

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP663/2015

### CATCHWORDS

**Domestic building:** mutual claims of repudiation of contract; finding that applicants/owners lawfully terminated contract; assessment of applicants' claims for damages; assessment of applicants' claim for interest; respondent/builder's counterclaim dismissed; costs and reimbursement of fees reserved.

**FIRST APPLIANT:** Mr John Fotopoulos  
**SECOND APPLICANT:** Mrs Charmaine Fotopoulos  
**RESPONDENT:** Sawtech Pty Ltd (ACN 134 385 685) t/as Deccan Homes  
**WHERE HELD:** Melbourne  
**BEFORE:** Member C Edquist  
**HEARING TYPE:** Hearing  
**DATE OF HEARING:** 20, 21, 22, 23, 24 and 27 March 2017 and 11, 12, 13, 14, 15, 18, 19 and 20 September 2017  
**DATE FOR RECEIPT OF FINAL SUBMISSIONS:** 22 September 2017  
**DATE OF ORDER:** 16 November 2017  
**CITATION:** Fotopoulos v Sawtech Pty Ltd t/as Deccan Homes (Building and Property) [2017] VCAT 1544

### ORDERS

- 1 The respondent must pay the applicants damages in the sum of \$52,194.10.
- 2 In addition, the respondent must pay the applicants damages in the nature of interest of \$12,569.49.
- 3 The respondent's counterclaim is dismissed.
- 4 Costs and reimbursement of fees under s115B of the *Victorian Civil and Administrative Tribunal Act 1998* are reserved. The parties have liberty to file further submissions regarding costs, and any application for an order for reimbursement of fees, within 30 days. Any such submissions should include reference to any offers made.

**MEMBER C EDQUIST**

**APPEARANCES:**

First Applicant: In person

Second Applicant: In person

Respondent: Mr Abdul Rafay Syed under a written authority from Mr Abdul Wasay Syed, director.

## REASONS

### INTRODUCTION

- 1 The applicants, Mr John Fotopoulos and Mrs Charmaine Fotopoulos (“the owners”), are the proprietors of a property in Wickham Road, Moorabbin. When they purchased it, there was an existing house at the front of the property. They decided to renovate that house using as their builder Mason Construction Melbourne Pty Ltd (“Mason Construction”). They also decided to enhance the value of their investment by constructing a second house of the rear of the block.
- 2 This long-running dispute arises out of the relationship between the owners and the builder of the second house. One of the issues in the case was the identity of the builder. The issue arose because the building contract entered into by the parties named the builder as “Medina Homes a/or Deccan Homes”. When the owners filed their application at the Tribunal on 22 May 2015 they named Sawtech Pty Ltd (ACN 134 385 655) trading as Deccan Homes (“Sawtech”) as the respondent. Sawtech initially accepted that it was the builder, then changed its position, and it was only on the first day of the hearing that it confirmed that it was the builder.
- 3 The owners filed points of claim with the application seeking damages for breach of contract of \$283,373 from Sawtech, basing their claim on a report prepared by Mr Laurie Mitchell dated 21 April 2015. The sum of \$283,373 comprised \$136,575 in respect of the estimated cost of rectifying defects, \$131,798 in respect of the estimated cost of completing works, \$15,000 in lost rental income and interest under the *Penalty Interest Rates Act 1982*. An unquantified claim for continuing loss of rental income was also made. In this pleading no claim that the contract had been terminated was made.

### THE PLEADINGS

- 4 The Tribunal is not a court, and does not necessarily require parties to file pleadings. However, from the outset the owners engaged Velos Lawyers to assist them to articulate their claim. From June 2015, at least, Sawtech had its pleadings prepared by MLC Lawyers. In circumstances where at the hearing the parties were not represented by professional advocates, the pleadings took on particular significance in assisting the Tribunal to understand the respective positions of the parties regarding critical issues such as the formation of the contract, its contents, the date when it came into effect, and its termination. For this reason, it is necessary to refer to the pleadings at least briefly.
- 5 When the respondent filed its defence in June 2015, no issue was taken with the owner’s contention that Sawtech was the builder. The issues were confined to denial of any breaches of the contract, and loss.
- 6 The owners filed amended points of claim in July 2015. The claim in respect of defects and incomplete works was maintained. However, a new claim was made for rectification of the contract, with a view to establishing

that the contract was made between the owners and Sawtech, not between the owners and Abdul Wasay Syed. The amended points of claim also adjusted the sums claimed, made a new claim for bank interest on progress payment claims wrongly claimed and paid, and sought costs.

- 7 It was also asserted that progress claims had been sought other than as allowed by s40 of the *Domestic Building Contracts Act 1995*. The owners also contended they had lawfully terminated the contract using the show cause mechanism set out in the contract.
- 8 Sawtech filed a substantially enlarged defence dated 22 September 2015 which admitted the terms of the contract alleged by the owners and consented to the claimed order for rectification. Sawtech also admitted that it had “[i]n or about September 2014 formed a common intention to enter a contract” with the owners to build a two storey dwelling on the land for \$232,000 (including GST) and admitted that concurrently the owners and it had executed a contract for the carrying out of the works for that price. However, it denied breaching the contract, and disputed the owners’ entitlement to terminate the contract. Sawtech asserted that the owners had repudiated the contract, and contended that it had accepted that repudiation.
- 9 Sawtech also made a counterclaim for \$34,800 in respect of the 15% fixing stage. It also relied on non payment of this sum as a basis for termination.
- 10 The owners yet again amended their claim in December 2015. The claims previously made about rectification, the terms of the contract, and breach of s40 of the *Domestic Building Contracts Act 1995* were maintained, but a new claim was pleaded that Sawtech had failed to address the matters raised in the owners’ notice of intention to terminate issued on 16 April 2015. Furthermore, the owners maintained the allegation that Sawtech had repudiated the contract, and alleged that they had accepted Sawtech’s repudiation when they delivered a notice of termination of the contract on or about 15 May 2015. The owners also amended their claim for damages.
- 11 When Sawtech put in its further amended points of defence and counterclaim on 23 February 2016 (“the final defence and counterclaim”, the case took a new turn. Sawtech denied that it had ever been a party to the building contract, and that it was never intended to be a party. It said that the contract correctly identified Medina Homes as the builder.
- 12 Sawtech also augmented its claim regarding termination of the contract, asserting that it was entitled to serve the fixing stage progress claim on 16 April 2015, and that the failure to pay that payment claim was a repudiation of the contract.
- 13 Perhaps surprisingly in the light of its claim that Medina Homes was the builder, Sawtech maintained the counterclaim, asserting that the owners were liable to it in respect of the 15% fixing stage claim of \$34,800. Sawtech also claimed interest and costs.
- 14 When the pleadings are reviewed, it can be seen how the respective claims of the parties evolved. The issue of the identity of the builder is worthy of

comment. As noted, Sawtech initially admitted that it was the builder, and then resiled from this position, but then ultimately adopted its original position at the opening of the hearing.

- 15 Before leaving the pleadings, I make a comment about the quantum of the owners' claim for damages. Although the owners, with the assistance of their lawyers, had articulated their monetary claims in detail up to December 2015, no updated particulars of loss and damage were filed. It was only during the course of the second part of the hearing in September 2017 that it became clear that the owners were seeking damages in respect of new defects which had been discovered after an inspection of the house which had taken place as part of the hearing in March 2017.
- 16 I also briefly address Sawtech's claim for damages. In its pleading it had limited its counterclaim to a claim for payment of the fixing stage payment of \$34,800. However, in its written submissions it added a claim for interest on that sum from 21 April 2015, calculated at 10%, allegedly under the *Penalty Interest Rates Act 1983*, and quantified at \$8,410. Sawtech also claimed an additional \$11,162 in respect of work that had been performed or in respect of items which had been acquired, but not fitted, at the time of termination. Its quantified claims accordingly totalled \$58,432. It also sought profit and overhead on its final claim. Interest was claimed again, together with costs.

## **THE ISSUES**

### **Termination**

- 17 The central issue between the parties is termination. From the owners' point of view, the question is whether they legally terminated the contract, either using the show cause procedure set out in clause 20 of the contract, or at common law by reason of Sawtech's repudiation of the contract. A subsidiary issue, if the owners legally terminated the contract, is the date upon which the contract was terminated.
- 18 From Sawtech's perspective, the issue is whether it legally terminated the contract under the show cause mechanism contained in clause 22 of the contract, or at common law by reason of the owners' repudiation of the contract. Again, the date of any such termination will need to be identified.

### **Damages**

- 19 Once it has been determined which party lawfully terminated the contract, an assessment of damages can be undertaken using the normal principles of contract law.

### **The owners' problem of proof of loss**

- 20 A complication in this case arose from the fact that the builder which the owners used to complete the second house, Mason Construction, was a company through which Mr Fotopoulos, who is a registered building practitioner, operates a construction business. He was a director. The

complication was that the owners had during the period that Mason Construction was completing the second house confused their legal identity with that of the company. In particular, they confused payments made by Mason Construction with payments they themselves had made. The extent to which the owners themselves can establish loss became a major issue in the case.

### **Interest**

- 21 Both parties have claimed interest, and both parties indicated they would be happy to have any interest to which they are entitled calculated at the rate applicable under s2 of the *Penalty Interest Rates Act 1983*.

### **Costs**

- 22 Both sides claimed costs under s109 of the VCAT Act.

### **Reimbursement of filing fees and hearing fees.**

- 23 During the course of the hearing the operation of *s115B of the Victorian Civil and Administrative Tribunal Act 1998* (“the VCAT Act”) was explained, and both parties have indicated they would like an order for reimbursement of fees to be made if they qualified for such an order..

### **THE HEARING**

- 24 The hearing began on 20 March and continued on 20, 21, 22, 23, 24 and 27 March 2017. There was an unsuccessful compulsory conference on 28 March 2017, after which the proceeding was listed for hearing on 11 September 2017, with an allowance of a further 10 days. The hearing ran continuously over 11, 12, 13, 14, 15, 18, 19 and 20 September 2017. The parties were given leave to file written submissions on 22 September 2107, and both sides did.
- 25 At the hearing Mr and Mrs Fotopoulos appeared in person. They both gave extensive evidence, and were subjected to lengthy cross-examination. They did not call Mr Mitchell on the basis that he had asked for a fee that they could not afford.<sup>1</sup> They also called as an expert Mr John Rosa, who had produced a written report, and also gave oral evidence for the best part of the day in the first phase of the hearing. Late in the hearing they called two witnesses from AA Pro-Painting, but did not call any other witnesses of fact.
- 26 Sawtech was represented by Mr Abdul Rafay Syed (“Mr A R Syed”), under a written authority from a director of the company, his brother Mr Abdul Wasay Syed (“Mr A W Syed”). Mr A R Syed explained that he had visited the site throughout the job and had managed the contract for Sawtech. He was the principal witness for Sawtech, and was cross-examined at length. Mr A W Syed confirmed that although he was a director of Sawtech, he had not been on site, and had limited personal knowledge of what had occurred.

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<sup>1</sup> The first exhibit the owners tendered was an email from Mr Mitchell explaining that his estimated fee to attend was \$9,000.

He was present almost continuously throughout the hearing, but gave only limited evidence. He was also cross-examined, but for a limited period.

- 27 Mr A R Syed explained that on the ground supervision during the project had been provided by a Mr Hassan Ahmed, but he was not available for the hearing as he now worked for another company. Sawtech called as its expert Mr Ian Forrest. Not only had he prepared a report, but he gave oral evidence, and was cross-examined.
- 28 Sawtech made extensive use of summonses to procure evidence. For instance, Mr Habib of Amana Constructions was summonsed and appeared on the sixth day of the hearing. After a couple of attempts Sawtech was able to force the relevant building surveyor, Mr Romeo Georgiou of Arki Building Surveyors to produce his file. In the second part of the hearing Sawtech used a summons to force an electrician named Emmanuel Lambriankos to come to the hearing. Sawtech also issued a summons to three engineers from Kingston City Council to force them to attend to give evidence and produce documents. Sawtech also summonsed the Simmoll Family Trust trading as Elwood Trade Services to attend, but the summons was not answered.
- 29 I now turn to the primary issue to be determined.

## **TERMINATION**

- 30 Each party claims that it has validly terminated the contract.

### **The owners' case regarding termination**

- 31 In the final version of their points of claim filed in December 2015, the owners allege Sawtech failed to address the matters raised in the owners' notice of intention to terminate issued on 16 April 2015, thereby justifying termination under clause 20 of the contract. Alternatively they allege that Sawtech repudiated the contract either by issuing a fixing stage progress payment claim when the fixing stage was incomplete, or purporting to rescind the contract in a letter dated 28 April 2015.

### **Clause 20.1 of the contract**

- 32 In issuing the notice of intention to terminate the contract on 16 April 2015 the owners were clearly utilising the show cause procedure contained in clause 20 of the contract. Relevantly, clause 20.1 reads:

If the Builder:

...OR

fails to proceed with the Works with due diligence or in a competent manner; OR

...OR

refuses or persistently neglects to remove or remedy defective work or improper Materials, so that by the refusal or persistent neglect the Works are adversely affected; OR

refuses or persistently neglects to comply with this Contract...; OR

...OR

is in substantial breach of this Contract;

THEN

the Owner may give written notice by registered post to the Builder:

describing the breach or breaches of the Contract by the Builder; AND

stating the Owner's intention to terminate the Contract unless the Builder remedies the breach or breaches of this Contract within a period of fourteen (14) Days after the Builder's receipt of the above notice.

