractors. While he may be entitled to be reimbursed for payments made to those subcontractors, he is also ultimately responsible for any delays to the construction process caused by those subcontractors.
- [105] It is submitted on behalf of Mackrob, ‘email evidence confirms such delays were caused by Ozzie and that Ozzie were apologetic for Mackrob for the delays’.⁶²
- [106] While I acknowledge that Ozzie’s evidence does not give particulars of delays by subcontractors I am not satisfied in the case where possession of the building site is shared, it can safely be assumed that all delays must be the responsibility of Ozzie.
- [107] I am also not satisfied that Mackrob’s calculations of loss of rent based on the evidence of Toni Bradley’s estimate of occupancy⁶³ unsupported by historical occupancy figures between 2017 and the date of the hearing, is sufficient to discharge Mackrob’s onus in establishing quantum.

General damages

- [108] Mackrob claims the sum of \$30,000.00 for ‘general damages for inconvenience and distress resulting from the breaches of the contract by Ozzie’.⁶⁴
- [109] As a result of Ozzie’s breach of contract and failure to pay subcontractors, Mackrob has been pursued by multiple subcontractors requiring substantial cost to be outlaid in dealing with claims by subcontractors and resulting in judgments against Mackrob and associated reputational damage.⁶⁵
- [110] Mackrob and/or Mr Mackay entered contracts with the subcontractors and regardless of his right to be reimbursed he was responsible for paying them. If Mackrob chose not to, even if for a legitimate reason, the consequences of that, including the costs and reputational damages, cannot be said to be the responsibility of Ozzie.

⁶¹ Statement of agreed and disputed facts and issues to be determined by the Tribunal filed 11 July 2019, [7].

⁶² Applicant’s submissions filed 4 September 2019, [101], examples contained in Trial Bundle, 393.

⁶³ Trial Bundle, Affidavit of Toni Bradley dated 9 May 2018, 233-234.

⁶⁴ Applicant’s submissions filed 4 September 2019, [106].

⁶⁵ Ibid [105].

[111] Ozzie did not breach the contract by failing to pay Mackrob's subcontractors directly nor did it dictate Mackrob's reaction to the claim against it by Mr Mackay because it had not contracted with them.

[112] In those circumstances I decline to award general damages to Mackrob.

Counterclaim

[113] I have found that the works did not reach practical completion. Ozzie's counterclaim is calculated by deducting an allowance of \$15,000.00 from the practical completion stage payment of \$19,487.50. Neither amount is made out on the evidence before the Tribunal and there is no alternative quantum meruit claim.

[114] I dismiss the counterclaim.

Orders

[115] I calculate the amount payable by Ozzie to Mackrob as follows:

Contract price	\$391,750.00
Less	-
Restitution claim allowed	\$69,621.21
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Adjusted contract price	\$322,128.79
Less	-
Payments made by Mackrob	\$372,162.50
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Sub total	\$50,033.71
Plus	+
Damages	\$29,052.00
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Total	\$79,850.71

[116] I award interest on that amount pursuant to section 77(3)(c) of the *Queensland Building and Construction Commission Act 1991* (Qld) at the rate of 10 percent.

[117] I will allow the parties to file submissions as to costs.