### **The notice of intention to terminate the contract dated 16 April 2015**

33 Sawtech does not dispute that the owners delivered a notice of intention to determine the contract dated 16 April 2015. The notice was tendered. It relevantly read:

The Builder has failed:-

1 To proceed with the works with due diligence or in a competent manner.

2 Has unreasonably suspended the carrying out of works.

3 Refused and persistently neglected to remove and/or remedy defective work and/or improper materials so that by the refusal or persistent neglect, the works are adversely affected.

4 Refused and persistently neglected to comply with the Contract.

5 Has been unable or unwilling to complete the works and abandoned the Contract.

6 The Builder is in substantial breach of this Contract in that the Builder has failed to complete the works within the time specified by the Contract. The Builder has requested payment of Progress Payments in advance of those set out in Item 23.2 of the Appendix under the heading Progress payments. The Builder has been paid for lock-up stage and the Builder has not completed work to the stage, although it has been paid for it.

7 The Builder has undertaken works on the premises which are substantially defective and not in accordance with the building specifications.

8 The Owners intend on terminating the Contract unless the Builder remedies the breach or breaches of this Contract within a period of fourteen (14) days after the Builder's receipt of this Notice.

### **Sawtech's attack on the notice of intention to terminate the contract**

34 At the hearing, Mr A R Syed attacked the notice on the basis that it lacked particulars of the defective works complained of. That was clearly a fair criticism. Mr Syed further contended that the failure of the owners to properly particularise the defects complained of rendered the notice invalid,



with the result that the show cause procedure established by clause 20 of the contract had not been triggered.

### **The owners' counter argument**

35 The owners countered this argument by pointing out that they had on 21 April 2015 delivered to the builder a report they had procured from a building consultant, Mr Laurie Mitchell (“the Mitchell report”). The Mitchell report contained ample particulars of alleged defects. The owners contend that any lack of particularisation of the notice of intention to terminate the contract dated 16 April 2015 was cured by the service of the Mitchell report.

### **Discussion**

36 I do not accept the builder’s argument that the owners’ notice of intention to terminate was fatally flawed because it lacked particulars of the defects complained of. I highlight that other breaches of the contract were asserted, including that the builder was not proceeding with the works with due diligence, that it had abandoned the contract, that it had failed to complete the works within the time specified by the contract, that it had requested payment of progress payments in advance of those set out in Item 23.2 of the Appendix, and that it had been paid for lock-up stage when it had not completed work to this stage. I make no finding about these matters here, but emphasise that the notice of intention to determine the contract was based on a number of breaches of the contract. In my view, the failure to particularise the defects complained of did not mean that it was defective from the outset.

37 Furthermore, I accept the owners’ argument that when they served the Mitchell report on 21 April 2015, they in effect particularised the notice of intention to determine the contract in so far as defects were concerned. However, the fact that they particularised the defects complained of only when they served the report means that the notice became effective, in so far as it was concerned with defects, only on 21 April 2015. Having regard to later events, nothing turns on this particular timing issue.

38 After 21 April 2015 the builder made no attempt to return promptly to work, or to fix up the defects, or address other matters raised in the notice. Critically, this was confirmed by Sawtech’s director Mr A W Syed under cross-examination. He indicated that Sawtech’s initial response was to issue the fixing stage progress claim on 16 April 2015.

### **The letter of 28 April 2015**

39 The first response from Sawtech addressing the contents of the notice of intention to terminate the contract came on 28 April 2015 when Sawtech’s solicitors MLC Lawyers wrote to the owner’s lawyers disputing the contents of the notice, and also disputing the contents of the Mitchell report.

40 With respect to the Mitchell report, Sawtech’s solicitors wrote:

The Builder disputes the contents of Building Report commissioned by your Clients.

We are further instructed that the subject building is near completion and at the Final Stage of Building Works. Your clients have never previously expressed any dissatisfaction with the standard of Works or manner of Construction, having himself carried out daily inspections of all works in progress at the site.

- 41 It is apparent that this response to the detailed, 30 page report prepared by Mr Mitchell is bereft of particulars. It asserts that the works are at final stage, but does not address the question of whether the works are on program. The response also asserts that the owners have never previously expressed dissatisfaction with the works, but it does not challenge any of the defects which Mr Mitchell contended existed.
- 42 Critically, the letter of 28 April 2015 went further than challenging the contents of the notice of intention to terminate the contract. Sawtech's solicitors went on to say:
- Your clients have no justification in purporting to terminate the Contract. Your clients wrongful purported termination constitutes a repudiation of the Contract which our client hereby elects to accept and hereby rescinds the Contract.
- 43 Furthermore, Sawtech's solicitors pressed for payment of the fixing stage payment claim of \$34,800 as follows:
- Take Notice**, that unless we receive the sum of the \$34,800 within seven (7) days of the date of this Notice, we will issue proceedings on behalf of our client to recover the debt.
- 44 It was not argued in the letter of 28 April 2015 that the owners' failure to pay the fixing stage payment claim was a repudiation of the contract. This is no doubt because, in Sawtech's contention, the contract had already been brought to an end.
- 45 This being the case, the letter of 28 April 2015 makes it unnecessary to embark on an analysis of whether the statements contained in the notice of intention to terminate the contract were accurate at the time.
- 46 The relevant enquiry is that identified in the owners' response, which came in the form of a solicitor's letter dated 1 May 2017.

### **The letter of 1 May 2017**

- 47 The owners' lawyers responded to what they termed "the purported notice of termination" of 28 April 2015 in these terms:

The Notice of Intention to Terminate the Building Contract is just that. It is a Notice of Intention. It is not a Notice terminating the Building Contract.

You have misconstrued and misread this document

Our clients have not wrongfully terminated the Contract, as our clients have advised that it is a Notice of Intention to Terminate the Building Contract unless your client rectifies the breaches in the Contract.

Your client's purported termination of the Contract as a result of the owners' alleged repudiation is without merit.

- 48 The issue accordingly crystallised was whether Sawtech was entitled to take the position that the owners had themselves repudiated the contract merely by issuing a notice of intention to terminate the contract.
- 49 In my view, the owners' point is unanswerable. In characterising the notice of intention to terminate the contract dated 16 April 2015 as a notice of termination, Sawtech's lawyers had misconstrued the notice.
- 50 Far from being a notice which evinced an intention not to be bound by the terms of the contract, the owners' notice was consistent with the show cause mechanism contained in clause 20 of the contract.
- 51 However, rather than assert that Sawtech's lawyer's letter of 28 April 2015 was itself repudiatory, the owners' lawyers continued their response in a measured manner, saying:

Unless your client immediately rectifies the breaches referred to in the Notice of Intention to Terminate the Building Contract, a further notice will be served upon your client terminating the contract.

That Notice will be pursuant to Clause 20.2 of the Building Contract.

Your client pursuant to the Notice dated 16 April 2015 and served upon your client has 14 days in which to remedy the breach, failing which a further Notice will be served.

- 52 It is clear from these passages that the owners did not accept that Sawtech had effectively terminated the contract. Rather, the owners clearly regarded the contract as being on foot, as they confirmed their intention to rely upon the notice dated 16 April 2015 as a basis to terminate the contract in the event the alleged breaches of contract were not rectified within a further 14 days.
- 53 Sawtech did not respond to the owners' solicitor's letter of 1 May 2015. The next development was that the owners, through their solicitors, served a notice of termination of the contract on 15 May 2015.

#### **The notice of termination of the contract on 15 May 2015**

- 54 The notice is straightforward. It is stated to be a notice given pursuant to clause 20.2 of the contract, recites the names of the parties to the contract (which was said to be undated), refers back to the notice of intention to terminate the contract of 16 April 2016, and gives notice that the owners are immediately terminating the contract. It was signed by Velos lawyers on behalf of the owners.

#### **The owners' arguments as to why their termination was legal**

- 55 At the time the notice was served, the owners clearly took the view that they were terminating under the mechanism contained in clause 20 of the contract. They were doing so on the basis of the notice of 16 April 2016, as augmented by the Mitchell report on 21 April 2015.

- 56 However, the alleged defects set out in the Mitchell report do not need to be reviewed before a finding can be made regarding the legitimacy of the termination of the contract by the owners. This is because the owners in their amended points of claim filed in December 2015 broadened the bases upon which they said they had terminated the contract. The owners at this point alleged that Sawtech had evinced an intention not to be bound by the terms of the contract, and thereby repudiated it, in two respects, namely:
- a) issuing the fixing stage payment of \$34,800, in circumstances where the fixing stage had not been reached; and
  - b) claiming in the letter of 28 April 2015 that the notice of intention to terminate the contract was a repudiation of the contract.

**Sawtech’s primary argument as to why the owners cannot rely on the notice of termination dated 15 May 2015**

- 57 Sawtech did not make any technical attack on the notice of 15 May 2016 based on its form, or mode of service. Rather, Sawtech in its written submission said that the owners had terminated the contract in circumstances where they were in breach of the contract and therefore had repudiated the contract.
- 58 The issue here is whether the owners were in breach of the contract in failing to pay the fixing stage payment claim which had been issued by the builder on 16 April 2017.
- 59 One of the reasons why this is critical is that clause 20.3 of the contract provides that the owners may not terminate the contract unreasonably or vexatiously or if the owners are in substantial breach of the contract.
- 60 “Substantial breach” is not a defined term in the contract. However, clause 22.1 gives the builder a right to serve a notice of intention to terminate the contract in a number of circumstances, including where the owners are “in substantial breach of this Contract”. It is to be noted that one of the breaches on the part of the owners which would justify the builder issuing a notice of intention to terminate the contract under clause 22.1 includes where the owners have indicated to the builder that they are “unable or unwilling to make any payment required under the contract”. From this drafting, it may be inferred that a failure by the owners to make a payment required under the contract is a breach other than a substantial breach of the contract.
- 61 This inference is sufficient to deal with the argument that the owners were not entitled to terminate following the giving of a notice under clause 20.1 because they were in substantial breach of the contract at the time in not having paid the fixing stage payment claim.
- 62 By way of completeness, it is desirable to deal with the further argument raised by Sawtech in its further amended points of defence and counterclaim filed in February 2016 to the effect that the failure to pay the fixing stage payment claim was a repudiation of the contract and that the

contract was thereby terminated, alternatively is by the pleading terminated, either under clause 22.1 of the contract, or at common law.

- 63 The answer to this argument lies in clause 22.1, which, as noted, gives the builder a right to issue a notice of intent to terminate the contract where the owners have indicated to the builder that they are unable or unwilling to make any payment required under the contract. It follows that even if Sawtech did have a right to issue the fixing stage payment claim (which is expressly denied by the owners) the owners' failure to pay the fixing stage payment claim within the time required by the contract did not expose them to immediate termination. The builder was obligated to issue a notice under clause 22.1 giving the owners at least 14 days to cure the breach before proceeding to terminate the contract. This was an action Sawtech did not take.
- 64 The upshot is that Sawtech cannot rely on clause 22.1, alternatively on rescission at common law, in order to retrospectively justify its purported termination of the contract on 28 April 2015, or at any later point, on the basis of non payment of the fixing stage payment claim.

#### **Sawtech's secondary argument about termination**

- 65 Mr A R Syed raised an argument at the hearing that the owners had acted in a repudiatory manner because the day before they issued the notice of termination, they had instructed the relevant building surveyor, Mr Romeo Georgiou at Arki Building Surveyors Pty Ltd, to vary the building permit to reflect a change in the builders details.
- 66 I do not accept this argument. The owners agree that they did issue this instruction to Mr Georgiou. Indeed, they are seeking reimbursement of the required fee of \$330 inclusive of GST which they paid to Arki Building Surveyors on 14 May 2015. However, this was not an act which I consider to be inconsistent with the terms of the contract. It was an action taken at the conclusion of a lengthy process which had begun on 16 April 2016, and it was an action which was consistent with the owners' adherence to the contract to that point. It was a step which it was reasonable for the owners to take the day before they terminated the contract, so that they could promptly engage another builder immediately following the termination in order to proceed with the project as quickly as possible. It is to be noted that the amended building permit was not issued by the building surveyor to the owners until 15 May 2015, which is the day they served their notice of termination on Sawtech.
- 67 I make the additional point that Sawtech is acting inconsistently in, on the one hand, seeking to rely on its notice of termination dated 28 April 2015 and, on the other hand, asserting that the owners were behaving in a repudiatory manner when they instructed the building surveyor to amend the building permit to reflect the change in the identity of the builder on 14 May 2015.

## Discussion of letter of 28 April 2015

- 68 In my view, it is clear the owners were entitled to say that by purporting to terminate the contract on 28 April 2015 Sawtech acted in a repudiatory manner. In the face of the owners' notice of intention to terminate issued under clause 20.1, the builder was obligated to continue working and, if necessary, to remedy the breach or breaches of the contract alleged. In declaring that the contract was terminated with effect from 28 April 2015 Sawtech declared that it would no longer be honouring the contract, irrespective of whether any of the alleged breaches of contract articulated in the notice of 16 April 2015 subsisted.
- 69 Although the owners did not expressly rely on this act of repudiation as a basis for bringing the contract to an end on 15 May 2015, I consider that they are entitled to retrospectively rely on it as a supplementary justification for terminating the contract.

## Finding as to termination of the contract

- 70 For these reasons I find that it was the owners who validly terminated the contract. The date of termination was 15 May 2015.
- 71 This is a pivotal finding. As it was the owners who validly terminated the contract, they are entitled to damages for breach of contract. Furthermore, Sawtech's counterclaim must fail.
- 72 I now turn to the assessment of the damages to which the owners are entitled.

## DAMAGES

- 73 During the course of the hearing the parties were shown this passage from the decision of Alderson B in *Hadley v Baxendale*<sup>2</sup>:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

- 74 As the owners have established that they were entitled to terminate the contract, they can look to Sawtech for damages in respect of their losses arising directly or naturally from the breach. Those losses include the cost of rectifying defective works and completing the contract works which were not performed by the builder.

## The claim for loss of rent from the front house

- 75 The owners can also theoretically claim special damages if the fact that such damages might be incurred by the owner had been discussed before

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<sup>2</sup> [1854] EngR 296; (1854) 9 Ex 341.

the contract was formed. This follows from the second limb rule of the rule set out in *Hadley v Baxendale*, quoted above.

- 76 This consideration is relevant to the owners' claim for damages from Sawtech in respect of the loss of rent from the front house, which they said they were precluded from earning by reason of Sawtech's delays in completing the second house. The claim is quantified by the owners in their written submissions at \$7,500, calculated at \$500 per week for 15 weeks from 6 April 2015 to 20 July 2015.
- 77 I consider that this particular claim must fail for two reasons. The first is factual. There is no evidence that the relationship between the completion of the second house and the commencement of renting out the front house was discussed when the contract was being negotiated in January 2014.
- 78 On the contrary, the evidence contained in the contract suggests that the owners may not have been concerned about delay at all, because the rate for the liquidated damages identified in item 17 of the schedule to the contract was "N/A".
- 79 The intention of the parties may have been that general damages for delay would be available. This is discussed below, in the context of the claim for damages for delay in completing the second house. However, even if general damages for delay were available to the owners in respect of delay in completing the second house, there is certainly no basis to infer that such damages would relate to both the second house (to which the contract primarily related) and to the front house. There are certainly no words in the contract to support this view.
- 80 On the contrary, the owners clearly understood that, on the basis of the contract as it was written, they had no entitlement to damages in respect of delay in leasing out the front house arising from delay in completion of the second house. This is demonstrated by the fact that the owners in early March 2015 asked Sawtech to sign an acknowledgement that it was to pay \$600 a week in respect of the front house from 4 April 2015. This requirement was expressed to "override the signed building contract item no 17 & 17a where it is stated N/A". Not surprisingly, Sawtech refused to sign that acknowledgment.
- 81 For these reasons, I find that the owners' claim for damages in respect of rent which they allege they were precluded from receiving in respect of the front house, by reason of delay in completion of the second house, must fail.
- 82 As I have made this finding, it is not necessary to canvass here the evidence regarding the alleged breach by the builder in failing to complete the second house by 3 April 2015, which is the date the owners clearly accepted, in early March 2015, as the adjusted date for completion.

## **DAMAGES FOR RECTIFICATION OF DEFECTS AND COMPLETION OF CONTRACT WORKS**

83 The touchstone for assessing whether there is a defect or an item of incomplete work is of course the contract. For this reason it is necessary to say something about the history of the formation of a contract, and its terms, before the owners' claims for damages for defects, and for completion, are discussed.

### **Formation of the contract**

84 Mr and Mrs Fotopoulos gave evidence about the formation of the contract in the first week of the hearing. It was Mrs Fotopoulos who was more closely cross-examined about the circumstances in which the contract came to be signed in January 2014.

85 She was unclear as to how many meetings she had had with representatives of the builder before she signed the contract. She was even unclear as to whether Mr A R Syed was there when she signed the contract.

86 However, it was established that on about 23 January 2014 a Mr Arbab came to their house. Previously the specification had been emailed to the Fotopoulos's. At the meeting the specification was not amended. It was signed by the parties and dated 23 January 2014. The contract was reviewed, and then signed by Mr and Mrs Fotopoulos, and by Mr Arbab, although it was not dated.

87 As the contract had been signed by the owners and the builder, as it was a standard form MBA new homes contract which on its face appear to comply with the specific requirements of the *Domestic Building Contracts Act 1995*, and as the specification incorporated by reference a number of critical documents including a soil test report, drainage engineering plans, engineering plans, town planning drawings and construction drawings, the contract broadly complied with the requirements of s31(1) of the *Domestic Building Contracts Act 1995*.

### **No commencement date**

88 In item 9.1 of the schedule to the contract, no anticipated commencement date was stated. It is relevant to refer to the explanatory note which appeared under item 9.1, which provides:

A specific starting date generally should only be specified if all permits have already been obtained and issued prior to the date of the Contract and all other items listed in (ii) in Clause 8.1 have been or are expected to be received by the Builder prior to the anticipated Commencement Date. If no date is specified above, then the Commencement Date shall be determined under Clause 8.1.

89 Reference to clause 8.1(ii) indicates that one of the documents required is "all necessary valid and current building and/or building permits". At the time the contract was signed on 23 January 2014 the building permit had not been obtained. Accordingly, it is hardly surprising that no completion date was stated in the contract.



- 90 According to the note appearing under item 9.1, as a commencement date had not been stated, the commencement date was to be determined in accordance with clause 8.1.
- 91 Under this provision, the builder is obligated to do everything reasonably possible to ensure that construction of the works will start within 14 days of the receipt by the builder of all the necessary specified documents, including a valid building permit.

### **The amendment of the stormwater plan**

- 92 The delay in the builder formally getting under way worked to the mutual advantage of the owners and the builder, because the parties were agreed that the stormwater drainage plan which had been obtained, and upon which contract price had been formed, contained an element of “overkill”. On the advice of Mr A R Syed, Mr Fotopoulos engaged John Khouri’s firm Skilled Design Consultants to redesign the storm water drain. To this end, Mr Fotopoulos paid Skilled Design Consultants \$2,000. In September 2014 the building permit was issued. The plans upon which the building permit was based included the revised storm water drainage plan.
- 93 On the final day of the hearing Mr and Mrs Fotopoulos tendered the plans stamped by the building surveyor. They contended that they were the plans incorporated into the contract. Mr A R Syed contested this on behalf of the builder. He did not persuade me at the hearing that the stamped plans were not the plans ultimately agreed between the parties to constitute the contract plans. Furthermore, I note that Mr Syed’s position on this occasion appeared to be in conflict with the position he had adopted when cross examining Mr Fotopoulos during the first phase of the hearing, when he had based a question about pouring the replacement pit on the proposition that the pour had to be in accordance with the stamped stormwater drainage plan.
- 94 Accordingly I find that the contract which had been executed on or about 23 January 2014 was amended by the substitution of the approved construction plans stamped by the building surveyor.
- 95 As the design had been crystallized, and a commencement date was identifiable (14 days after the issue of the stamped construction plans) the contract became enforceable at a point in September 2014. This is consistent with the fact that the builder began to undertake work, other than the plumbing, in that month.
- 96 Having identified the relevant terms of the contract, I will turn shortly to an examination of the alleged defects. But first, I make some comments about quantum, and proof of loss.

### **FINAL QUANTUM OF THE OWNERS’ CLAIMS**

- 97 The owners in their written submissions clarified that the final amount they were seeking for rectification of defects and completion of works was \$197,450.99, less the unpaid balance of the contract sum, which they put at

\$46,400. Their net claim for rectification and completion accordingly was \$151,080.99. I comment that this, on its face, is a high figure given that the original contract sum was \$232,000.

- 98 The figure of \$151,080.99 does not include claims for loss of rental from the front house of \$7,500 (in respect of which I have already found against the owners) and loss of rental from the second house of \$15,000.
- 99 The owners in their written submissions make mention of several stages claimed for and paid for before they were completed, but no monetary claim for disgorgement of funds received from the builder was articulated by the owners. Perhaps this was in recognition of the fact that the stages have now been completed. In any event, those claims will not be considered as they were not pressed at the hearing.

## **PROOF OF LOSS**

### **The undated invoices rendered by Mason Construction**

- 100 One of the hurdles facing Mr and Mrs Fotopoulos was that they had used Mr Fotopoulos' company, Mason Construction, to complete the construction of the second house after Sawtech has been terminated. Establishing a nexus between the expenses allegedly incurred by Mason Construction and the payments made by Mr and Mrs Fotopoulos was highlighted as a major issue by Mr A R Syed in the first part of the hearing.
- 101 Although Mrs Fotopoulos deposed that a building contract for the completion of the second house was put in place between her and Mr Fotopoulos on the one hand and Mason Construction on the other, that document was never put into evidence. Moreover, no monthly payment claims from Mason Construction addressed to Mr and Mrs Fotopoulos were ever tendered. Instead, a series of invoices on Mason Construction' letterhead were issued to Mr and Mrs Fotopoulos. Surprisingly, many of these were not dated.
- 102 The explanation for this came out in cross-examination when Mr Fotopoulos conceded that the invoices had been created after he had consulted a barrister who had enquired about evidence. However, he denied they were fabricated. When he was asked why they were not dated, he answered "They don't need dates". He later clarified that invoices did not need to be dated when he was paying "himself."
- 103 Mrs Fotopoulos was also cross-examined about the invoices. She conceded that she typed the invoices up on the basis of "what John tells me". She said that the first thing she put in an invoice was the date or the name. When she was asked to look at a particular Mason Construction invoice for \$2,354, which did not have a date<sup>3</sup> she explained that she did not put in the date "if I am paying myself". She agreed the invoices were not contemporaneous. Although she could not recall when they were produced, she said it was

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<sup>3</sup> Exhibit A 47

before the proceeding started. See also agreed that Mason Construction was not paid against invoices.

- 104 I consider, on the basis of the concession made by Mr Fotopoulos that the undated Mason Construction invoices had been prepared after he had become aware of a need for evidence, I find that they were not standard, contemporaneous records created in the usual course of business. On the contrary, I find that they were fabricated for the purposes of the litigation.
- 105 Mrs Fotopoulos' evidence as to the timing of their production, and her concession that Mason Construction were not paid against invoices, also underlines their artificiality.
- 106 I consider that the invoices have no value as contemporary documents evidencing charges made by Mason Construction to Mr and Mrs Fotopoulos from time to time in respect of completion of the second house. Their use, if they have one, is to set out in writing what is being claimed by Mr and Mrs Fotopoulos in respect of a number of individual items. In other words, they function as Mr and Mrs Fotopoulos' particulars of their claim.

#### **Payments made by Mr and Mrs Fotopoulos**

- 107 In order to attempt to establish a connection between expenses incurred by Mason Construction in completing the second house and payments made by her and Mr Fotopoulos, Mrs Fotopoulos, in the second phase of the hearing, tendered a bundle of yellow invoices which she said demonstrated that a number of transfers had been made from their personal account to Mason Construction in the period between 13 May 2015 and 26 October 2015. However, no documentation was tendered at the time explaining what those transfers represented.
- 108 Payments were made on 13 May 2015 for \$1,000 and \$1,500 respectively by Mr and Mrs Fotopoulos to Mason Construction. Clearly they must be disregarded, as they were made prior to the date of termination of the Sawtech contract on 15 May 2015. Mason Construction should not have been doing work on the second house until after 15 May 2015.
- 109 Three of the transfers, namely those on 4 June 2015 for \$4,873.40, 9 June 2015 for \$30,171.55, and 23 June 2015 for \$6,172.65, were for specific sums which possibly could be linked to specific Mason Construction's invoices allegedly issued in respect of completion of the second house. For instance, the payment of \$4,873.40 is similar to the sum of \$4,793.42 which Plumb Master billed to Mason Construction on 2 September 2015. The sum of \$30,171.55 is very close to the sum of \$30,701.72 invoiced by Mason Construction to Mr and Mrs Fotopoulos in respect of the demolition of the pit in the rear courtyard and associated work. And \$6,172.65 is identical in amount to an invoice received by Mason Construction dated 18 June 2015 from Plumb Master. However, whether the three payments referred to are linked to particular invoices referred to is mere speculation. No evidence was given by either Mr Fotopoulos or Mrs Fotopoulos linking any payment to any specific Mason Construction invoice.

- 110 All other payments were for a round figure such as \$1,000, \$1,500, \$2,000, \$3,000, \$4,000 \$4,500 or \$5,000. I accept it is reasonable to infer that the successive payments made from 2 June 2015 until 26 October 2015 were payments made by Mr and Mrs Fotopoulos in order to fund Mason Construction as it completed the second house following the termination of the Sawtech contract.
- 111 However, this conclusion does not completely address the problems that Mr and Mrs Fotopoulos face in establishing their claim, because, putting aside the two payments made on 13 May 2015, the payments made by Mr and Mrs Fotopoulos to Mason Construction total only \$90,717.60. This sum, plus any sum directly paid by Mr and Mrs Fotopoulos to any trade contractor or supplier, is the limit to the amount they can recover as damages for the rectification of defects or the completion of contract works, assuming all other requirements for the recovery of such damages are satisfied.
- 112 The owners' recovery will also be affected by the unpaid portion of the contract sum. Because the purpose of an award of damages for breach of contract is to put the innocent party back in the position they would have been in had the contract been performed, Sawtech is entitled to have credited to it, in reduction of its liability for uncompleted work, the balance of the contract sum that would have been paid by the owners to it had it completed the contract. This has been conceded by the owners in their pleading. It was also conceded again in their written submissions, although they asserted there that the relevant concession to be made was limited to \$46,400. In my view, the correct allowance is \$46,900, as the parties are agreed that the contract price was \$232,000, and that a total of \$185,100 has been paid by the owners.

## **THE OWNERS UPDATED CLAIMS**

- 113 In their written submissions, the owners tabulate their claims in three schedules. The first (Schedule A) relates to costs allegedly incurred in rectifying some defects. The claims in this schedule total is \$60,619.87. Schedule B relates to costs allegedly incurred in completing incomplete works. The total in respect of this category of claims is \$106,361.12. Schedule C relates to allegedly incomplete rectification work or items. The total of these claims is put at \$30,470.
- 114 It is convenient to deal with the owners' claims in the order in which they have been organised by the owners. I accordingly turn first to Schedule A, which relates to the costs allegedly incurred in rectifying defects.

## **THE SCHEDULE A CLAIMS**

### **Split air-conditioning system - \$5,540**

- 115 The owners claim damages of \$5,540 in respect of the air-conditioning split system. This figure comprised 2 invoices from Amps Alive Electrical Pty

Ltd and 2 Bunnings invoices relating to the purchase of three air-conditioning units and associated equipment.

- 116 The contract specification at section 34.1 provided for “Ducted Heating / Cooling” Samsung, Toshiba or Fujitsu were the nominated brands.
- 117 Mr Mitchell noted in his report that a “ducted refrigerated heating and cooling” system had not been provided. However, he said, piping for air-conditioning had been installed. Because ducted heating and cooling had been specified, he suggested that it was necessary to remove the air-conditioning piping, and to carry out necessary plaster repairs, and then to supply and install air-conditioning as specified, including appropriate electrical upgrading.
- 118 Mr Forrest inspected the second house. He did not identify the date of inspection in his report, but when he gave evidence at the hearing he said that he inspected the property on or about 14 August 2015. He suggested split-system air-conditioners had been installed, but he did not include any photos.
- 119 Mr A R Syed gave evidence in the first part of the hearing that the roof space available in the house was insufficient to allow the installation of a ducted system. Accordingly, a change was required, and pipes had been put in with the approval of the owners.
- 120 Mr A R Syed’s evidence on the point was quite detailed. He said that he recommended a multi headed system comprising 2 x 3.5kW units upstairs and a 7kW unit downstairs. They would provide 14kW of capacity, compared to the 14.5kW which had been proposed. I accept Mr Syed’s evidence as it is consistent with the evidence that ducts for the air conditioning system were never installed.
- 121 Moreover, Mr A R Syed said that the owners wanted to change the specification of the system to a split-system with multiple units in order to give themselves the flexibility to ultimately create a new room in the downstairs area. Specifically, they wanted to make the TV room a bedroom. Mr Syed deposed that he had advised the owners not to make the change until after works were complete, as the changes would be contrary to the town planning permit. He said that air conditioning pipes installed were changed after Sawtech left the site.
- 122 Mr A R Syed also said that Sawtech had purchased a Mitsubishi system, but the invoice was not tendered.
- 123 Mr Fotopoulos claimed damages in respect of tendered invoices from Bunnings addressed to Mason Construction evidencing the purchase of one 5kW air-conditioning unit for \$1,270, and two 2.5kW air-conditioning units for \$1,630, on 5 October 2015. These invoices demonstrate to my satisfaction that the air-conditioning units could not have been installed on or about 14 August 2015, as was suggested by Mr Forrest.
- 124 The owners claim electrical work carried out by Emmanuel Lambrinakos, who had issued a compliance certificate in connection with the refrigerated

air conditioning system dated 6 February 2017, following completion of the work on 3 January 2017.

125 Mr Lambrinakos trades through his company Amps Alive Electrical Pty Ltd. On 15 September 2015 Amps Alive Electrical Pty Ltd invoiced “John at 2/205 Wickham Road, Moorabbin” the sum of \$660 inclusive of GST. The description of work was:

Removed cut and damaged air-conditioning pipes.

Removed incorrect wiring for air-conditioning.

All labour and materials included

126 A second Amps Alive invoice dated 18 October 2015 addressed to John at 2/205 Wickham Road, Moorabbin was also tendered in the sum of \$1,980 inclusive of GST. The narrative was:

Replaced cut and damaged air-conditioning pipes.

Wiring for air-conditioning incorrect. Replaced

All labour and materials included.

127 Mr Lambrinakos was summonsed to give evidence by Sawtech, and attended to do so on the ninth day of the hearing. He gave evidence that the reason he certified compliance in late February 2017 was that he could not issue the certificate until work was complete, and the air-conditioning system was “laden”. I note his compliance certificate of 6 February 2017, said the work was completed on 3 January 2017.

128 When asked about the invoice for \$660, Mr Lambrinakos said that this related to the replacement of incorrect wiring.

129 He explained that the air-conditioning system to be installed included three units, which comprised a large unit for downstairs, and 2 smaller units upstairs.

130 He had to return and wire up the two units upstairs. He removed tiles to set screens, and cut and soldered redundant pipes in the roof. He vacuum tested the pipes before adding refrigerant, and he put in control wiring between the indoor and outdoor unit. The second invoice from Amps Alive dated 18 October 2015, for \$1,980 related to this work.

131 In his evidence, Mr A R Syed alleged that Mr Lambrinakos had suggested that the owners should install three units because he would be able to assist with such a configuration even though he had a limited electrical licence. This was not an issue which was put to Mr Lambrinakos during cross-examination, and I make no finding about it.

## **Discussion**

132 The key to resolving the question of whether Sawtech has any liability to reimburse the owners in respect of the Amps Alive invoices for \$660 and \$1,980 respectively is to determine if Mr and Mrs Fotopoulos changed the

specified ducted system to a split system as a result of any act or omission of Sawtech's.

- 133 No such act or omission was brought to my attention. I make no finding about Sawtech's contention that the roof space could not accommodate the equipment necessary for a ducted system, as I heard very limited evidence about the point. However, I accept Mr A R Syed's evidence that the owners chose to change to a split system with three units, as it gave them greater flexibility with regard to future use of the downstairs area.
- 134 I also accept the evidence given on behalf of Sawtech that it had installed piping and wiring consistent with the requirements of the split system which the owners had initially approved in lieu of a ducted system. Accordingly, I do not think there is any basis to order that Sawtech should pay damages to the owners in respect of the costs incurred in engaging Mr Lambrinakos to rewire the air-conditioning system and to cut off and solder the redundant pipes, and put in new pipes.
- 135 However, it is clear that Sawtech did not install any air-conditioning system, and because an air-conditioning system had been installed by the owners after the date of termination of the contract, it is appropriate that Sawtech should pay damages to Mr and Mrs Fotopoulos in respect of the sum that it did not have to expend in meeting its contractual obligation to put in a system.
- 136 As Sawtech did not put in evidence as to the cost of the Mitsubishi system which Mr A R Syed said had been purchased, I am unable to identify the amount that Sawtech saved. However, I note that \$2,900 was the cost incurred by Mason Construction in purchasing the three units from Bunnings on 5 October 2015. I accept that Mr and Mrs Fotopoulos paid this \$2,900 to Mason Construction as part of the \$90,717.60 they have demonstrated they have paid to the company.
- 137 I find that Sawtech must pay to Mr and Mrs Fotopoulos damages in the sum of \$2,900 in respect of airconditioning.

### **Plumbing work - \$36,874.37**

#### Breakdown

- 138 The owners claim a total of \$36,874.37 in respect of this item (although in their submissions they erroneously put the figure as \$36,374.27). This figure is comprised of an invoice rendered by Mason Construction in the sum of \$30,701.72, and an invoice which was rendered to Mason Construction by Plumb Master on 18 June 2015 for \$6,172.65.

#### Double Counting

- 139 I note that a review of the documentation indicates that there is an element of double counting in this claim. The Mason Construction invoice for \$30,701.72 is comprised of a number of sub items, which include under the subheading "Plumbing Work Carried Out Stormwater" an entry for work

carried out by Plumb Master. There are three other items of work described under this section, and the total amount claimed by Mason Construction for the four items is \$7,172.65. The relationship of this figure to the Plumb Master account of 18 June 2015 for \$6,172.65 is obvious. The conclusion seems inescapable that Mason Construction have billed the owners in their invoice for \$30,701.72 for the Plumb Master invoice, and a further \$1,000.00 for the other three items billed in this section of the account.

- 140 On this basis, I will set aside from the calculation of damages the Plumb Master account for \$6,172.65 which has been claimed separately, and deal only with the Mason Construction invoice for \$30,701.72.
- 141 I note in passing that this particular Plumb Master invoice highlights the unsatisfactory nature of the owners' paperwork. The Plumb Master invoice dated 18 June 2015 tendered contains a notation that it was paid by cheque or EFT on 23 June 2015. The cheque or EFT was presumably drawn on the Mason Construction account. In any event, on 23 June 2015 Mr and Mrs Fotopoulos transferred from their personal account to the Mason Construction account the same figure. This was presumably by way of reimbursement of the payment just made to Plumb Master. However, no evidence about these transactions was given.

### **The Mason Construction invoice for \$30,701.72**

- 142 The first item in the invoice is a claim for \$1,416 in respect of the demolition of a pit to the rear courtyard and the removal of debris. A further \$740 is claimed in respect of the repair of pits in neighbouring properties, and internal rendering. The major claim of \$13,280 relates to the forming up of a pit in the courtyard, and 2 pits in the driveway, and the pouring of the pits with 25 Mpa concrete. Then there is a claim for the supply of pit lids put at \$5,258. The remaining claim is the one previously mentioned, in respect of plumbing work carried out in connection with the stormwater system, quantified at \$7,172.55. I take these items in turn.

### **Demolition of pit in rear courtyard, the removal of debris and the forming up and remaking of the pit**

#### Mr Mitchell's evidence

- 143 In the schedule to Mr Mitchell's report, a claim is made for demolition, rubbish removal, supply and installation of a new pit including electrical supply for pumps, and crane hire plus contingency and margin and GST. The total claim is for \$25,633.
- 144 Despite the obvious monetary importance of the claim, Mr Mitchell put forward only a paragraph in justification of the claim. He said:
- The sump and orifice pits are of such a poor standard of finish, as indicated in the photographs below, it appears that the walls and base are not connected and cracking is evident, there is no alternative other than complete removal of existing pit. A grate and frame arrangement has been incorporated to the top of the pits which is located adjacent



to the external door leading to the outside area. This situation, not only renders the outdoor area almost unusable but extremely hazardous.

- 145 Importantly, Mr Mitchell's commentary identifies two issues. The first is with the pits, and the second is with the grate. The rectification costs Mr Mitchell referred to are limited to the replacement of the pit, and nothing was claimed in Mr Mitchell's schedule in respect of the grate which was replaced by Mr and Mrs Fotopoulos.
- 146 Mr A R Syed contended that Mr Mitchell was not qualified to give expert evidence about the pit as he was not a civil engineer, and he was not a plumber either.

#### Mr Fotopoulos' evidence

- 147 The issue of the pit came up repeatedly in the opening phase of the hearing. Mr Fotopoulos said in his opening that the pits and the pipe installed in the sewerage easement had not been inspected by the council. He said the work had not been completed, and as a result he could not achieve subdivision.
- 148 Under cross-examination, Mr Fotopoulos conceded that he had engaged John Khouri's firm Skilled Design Consultants to redesign the store water drainage system. Mr Fotopoulos was shown and identified the stormwater plan produced by Skilled Design Consultants. He agreed with Mr A R Syed's proposition that the stamped stormwater plan was the plan that the builder was required to use.

#### Mr Syed's evidence about an inspection by council

- 149 Mr A R Syed presented evidence based on his mobile phone records. This demonstrated that on 23 September 2014, he made two calls to Kingston City Council in order to arrange an inspection of the completed pit. The first call was at 10.12 a.m. and lasted 68 seconds. He said this was when an inspection was arranged for that afternoon. The second was at 10.41 a.m. and lasted 17 seconds.
- 150 Mr A R Syed said that an individual from the Council did attend on the site, and left his business card. Regrettably, Mr A R Syed did not at the time make a note of the name of the inspecting officer, nor did he put the business card in a place where he could find it later. He was unable to put the business card into evidence.
- 151 These oversights meant that when Mr Syed sought to prove the attendance of a Council officer at the site to inspect the pits, he could not name the relevant individual. However, he said that he had caught the attention of the supervising officer within Council, Mr Ross Walker, by providing a clear description of the officer who he said had attended at the site. Mr Walker had indicated that a Council officer fitting the description provided was Mr Cheng Wal Wuol.

### The Council witnesses

- 152 Mr A R Syed summonsed three witnesses from the engineering department of the Council in the second phase of the hearing. His object was to counter the owners' argument that the pits had not been inspected by the Council when they were initially built.
- 153 One of the summonsed witnesses was Mr Wuol. When he took the stand, he initially denied having visited the site, and also denied having ever met Mr A R Syed. However, he affirmed his mobile number was the number shown as having been called by Mr A R Syed's phone on 23 September 2014 at 10.12 a.m. and again at 10.41 a.m.
- 154 Notwithstanding that the telephone records confirm that Mr A R Syed had called Mr Wuol for 68 seconds on 23 September 2014, Mr Wuol maintained that he had never spoken to Mr A R Syed. As that call was 3 years ago, Mr Wuol's response was perhaps not surprising. However, Mr Wuol did confirm that no one else had access to his phone.
- 155 Ultimately, under intense questioning from Mr Syed, Mr Wuol agreed that he could not recall an inspection of the site.
- 156 Under cross-examination from Mr Fotopoulos, Mr Wuol said that the Council's processes did not necessarily require any document being signed. It depended on the work involved. For instance, only backfilling might be involved. Mr Wuol suggested the reason records were not created was because he spent half his day outside.
- 157 When Mr Wuol was asked where he would record a request to go to a site inspection before he went, he confirmed that he would record it in a work diary.
- 158 Mr Wuol also confirmed the existence of an email on the Council's file sent by a Council officer, Mr Roshan Khanal, to another Council officer, Mr Tony Pell, on 18 September 2014. This had been sent after Mr Syed had called to arrange a pre commencement meeting.
- 159 Mr Khanal was also one of the 3 council officers summonsed. He confirmed the existence of this email.
- 160 The third officer of the Council summonsed was Mr Ross Walker. One aspect of Mr Walker's evidence was that by an email sent to a number of parties including Sawtech dated 31 March 2017, he listed three requirements which would have to be fulfilled before the Council "signed off" on the drainage. These were that the new gatic type lid and surround was to be installed on the drainage pit at the rear of 203 Wickham Road; the buried drainage pit at the rear of No 2 Harlow Court would need to be uncovered for inspection; and delivery dockets for the new stormwater pipe and bedding materials would need to be forwarded for perusal, to ensure they were to the Council's standards.
- 161 I consider that although these requirements represent the Council's current position, they of themselves are not conclusive either way as to whether the

rear pits and pipe were inspected in September 2014 before the pipe was covered up. I note that Mr Walker recorded in his email, just before the statement that the new gatic type lid was required for the pit at the rear of 203 Wickham Road, that the pit was found to be acceptable. This seems to be consistent with the proposition that it was inspected and passed by the Council after it had been constructed.

### **Finding about the rear pits and pipe**

- 162 In circumstances where the Council file confirms that Mr A R Syed called the Council on 18 September 2014, and where Mr A R Syed has demonstrated using his phone records that he called Mr Wuol at least twice on 23 September 2014, I am satisfied, on the balance of probabilities, and find, that a Council officer, most likely Mr Wuol, did inspect the pits and pipe at the rear of 205 Wickham Road on that day.
- 163 The next issue is: what happened at the inspection? Mr A R Syed deposed that Mr Wuol came and inspected at the site, then left. The trench was then backfilled, and the plumbing was finished on 23 September 2014.
- 164 I accept Mr A R Syed's evidence on the matter as he appeared to have a clear recollection of events. The fact that there was no record made by the Council of the inspection was consistent with Mr Wuol's evidence that there might be no Council record if the only work that was required following an inspection was backfilling.

### **Plumbing Compliance Certificate**

- 165 Mr A R Syed also relied on a plumbing certificate of compliance tendered by the owners signed by Sawtech's plumber, Mr Brenton O'Grady, dated 10 June 2015. This related to plumbing work which had been completed on 31 December 2014. Importantly, the narrative on the compliance certificate indicated that the work had only been partly completed. In particular it read:

Sewer completed by us. Stormwater to backyard, stormwater main renewal and concrete pits in back yard only by us (incomplete). Water tapping completed by us only.

- 166 I find that the plumber Brenton O'Grady did sign off the sewer, the stormwater and the pits to the extent certified.

### **Relevance of unpoured floor and of cracks in the wall of the pit**

- 167 The limited nature of the work described by Mr O'Grady in his compliance certificate is corroborative of the evidence given by Mr A R Syed that the large pit criticised by Mr Mitchell had not been completed. In particular, he said that the bottom of the pit was yet to be poured. He explained that the pour would have occurred at a later point, in order to get the levels aligned. He also said that the cracking in the side of the pit was an issue which could be rectified using Bondcrete later.
- 168 Mr Fotopoulos challenged Mr A R Syed's contention that the cracks in the pit wall could be remediated using Bondcrete. He emphasised that the pit

was large, and would hold a lot of water, and that the weight of the water would mean using Bondcrete or render to seal the pit would not be satisfactory.

- 169 Mr Fotopoulos is a builder but is not a plumber. Mr Mitchell was not present at the hearing and could not provide a comment on Mr Syed's contention that the floor could be poured later, and that the cracks could be sealed using Bondcrete.
- 170 In these circumstances I am not persuaded that the large pit could not have been quite cheaply completed, and made fit for purpose.

### **Finding regarding the pits in rear courtyard**

- 171 I have found that the rear pits and pipe in the easement were approved by Council. I have also found that the pits in the backyard were signed off with a certificate of compliance by the plumber on the basis that they had only partly been completed. In these circumstances, I do not think that the owners were justified in incurring the costs they claim in having the sump pit and the orifice pit demolished, and for rebuilding the pits.
- 172 I accordingly find against the owners in respect of this claim. There will be no allowance for the demolition and reconstruction of the pits.
- 173 This finding about the inspection of the rear pits and pipe is important, for two reasons. Firstly, it means that I must reject the owners' argument that Sawtech was in breach of its contract because it did not get the Council to approve the rear pits and pipe, and thus was delaying the subdivision.
- 174 Secondly, it provides the underpinning a criticism of Mason Construction's later work on the rear pits procured by the owners. Mr A R Syed contended that once the pits had been inspected by the Council, they should not have been altered without Council's approval. I think this point is well made.
- 175 I note that under cross-examination, Mr Fotopoulos agreed that he had not personally informed the Council about the demolition of the pits, although he suggested he was "pretty sure the plumber did". I think this evidence reinforces the view that the owners should not be compensated for Mason Construction's demolition and reconstruction of the pits.
- 176 I note that my finding about the pits does not preclude the owners from pressing their separate claims for the making of a new pit lid, or the creation of pits in the driveway.

### **Repair and internal rendering of pits in neighbouring properties**

- 177 My findings that the drainage system was approved by the Council, and was later signed off with a qualified certificate of compliance by the plumber, also means that the owners' claim for \$740 in connection with rectifying and rendering the pits in the neighbouring properties cannot be sustained.

### **The two pits in the driveway**

178 Mr A R Syed did not dispute at the hearing that Sawtech had not constructed the two pits in the driveway required by the stamped stormwater drainage plan. The owners are accordingly entitled to damages in respect of this item of incomplete work. The Mason Construction invoice does not set out a specific figure in relation to the two pits in the driveway, but rolls them up in a global claim for \$13,280 in respect of forming up and pouring a pit in the courtyard and two pits in the driveway. Doing the best I can do on the evidence available, and noting that there were actually two pits in the courtyard (a sump pit and an orifice pit) I assess the owners' damages in respect of the two pits in the driveway at 50% of the global claim of \$13,280, i.e. \$6,640.

### **Pit lids**

179 Mr Fotopoulos' evidence was that the grate outside the living room was defective because it needed to be a solid plate rather than a grate as it was straight outside the living room door. He gave evidence that he arranged to have a new pit cover manufactured, and tendered an invoice from All Steel Fencing & Design Pty Ltd dated 15 June 2015 in the sum of \$5,258. This is precisely the amount invoiced to Mr and Mrs Fotopoulos by Mason Construction for the lids, and accordingly it is clear that Mason Construction has added no margin.

180 Sawtech's defence to this claim was that it had supplied a satisfactory pit lid, at considerable expense. Mr A R Syed tendered an invoice from ENZ Welding Pty Ltd dated 29 September 2014 for \$10,450 inclusive of GST in respect of structural steel work for the project. The inference to be drawn is that the grate was included in this scope of work.

181 At the hearing, Mr Forrest gave evidence which supported the owners' position. When he was asked whether the grate outside the sliding doors was dangerous, he agreed. He considered it would be a hazard to anyone wearing high heels, and that children could drop things through the grate.

182 On the basis of Mr Forest's evidence, I find for the owners in respect of this particular claim, and assess the owners' entitlement to damages in respect of the new pit lid at \$5,258.

### **Stormwater plumbing**

183 As previously noted, this claim, which is \$7,172.65, appears to comprise a pass through of the Plumb Master invoice dated 18 June 2015 for \$6,172.65, and a figure of \$1,000 in respect of the other items claimed, which are "Storm water work and pit connections", "run mains Poly pipe to house", and "Supply labour to install downpipes".

184 Mason Construction has evidently passed through to the owners without margin the Plumb Master invoice for \$6,172.65. The scope of work invoiced covers:

To connect up stormwater at rear of property, running new 100mm PVC drains from downpipes and provision for future rainwater tank.

Connect up the overflow into the retention pit in rear.

Remove ribbed pipe in driveway that was undersized according to the hydraulic plan and supply and install new 600mm ribbed Stormpro pipe.

Supply and install strip grates as per plan plus additional one at end of driveway for rear house.

Dig trench and supply and install new poly waterline from water meter to house.

- 185 The most contentious item in the scope of work was the removal of the ribbed pipe in the driveway which was said to be under sized. Reference to the stamped stormwater plan indicates that a 600mm pipe was required. I am satisfied that the 300mm ribbed pipe which Sawtech had installed was removed, as a photo of it after removal was tendered by the owners<sup>4</sup>. I find that the owners are entitled to damages in relation to the cost of removal of the wrong pipe and installation of the specified 600mm pipe.
- 186 I did not understand Sawtech to take issue with the other items claimed in the Plumb Master invoice for \$6,172.65, and accordingly I am prepared to allow it in full.
- 187 However, I am not prepared to accept the claim for \$1,000 in relation to the sundry items, as each of the items relate to plumbing work, and as such should have been carried out by a licensed plumber. If materials were being claimed, this is not clear, as none were itemised.
- 188 Accordingly, the owners' recovery in relation to stormwater plumbing will be limited to \$6,172.65.
- 189 In summary, my assessment of the owners' entitlement to damages in relation to plumbing issues is \$6,640 in respect of pits in the driveway, \$5,258 in respect of pit lids and \$6,172.65 in respect of stormwater plumbing, a total of \$18,070.65.

#### **REPAIR OF THE EDGE OF THE SLAB**

- 190 In their written submissions the owners confirmed that they are seeking damages of \$2,354 in respect of rectification of "brickwork". They rely on an invoice rendered by Mason Construction which bears no date, but carries the number M018. Reference to this invoice indicates that it relates to the jack hammering of excess concrete on the slab, the removal of debris, cleaning, the forming up of the slab and the pouring of high strength concrete. It accordingly has nothing to do with brickwork.
- 191 Reference to the owners' schedules indicates that the reference to "brickwork" is a simple typographical error. Repair of the edge of the slab is not dealt with elsewhere in the Schedules, but "brickwork" is, in

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<sup>4</sup> Exhibit A119, photo No.8

Schedule C. I will accordingly deal here with the owners' claim for damages in connection with the repair of the edge of the slab.

- 192 Mr Mitchell in his report stated that the exposed edge of the slab on the east boundary was not satisfactory, and he included seven photographs demonstrating why this was the case. The method of rectification he recommended was jack hammering off the excess concrete, the application of a protective grout and the application of a render of matching colour. He estimated the cost of this work at \$3,658 inclusive of a contingency of 10%, margin of 35% and GST.
- 193 Mr Fotopoulos gave evidence that the slab has now been certified, as this was necessary for the owners to obtain an occupancy permit.
- 194 In support of the claim, Mr Fotopoulos tendered an email which had been received from a building inspector Mr Lukas Kelly of LMK Building Services to the effect that a direction had been given to the concreter and to Hassan, at the time of an inspection, that boxing needed to be done along the title boundary. Mr Kelly considered, on the basis of photos he had received, that the boxing had not been completed, or the boxing was not installed correctly down to ground level. A copy of Mr Kelly's building inspection report/certificate of compliance dated 28 October 2014, confirming the instruction that boxing was to be completed along the title boundary, was also tendered.
- 195 Mr Forrest did not dispute the slab required to be rectified. However, in his report, he estimated the cost of rectification at \$1,500, based on 1 day's labour plus hire. He noted the relevant area was approximately 3 m in length by approximately 300 mm high. He said applying a protective coloured render was not a requirement.
- 196 In order to justify the claim financially, Mr Fotopoulos tendered an undated invoice from Mason Construction of \$2,354 inclusive of GST. The narrative read:
- Jack hammer side boundary of excess concrete to slab on neighbouring property.
  - Remove all debris and clean.
  - Form up side of slab and pour high strength concrete.
  - Materials and labour included.
- 197 Mr Fotopoulos gave evidence that the subcontractor to Mason Construction who had actually carried out the work was George Maranis. A handwritten tax invoice showing an ABN dated 10 August 2015 in the name of George Maranis for \$2,500 was tendered, but Mrs Fotopoulos said this invoice related to other work performed by Mr Maranis. As the amount invoiced to Mr and Mrs Fotopoulos by Mason Construction was \$2,354, this supports Mrs Fotopoulos view that the Maranis account for \$2,500 relates to another matter.

- 198 The upshot is that there appears to be no primary evidence of what the slab rectification work actually cost.
- 199 An attack was made by Sawtech on the competence of Mr Maranis to carry out the rectification of the concrete. In particular it was said that he was not “a registered concreter”. Furthermore, no engineer’s certificate had been obtained for the work as recommended by Mr Mitchell.
- 200 I am in a poor position to make any finding about Mr Maranis’ technical expertise as he did not give evidence, and accordingly I can only pay attention to what I have been told about him. However, even if I were disposed to make a finding that he was not a registered concreter, I do not think that this would be a basis for discounting the owners’ claim for damages about the rectification of the concrete. There is no doubt that the slab extended into the neighbour’s property, and needed to be rectified, and that the work was carried out. The owners are entitled to recover the reasonable cost of the work.
- 201 The fact that the rectification work was not approved by an engineer before it was carried out, as recommended by Mr Mitchell, is not a reason to disallow the owners’ claim, unless it can be demonstrated that the rectification work was ineffective. There is no such evidence. If the owners had in fact gone to the expense of retaining an engineer to advise on the appropriate method of rectification, that might have been another expense to be passed on to the builder.
- 202 I turn again to the Mason Construction invoice for \$2,354. This was one of the undated invoices I have found to have been fabricated, and for the reasons already expressed I do not regard it as evidence. The invoice does not state who did the rectification work, when it was done, and how long it took. On its face, it is not compelling, even if viewed merely as particulars of the amount claimed. In the present case, even though the identity of the subcontractor used (Mr Maranis) was known, he was not called to give evidence about what work he did, and when he did it and how long it took. Furthermore, it appears that no relevant invoice from that subcontractor was put into evidence.
- 203 Having regard to Mr Forrest’s observation that the area of concrete to be rectified was approximately 3 m long and 300 mm high, I think Mr Forrest’s estimate of \$1,500 to carry out the rectification work appears to be more reasonable than \$2,354 claimed in the undated Mason Construction invoice.
- 204 I find that the owners are entitled to an award of damages of \$1,500 in respect of the rectification of the concrete slab.
- 205 This figure includes an allowance for rendering. I note that Firsttouch Rendering charged the owners an unspecified amount in respect of rendering the edge of the slab when they billed the owners \$6,000 for rendering work which also included the front fence and the front house garage. The specific amount charged in relation to the slab was not



specified in the invoice, and no allowance for that sum will be made here. The issue will be taken into account when the Firsttouch Rendering invoice is assessed below.

## **HIGH MOISTURE CONTENT IN GROUND FLOOR TIMBER FLOORBOARDS**

### **(REPLACEMENT OF FLOOR)**

- 206 This particular claim appears to take its name from a heading in the Mitchell report.<sup>5</sup> The issue identified by Mr Mitchell was that at two locations the floorboards showed moisture readings in excess of 20%. The Australian Timber Flooring Association recommends a moisture content of 10 to 12%. Mr Mitchell suggested that the high moisture content could be caused by a lack of moisture barrier to the substrate, or by a failure to acclimatise the timber prior to placing, or due to a failure to seal the house. He suggested that the floorboards should be monitored for up to 12 months. If the floor failed, he estimated the cost of replacement at \$26,522 inclusive of margin and GST.
- 207 Mr Fotopoulos gave evidence that he has had the floor sanded on 17 July 2015 by a contractor called The Floor Forever. He tendered an invoice from this firm in the sum of \$3,400 inclusive of GST addressed to “John”.
- 208 He then gave evidence that because the floor was damaged when water entered the building because Sawtech had not left it watertight, he had to replace the floor. Accordingly, it is more appropriate to refer to this claim as the claim for damages for the cost of replacing the floor.

### **The invoice from Elwood Trade Services of 5 October 2015**

- 209 Mr Fotopoulos’ evidence was that the replacement of the floor was carried out by Elwood Trade Services, and he tendered an invoice from that firm dated 5 October 2015.
- 210 This evidence was vigorously contested.
- 211 Firstly, Mr A R Syed questioned how the floor could have been damaged by water entry from the ceiling, when there was no evidence that the plaster walls or ceiling had been damaged. He gave evidence that by February 2015 the plaster had been completed. Also, all the electrics had been done, and all the plumbing and all the piping. March came and went. And then April. The flooring had been done, and the painting had been completed.
- 212 Mr A R Syed said it had rained a number of times. He suggested that if there had been a leak in the roof, then the plaster would have been affected in the ceiling and on the walls. This had not occurred. It was therefore illogical to suggest that the flooring had been damaged by a leak.
- 213 Moreover, Mr A R Syed in the first phase of the hearing questioned whether Elwood Trade Services had actually done the work, and challenged their tax invoice of 5 October 2015 for \$16,351.50. Mr Syed referred Mr

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<sup>5</sup> Mitchell report, section 7, page 14

Fotopoulos to the tax invoice, which had been rendered by “The Simmoll Family Trust Trading as Elwood Trade Services”.

- 214 Mr Fotopoulos confirmed that the invoice was “true and correct” and specifically confirmed the scope of works referred to. He said payment had been made in cash.
- 215 When Mr A R Syed made it plain that he wanted a witness called from Elwood Trade Services, the parties were reminded by me that it was up to each of them to call their own witnesses. I then gave the parties guidance about *Jones v Dunkel*<sup>6</sup> and the circumstances in which an adverse inference might be formed against a party who failed to call a relevant witness.
- 216 Mrs Fotopoulos gave her evidence on the sixth day of the hearing about a receipt issued by “Simmoll Pty Ltd Trading as Elwood Trade Services” for \$16,351 which also bore the date 5 October 2015.<sup>7</sup> When she was asked how she paid the account she ultimately confirmed the payment had been made in cash. She deposed the money had been hand delivered, and that a receipt had been issued on that day, 5 October 2015. When she was asked where the money came from, she answered: “I can’t recall”.
- 217 On the eighth day of the hearing Mr A R Syed said that he had issued a summons addressed to The Simmoll Family Trust t/as Elwood Trade Services. He tendered the summons. He then deposed that the people he had spoken to had refused to attend.
- 218 Mr A R Syed’s evidence on the matter was that he went with two colleagues to the relevant address in Broadway. It was later established that this was on the Thursday before the hearing resumed, namely 7 September 2017. Mr A R Syed said he went to the front door to deliver the summons. The door was open. He spoke to a woman he now knows to be Deborah. He explained the summons, but he was told by Deborah that “We have no time... We’re not coming”. He then returned to his car.
- 219 Mr A R Syed said that on realising that he would need to do an affidavit of service, he returned. This time he spoke to a man, who was at the time reading the summons. Mr Syed said that he asked the man his name. The answer given was “The Simmoll Family Trust”.
- 220 Mr Fotopoulos was asked what he knew about the situation and he responded that he had received a call from Gavin Cadzow of Elwood Trade Services. He deposed that Mr Cadzow had confirmed that he would not be attending at the Tribunal, on the bases that he had not been served properly, and there was “not enough time”. This evidence clearly corroborates that Mr A R Syed had served the summons.
- 221 Mr A R Syed at this point again challenged the invoice rendered by Elwood Trade Services.

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<sup>6</sup> (1959)101 CLR 298

<sup>7</sup> The owners tendered the tax invoice on 21 March 2017 as Exhibit A48. The owners tendered the receipt on 24 March 2017, as Exhibit A102.

- 222 There was a further discussion about *Jones v Dunkel*, and the owners were warned by me that if they did not call a witness from Elwood Trade Services, then Sawtech might ask me to draw an inference adverse to the owners to the effect that the evidence of that witness would not have been helpful for their case. I indicated that they would be given an opportunity to give evidence about any attempt to call a witness from Elwood Trade Services.
- 223 Because of the potential importance of the issue, the following day I handed to the parties some printed passages from my recent published decision *Glowell International Pty Ltd v Biggin & Scott Commercial Pty Ltd*<sup>8</sup>. The relevant passages were (with citations omitted):

80. This being the case, it is necessary to address *Jones v Dunkel* briefly. The case concerned an appeal to the High Court of Australia by a widow whose husband had been killed when driving up a winding road through wooden hills south of Sydney. The widow brought proceedings against the owner and the driver of the other truck alleging that the driver had been negligent. There were no eyewitnesses to the collision, which took place in darkness. The defendants sought a direction from the trial judge that the case be dismissed before it went to the jury, but the judge allowed the case to go to the jury. The jury found in favour of the defendants. The issue on appeal was whether the trial judge had misdirected the jury regarding the weight which ought to be attached to the fact that the driver of the other truck, who had survived the accident and had given a statement to police, was not called as a witness. In separate judgements, Kitto J, Menzies J and Windeyer J found that the trial judge had misdirected the jury. As they constituted a majority, the appeal was allowed.

The relevant passage in the judgement of Kitto J is:

[A]ny inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.<sup>[2]</sup>

Windeyer J expressed the principle in these passages:

82. Then, I think, his Honour should, when the juryman asked his question, have given an answer in accord with the general principles as stated in *Wigmore* on Evidence 3rd ed. (1940) vol. 2, s. 285, p. 162 as follows: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or

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<sup>8</sup> [2017] VCAT 1342

witness, if brought, would have exposed facts unfavourable to the party.<sup>[3]</sup>

As *Wigmore* points out (*Evidence* 3rd ed. (1940) vol. 2, ss. 289, 290, pp. 171-180), exactly the same principles apply when a party, who is capable of testifying, fails to give evidence as in a case where any other available witness is not called. Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case.<sup>[4]</sup>

- 224 On the twelfth day of the hearing Mrs Fotopoulos tendered a number of new documents. Importantly, they did not include any bank statement evidencing a cash withdrawal from her and Mr Fotopoulos' personal bank account of \$16,351.50 on 5 October 2015, or on any other date. Nor did she produce any evidence of any electronic transfer or cheque made payable to Elwood Trade Services for \$16,351.50 on 5 October 2015, or on any other date.
- 225 On the last day of the hearing Mr and Mrs Fotopoulos were given an opportunity to explain why Mr Cadzow from Elwood Trade Services had not been called as a witness. Mr Fotopoulos deposed that he had spoken to Mr Cadzow after he had been summonsed. Mr Cadzow said that he didn't want to come. He said he was happy to do a statutory declaration. I told him "not to bother."

## **Discussion**

- 226 From the first phase of the hearing it must have been clear to the owners that their claim to recover the \$16,351.50 which they alleged they had paid to Elwood Trade Services in respect of the replacement of the floor was being challenged in the strongest terms. Firstly, it was said that it was improbable that the floor had been damaged by water leaking from the roof in circumstances where the ceiling and the plaster walls had not been damaged. Secondly, it was said that Elwood Trade Services had not actually attended to do the work, and the invoice was false. Thirdly, it was said that, in any event, there was no proof of payment from Mr and Mrs Fotopoulos to Elwood Trade Services.

## **Findings about the floor**

- 227 On balance, I am persuaded by Mr A R Syed's argument that it would make no sense for the timber floor downstairs to be damaged by water leaking from the roof when there was no evidence of damage to the ceiling and plaster walls. In this connection, I note that no photographs of the allegedly damaged floor were put in evidence. Nor did the owners call Mr Mitchell back to the site to provide independent evidence regarding the state of the floor prior to its replacement.
- 228 No doubt if Mr Cadzow of Elwood Trade Services had actually repaired the floor, he could have given relevant evidence. Sawtech was aware of this, and had been so keen to hear evidence from Elwood Trade Services that it

tried, albeit unsuccessfully, to summons the Simmoll Family Trust t/as Elwood Trade Services.

- 229 In its written submissions Sawtech invited me to draw an adverse inference under *Jones v Dunkel* against the owners in respect of their failure to call the flooring contractor.
- 230 The criticality of the flooring contractor's evidence had been stressed to the owners by Mr A R Syed on behalf of Sawtech, and had been explained by me at least twice to them. Mr Cadzow was contacted by the owners, but when he said he didn't want to come to the hearing he was not even pressed, let alone compelled by summons to attend. Mr Fotopoulos did not even take up Mr Cadzow's offer to swear a statutory declaration.
- 231 I find there was no satisfactory explanation from the owners as to why Mr Cadzow was not called. I accordingly find this is an appropriate case for me to draw an inference to the effect that Mr Cadzow's evidence about the state of the floor would not have been of assistance to the owners. I formally draw such an inference.
- 232 The first finding I make about the floor is that, on balance, I do not think it did require to be repaired as a result of a water leak.
- 233 The second issue is whether, even if the floor had been so damaged by a leak that it had to be repaired, it was actually repaired by Elwood Trade Services.
- 234 Mr A R Syed said the floor was not replaced, and the floor in the house at the time of the inspection was the floor that Sawtech had laid.
- 235 The owners failed to put into evidence any photographs showing workers from Elwood Trade Services working on the floor. Without more, I find myself in a situation where there is a simple contest of evidence between Mr A R Syed and Mr Fotopoulos as to whether the floor was replaced.
- 236 Mr Fotopoulos was clearly on notice from both Sawtech and me as to the potential importance of the flooring contractor evidence in respect of the invoice. Mr Cadzow could have given evidence about what work was done, by what workers, and what a fair price for the work was. He might also have given evidence about the date when the work was done. Curiously, the date of the work did not appear in either the invoice or the receipt.
- 237 I have found that the owners gave no proper explanation as to their failure to ensure that Mr Cadzow attended to give evidence. In respect of the issue as to whether Elwood Trade Services replaced the floor I also form an adverse inference against the owners to the effect that Mr Cadzow's evidence would not have assisted them.
- 238 On balance, I find that Elwood Trade Services did not repair the floor. It follows that I accept Sawtech's submission that the invoice from Elwood Trade Services was false.
- 239 The final issue is whether Mr and Mrs Fotopoulos paid Elwood Trade Services for the repair of the floor. There was no documentary evidence that

they had done so, even though the owners were on repeated notice about the desirability of producing such evidence.

- 240 Mr and Mrs Fotopoulos might have been assisted by evidence from Mr Cadzow to the effect that his firm had been paid by them for repairing the floor. Moreover, Mr Cadzow might have been able to explain why an invoice was issued by The Simmoll Family Trust Trading as Elwood Trade dated 5 October 2015, and a receipt was issued on the same day by Simmoll Pty Ltd Trading as Elwood Trade Services.
- 241 My finding, previously made, that the owners gave no proper explanation as to the failure to call Mr Cadzow warrants a third adverse inference against the owners to the effect that Mr Cadzow's evidence about payment would not have assisted them.
- 242 For all these reasons I find that the owners' claim for damages for \$16,351.50 in respect of repair of the floor must fail.

### **SUMMARY OF ASSESSMENT MADE IN RESPECT OF SCHEDULE A CLAIMS**

- 243 I have found above that the owners are entitled to damages in respect of their Schedule A claims as follows:
- split system: \$2,900;
  - plumbing works \$18,070.65;
  - repair of the edge of the slab \$1,500;
  - replacement of timber floors: nil.
- 244 My assessment of the Schedule A claims accordingly totals \$22,470.65. I comment that while this is not an insignificant figure, it is overshadowed by the owners' claims which totalled \$60,619.87.

### **SCHEDULE B – ALLEGED COSTS INCURRED COMPLETING INCOMPLETE ITEMS**

- 245 This schedule comprises a set of claims derived from the list of items of incomplete work set out in Mr Mitchell's report,<sup>9</sup> with a limited number of exceptions.
- 246 The exceptions arise because the owners, during the hearing, indicated that they were not claiming in relation to the stairwell expansion joint cover board, housecleaning, any allowance for handover and maintenance, or the investigation and rectification of the sewerage odour.
- 247 Most of the owners' claims are set out in their written submissions. However, those submission omitted some claims which had been the subject of evidence, and were not expressly waived at the hearing. They are accordingly dealt with at the end of this section.

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<sup>9</sup> Mitchell report pp19 and 20.

### **Floor sand and polish - \$3,400**

- 248 Mr Fotopoulos tendered an invoice from The Floor Forever dated 17 July 2015 for \$3,400 inclusive of GST as proof that the work had been performed, and of its cost.
- 249 Sawtech, in its defence dated 23 February 2016, did not dispute that the work had to be carried out, and conceded that it would have been completed in the final stage. However, it contended the appropriate costing was \$1,800, based on a quote from Amana Constructions.
- 250 I am satisfied that the invoice rendered by The Floor Forever was paid by cheque, because the owners put into evidence a Commonwealth Bank receipt for \$3,400 drawn against the Mason Construction account in respect of cheque No.000115. A photocopy of this cheque was also tendered.
- 251 As I am satisfied that Mason Construction paid the account, I am prepared to accept that the work was performed, and that the account was reasonable. I find for the owners in respect of this item, and allow them damages of \$3,400 in respect of it.

### **Painting – AA Pro Painting - \$6,690.67**

- 252 Mr Mitchell referred to painting briefly in his report. He said that a three coat system had been specified. Reference to section 50 of the contract specification indicates that this was right, on the basis that the three coat system included a primer.
- 253 Mr Fotopoulos gave evidence that painting had not been completed because only the undercoat had been done. He said that even the undercoat was defective because it had been watered down, and had to be redone.

### **The evidence of Mr Habib of Amana Constructions**

- 254 In the first phase of the hearing Mr Habib Habib, a director of Amana Constructions Pty Ltd was summonsed by Sawtech. He was asked about an Amana Constructions invoice issued on 15 February 2015 for \$3,500 in respect of “3 Coats of painting to all the internal and external areas, Stairs” (sic) at 205 Wickham Road.
- 255 He deposed that his company and Sawtech share trades. He said he had never been to the site until the previous Tuesday, but understood from the trades that they had not been paid, and wanted their money. He explained that this was why he had generated the invoice. He conceded that he did not see the painters work and did not supervise them, that he did not know what cover had been applied, or the brand, and that this would be known “by the site supervisor Hassan or Rafay”. (I note Rafay is Mr A R Syed).
- 256 In the circumstances, I consider that Mr Habib’s evidence is of no assistance, and I place no reliance on the Amano Constructions invoice of 15 February 2015 for \$3,500.

### Sawtech's defence

257 In its defence of February 2016, Sawtech denied that the painting had to be repaired, and said that the only painting left to be completed was the staircase. The cost for this was estimated at \$800. It was later conceded that the staining of the front door needed to be done also.<sup>10</sup>

### The AA Pro Painting invoices

258 The owners relied on an invoice from AA Pro Painting for \$6,690.67 dated 14 July 2015. This was put into evidence by the owners in the first week of the hearing.<sup>11</sup> Mrs Fotopoulos gave evidence that it had been paid. However, she could not produce proof of payment at the time.

259 Mrs Fotopoulos was shown an ABN Lookup search for ABN 69 845 372 786 that showed that AA Pro Painting began trading on 23 November 2015.<sup>12</sup> Between 9 December 2010 and 23 November 2015, the business name held by Ahmad Ayache was Ayaches Pro Painting. Nonetheless, Mrs Fotopoulos insisted the invoice was genuine. She said that no one from AA Pro Painting was going to be called as a witness.

### Mr Ayache's email of 7 September 2015

260 There was great controversy about the AA Pro Painting invoice because, days before the resumption of the hearing, Mr A R Syed and a couple of colleagues had visited Mr Ayache and had shown him two inconsistent invoices from AA Pro Painting. One was the invoice dated 14 July 2015. Mr Ayache was told that if he issued a statement to the effect that one invoice was false, he would be relieved of the obligation to attend at the hearing to give evidence. Mr A R Syed prepared a statement on Mr Ayache's mobile phone, and sent it to himself. In this way Mr Syed was able to put into evidence an email which declared that the AA Pro Painting of 14 July 2015 for \$6,690.67 was false.<sup>13</sup>

261 Because Mr Ayache's email was put into evidence by Sawtech, the owners changed their mind, and called Mr Ayache and his bookkeeper to give evidence.

### Ms Flusk's evidence

262 The bookkeeper was the first of these two people to give evidence. Her name was Ms Marlen Flusk. She deposed that she had worked with Mr Ayache since 2010, and that she was responsible for preparing quotations and invoices. She recalled the job at 205 Wickham Road, and said that she may have gone there.

263 Importantly, she said that two invoices had been raised for the job. The first was dated 15 July 2015 and was for \$4,700. A second invoice, for

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<sup>10</sup> See paragraph 306 below.

<sup>11</sup> Exhibit A49.

<sup>12</sup> Exhibit A169.

<sup>13</sup> Exhibit R 15



\$6,690.67, was issued in October 2015. Her explanation was that a deposit of \$2,000 had been paid on 27 June 2015. She said that this was recorded in “the bank account details”. The October invoice was for the full amount of the contract price. She added that the full contract price had been paid. This was also recorded.

- 264 She deposed that she had not invoiced for the deposit payment of \$2,000, but had invoiced for the balance of the contract sum of \$4,700. She confirmed that the first invoice for \$4,700 had been rounded up from \$4,690.67.
- 265 Ms Flusk was shown some invoices by Mr A R Syed. One of these was dated 14 July 2015 and was for \$6,690.67, and was in this way similar to the invoice which had been tendered by the owners. It also described the work performed as it had been described in the first invoice. However, the new invoice had a border, and was under the name Ayaches Pro Painting, not AA Pro Painting.<sup>14</sup>
- 266 Another invoice shown to Ms Flusk was also dated 14 July 2015. It was for \$4,700 and was issued by AA Pro Painting. It differed to both the invoice tendered by the owners and the invoice with a border because it had a different layout, it described the work differently, and it referred to Eddie and Marlen rather than Ahmad and Marlen.
- 267 When Ms Flusk was asked which invoice was issued first, she said that the answer was “obvious”, and referred to the invoice for \$4,700. She said that it was sent on 14 July 2015.
- 268 She said that after it had been sent she had been contacted by Mason Construction, and asked to provide an invoice that showed the full price.
- 269 Ms Flusk could not access some emails Mr A R Syed had asked her to produce on her phone. She was excused on the basis that she might be called again.
- 270 Ms Flusk took the witness box again on the following morning. To begin with, she was shown the email which Mr A R Syed had received from Mr Ayache on 7 September 2017. The email relevantly read:
- Dear Mr Syed
- I have sighted a fabricated invoice 14 July 2015, of \$6690.57 on 7th sep 2017 at Altona.
- The invoice of \$6690.87 was not generated by me or neither generated by my company.(Sic)
- 271 Ms Flusk gave evidence that she was confused by the email. She tried to play down the significance, saying “It’s a bit of misunderstanding”. She also sought to blame Mr Ayache’s poor English.
- 272 Ms Flusk had also brought with her two bank statements relating to Mr Ayache’s personal account with the National Australia Bank. They were put

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<sup>14</sup> Exhibit R38.

into evidence.<sup>15</sup> One statement indicated that on 29 June 2015 a cheque for \$2,000 had been received from Mason Construction drawn on the Commonwealth Bank of Australia (CBA). Another statement indicated that on 15 June 2015, a cheque for \$4,700 had been received from Mason Construction, also drawn on the CBA.

273 Ms Flusk and also brought with her a AA Pro Painting invoice for \$6,690.67 dated 2 October 2015. This was put into evidence.<sup>16</sup> She also bought her own copy of the invoice for \$4,700 dated 14 July 2015, which was already in evidence.

#### Mr Ayache's evidence

274 Mr Ayache took the stand straight after Ms Flusk. He was asked about his email of 7 September 2015. He deposed that he had seen "Mr Abdul" (Mr A R Syed). He later explained that this was in a coffee shop, and two others were present. He had been shown two invoices, one being the invoice of \$4,700, and the other for "\$6,000 or something". He was told that he could send an email from his phone in order to avoid coming to the hearing. He explained that he was very keen to avoid coming, because he was very busy, and his father was sick.

275 Mr Ayache deposed that he allowed Mr Syed to write the email. He did not dictate it to Mr Syed. He also said that Mr Syed did not read it to him before it was sent.

276 When questioned, he confirmed that he had not been threatened, that his phone had not been taken from him by force, and that Mr Syed had sent the email with his permission. He agreed that the email of 7 September 2015 reflected what he had discussed with Mr Syed.

277 Mr Ayache deflected responsibility for preparation of the invoices to his bookkeeper "Marlen" (Ms Flusk).

278 He gave evidence that he had performed painting work at the second house at 205 Wickham Road at the request of Mr Fotopoulos, that the work was worth \$6,690.67 in total, and that the invoice was appropriate.

279 However, when questioned by Mr A R Syed, he said he could not recall whether, when he entered the property, the downlights had been put in. He also said that coversheets had not been placed over the windows, and deposed that he had put them up. I find this particular answer surprising, as covers on the windows were evident in photographs contained in Mr Mitchell's report which had been prepared on 1 April 2015, some months before Mr Ayache went to the site.

280 Mr Ayache also said that Haymes paint had been used. When it was pointed out to him by Mr A R Syed that the invoice said Dulux paint had been used, his explanation was that "the invoices always say Dulux".

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<sup>15</sup> Exhibits A144 and 145

<sup>16</sup> Exhibits A146.

## Discussion

- 281 The owners based their claim on the invoice for \$6,690.67 dated 14 July 2015 they tendered in the first phase of the hearing which bore the name AA Pro Painting. I do not think it is a genuine document. I note that it is in the name of a business entity which did not exist in July 2015. The entity trading at that time, according to the business name search tendered, was Ayaches Pro Painting. Furthermore, that invoice was not the only invoice dated 14 July 2015 that bore the name AA Pro Painting. A second invoice under that business name was for the sum of \$4,700. A third invoice dated 14 July 2015 was issued under the appropriate business name, Ayaches Pro Painting. This was for \$6,690.67, but had a different layout.
- 282 I note the evidence of Ms Flusk that the first invoice issued in time was the invoice for \$4,700. I note also her explanation that she issued an invoice for \$6,690.67 in October 2015, at the request of Mason Construction, so that the invoice reflected the full contract price.
- 283 I do not accept that the invoice dated 14 July 2015 for \$4,700 is a genuine document as it was allegedly issued by AA Pro Painting at a time when that business name was not being used by Mr Ayache. I am also deeply sceptical about the invoice of 2 October 2015 for \$6,690.67 issued by AA Pro Painting, as that invoice is similar to but not identical with an invoice issued under the same business name dated 14 July 2015. It is also similar in content to the invoice issued on 14 July 2015 under the name Ayaches Pro Painting, which was the correct business name at that date.
- 284 I am not prepared to accept Mr Ayache's evidence that the work he performed at 205 Wickham Road was worth \$6,690.67. He gave this evidence in September 2017, which is more than two years after the work was performed. His recollection of the job was clearly imperfect, as evidenced by his failure to recall that cover sheets were already placed on the windows when he went to the site. Neither he, nor Ms Marlen, produced any time sheets demonstrating which painters had worked on the job. His casual dismissal of the fact that the invoice referred to Dulux paint, when he agreed that Haymes paint had been used, also leads me to believe that his evidence as to the value of the work performed could not be relied on.
- 285 Ms Flusk brought to the hearing bank statements relating to Mr Ayache's personal bank account which satisfy me that a payment of \$2,000 was made into the account by Mason Construction on 29 June 2015, and that a second payment of \$4,700 was made by that company on 15 July 2015. However, I note Mr Ayache's evidence that he has done about 100 jobs with Mason Construction, and I am accordingly not satisfied that these two payments necessarily related to 205 Wickham Road. They could easily have related to another job.
- 286 I found it surprising that a contractor like Mason Construction would make a payment to a trade contractor without an invoice, but this is what I was invited to accept in respect of the initial payment of \$2,000.

- 287 In all the circumstances, I find against the owners in respect of their claim for painting.
- 288 I note that as Sawtech, in its defence, had conceded that \$800 was required to complete the staircase painting. I allow this sum to the owners, together with another \$100 in respect of the staining of the front door. In total, I allow \$900 for painting.

**Carpenter fit off and hardware – Mason Construction - \$5,598.90**

- 289 Mr Fotopoulos deposed that after Sawtech left the site he had to attend to the doors which had been fitted upstairs. The doors were binding, the door jams were out of plumb, the latches were no good, and no door handles had been fitted. By way of rectification, he had to remove all the doors, and replace and refit them. Also, skirting boards and architraves had to be redone so the frames could be realigned.
- 290 The owners claim damages in respect of an invoice from Mason Construction for \$5,598.90. Regrettably, in their written submissions, they did not indicate the exhibit number of this document. I have been able to locate, as part of Exhibit A51, Mason Construction invoice No.M008 for \$5,597.90. I presume that this is the invoice relied on, and that the claimed figure of \$5,598.90 simply reflects a typographical error.
- 291 Reference to Mason Construction invoice No.M008 indicates that the scope of works billed was extensive. It ran over three pages, and the work described was set out under headings relating to doors, first floor bedrooms, ground floor bathroom, linen cupboards, laundry, kitchen/living room/hallway, garage unit 2 and fly screens to sliding doors and windows.
- 292 Sawtech denies this claim.
- 293 Mr Mitchell gave very limited support to it. In this connection, I note that in his list of incomplete items of work, he included “Carpenter fit-off and hardware”. I consider this a surprisingly sparse entry having regard to the very significant scope of work claimed by Mr and Mrs Fotopoulos.
- 294 This was one of the many invoices prepared by Mason Construction which carried no date. For the reasons given, I attach no evidentiary weight to the undated invoices. Furthermore, on the invoice itself, there is no indication as to which individual carried out what work, on what day, and how long the work took. Accordingly, on its face, the invoice hardly assists in particularising the owners’ claim except in the broadest terms.
- 295 Apart from the indication from Mr Mitchell that some carpenter’s fit off and hardware required attention, there is no evidence that the work required to be done, other than Mr Fotopoulos’ own evidence. For reasons previously expressed, I do not regard him as a reliable witness.
- 296 Moreover, there is a particular issue with this invoice, which is that in relation to the scope of work concerning the kitchen/living room/hallway, there is a claim in respect of the supply and installation of new skirting boards following the removal of the original skirting boards when the floor

was replaced. I have made a finding above that Elwood Trade Services did not repair the floor.<sup>17</sup> It must follow, and I find, that this part of the invoice for carpenter's fit off is not authentic. This means the whole invoice must be regarded as unreliable, rather than merely being ascribed no evidentiary value.

297 I find against the owners in respect of this claim, and allow nothing for it.

**Robe fit out to bedrooms 1 and 2 - \$461.23 and \$757.50**

298 The owners refer in their written submissions to an invoice from Mason Construction for \$461.23 and an invoice from Bayside Concepts for \$757.50.

299 It is convenient to deal with the invoice from Bayside Concepts first. Mr Fotopoulos gave evidence that Bayside Concepts attended to fit out the walk-in robe, and to construct melamine shelves and fit stainless steel rods.

300 Although the amount claimed for the Bayside Concepts invoice in the owners' submissions is \$757.50, reference to the actual invoice<sup>18</sup> indicates that the invoice covers both installation of a shower screen, and the sliding mirror doors and frame. The cost attributed to the mirror doors and frame is \$750. When GST is added, the relevant portion of the invoice is \$825. This amount was conceded in Sawtech's defence of February 2016. Accordingly, I allow \$825 damages to the owners in respect of this aspect of the claim.

301 The invoice from Mason Construction was undated. The scope of work described included the master bedroom robe fit out and second bedroom robe shelving.

302 There was no indication in the invoice when the work was carried out, by whom, or when.

303 Mr A R Syed disputed that this work was necessary.

304 Mr Mitchell, in his list of incomplete items of work, referred to "Robe fit outs to bedrooms 1 and 2 including sliding doors to bedroom 1." Although I accept this as independent verification that the fit out of the wardrobes needed to be completed, I also note that the installation of sliding mirror doors appears to be precisely what Bayside Concepts attended to, according to their invoice.

305 On balance, I am satisfied that the Mason Construction invoice for \$461.23 covers the same scope of work as the Bayside Concepts invoice, and I find against the owners in respect of this particular invoice, and allow nothing for it.

306 The upshot is that the total award to the owners for this item is \$825.00.

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<sup>17</sup> Paragraph 238 above.

<sup>18</sup> Exhibit A 52.

### **External hinged doors - \$423.50**

- 307 According to Mr Fotopoulos, Mason Construction had to fix locks and handles to the rear unit front door and the garage side entry door. The owners claim damages in respect of an invoice from Mason Construction for \$423.50 (inclusive of GST).
- 308 Sawtech denied liability for the invoice in its defence. Mr A R Syed's evidence on the matter was that the doors had been hung, but he conceded that locks had not been fitted, as this was to be done at the final stage to prevent the locks being stolen. He also conceded that the front door had not been stained.
- 309 The Mason Construction invoice was undated, and I attribute to it no weight for the reasons explained. Moreover, the invoice did not provide any details as to who had fixed the door locks and handles, when this had been done, or how long the work took. Furthermore, materials were not specified. However, I must allow something for the work carried out. In the absence of any attack on quantum by Mr A R Syed, I allow the sum claimed on the basis that it does not appear to be unreasonable. I accordingly find for the owners in respect of this claim, and allow damages of \$423.50.

### **Window and door infills - \$313.50**

- 310 Mr Fotopoulos gave evidence that merbau decking was used to close gaps around the window and door infills, and then the lintels were spray painted.
- 311 Sawtech, in its defence, acknowledges this work had to be completed in the final stage, but says that it would have been performed by the carpenter at no additional charge.
- 312 What the cost would have been to Sawtech to have had the work completed in the final stage is not to the point, as Sawtech's contract was legally terminated. The issue is: what sum is to be allowed to the owners for damages in respect of the work.
- 313 The owners claim damages of \$313.50, based on a Mason Construction invoice. Reference to that invoice indicates that it is undated, and no detail is given as to when the work was carried out, by who, or how long it took. For the reasons given, as this invoice was undated, it is of no evidentiary value. However, something has to be allowed for the infill work carried out around the windows and doors. In the absence of any contest about quantification from the builder, I am prepared to accept the claimed sum as it does not appear to be unreasonable. I award the owners damages of \$313.50 in respect of this item.

### **Supply and fit two water tanks and bases - \$2,150 and \$2,025.73**

- 314 The specification in section 58.21 required the builder to install water tanks for the front house and for the second house.
- 315 The owners claim a total of \$4,175.73 in respect of the supply and fitting off of two water tanks. This sum comprises an invoice from All Oz Tanks

for \$2,150.00 inclusive of GST addressed to Mrs Fotopoulos, and an invoice from Mason Construction for \$2,025.73 to the owners, also inclusive of GST.

- 316 The All Oz Tanks invoice related to the provision of two 2000 litre slimline water tanks plus pumps and covers.
- 317 Mason Construction's invoice No.M006 relates to the pouring of concrete bases for the water tanks.
- 318 Sawtech in its defence of February 2016 does not deny that these works were to be completed in the final stage, but says that it had a quote for supply installation for only \$1,400.
- 319 As with the previous claim, the issue is not how much it would have cost Sawtech to have done the required work in the final stage, but how much should be allowed to the owners in respect of the work.
- 320 The Oz Tanks invoice for \$2,150 was dated 15 June 2015. I accept it at face value, and award damages to the owners in that sum.
- 321 At the inspection of the house, it was clear that concrete bases for the water tanks had been created. The Mason Construction invoice No.M006 for this work was undated. No information was given about who carried out the work, on what date it was carried out or how long the work took.
- 322 At the end of the hearing, when the owners' claims were all reviewed, Mr A R Syed conceded that there was no issue with the water tanks. Accordingly, I accept that the Mason Construction invoice sets out a reasonable claim for the work, even though it was created some time after the work had been carried out. I allow the owners damages of \$2,025.73 in respect of it.
- 323 In summary, the total award in respect of water tanks is \$4,175.73

#### **Electronic appliances and electrical fit off - \$5,702, \$380 and \$998.95**

- 324 The owners claim a total \$7,080.95, comprising three invoices. The first was from Landscape Electrical for \$5,702, the second was an invoice from The Good Guys in respect of a range hood costing \$380, and the third was a Bunnings' invoice in respect of an oven and cooktop purchased for a total of \$998.95.
- 325 Sawtech in its defence said that "Landscape Electrical" was not part of its contract. At the hearing Mr A R Syed acknowledged that there had been a misunderstanding, and that he realised that the claim did not relate to electrical work in the garden, but to the work of Mark Rout's firm Landscape Electrical.

#### Landscape Electrical

- 326 Reference to the relevant invoice indicates that Mr Rout charged Mason Construction for providing power to the range hood and for the cooktop, moving the light switch in the downstairs bathroom, providing power to the hot water system and to the rain water pumps, providing a TV connection,

rewiring the garage to unit 1, rewiring the switch board, and fixing the phone lead-in conduits.

- 327 An issue with this claim was whether the completion of the garage for the front house was part of the contract. This issue is resolved by reference to the “Construction Issue” elevations on drawing Number P983K (sheet 11/14), which shows a rendered blue board end wall of the garage. I find that the front house garage was a responsibility of Sawtech.
- 328 Having regard to the fact that this is an invoice from a third party, I am prepared to accept it on its face. I allow damages of \$5,720 to the owners in respect of the Landscape Electrical invoice.

#### Range hood

- 329 The next invoice relied on by the owners is from The Good Guys. It is dated 3 September 2015, and is addressed to Mason Construction. It is for a Chef range hood.
- 330 Sawtech in its defence disputes the invoice, saying that the work was not part of the contract. I do not understand this argument, as the specification, in section 45.3, refers to a range hood as one of the appliances to be installed by the builder. The type of range hood called up in the specification is Bosch, Whirlpool or Westinghouse, and I could have understood an argument that the range hood actually supplied was not one of the specified types. However, having regard to the fact that the Chef range hood cost only \$380, it is understandable that this point was not taken by Sawtech.
- 331 I accept the owners’ claim, and allow \$380 in respect of the rangehood.

#### Oven and cooktop

- 332 The final invoice under this heading claimed by the owners was a Bunnings’ invoice dated 8 August 2015 addressed to Mason Construction in respect of a Bellini cook top & oven pack and a packet of quick set concrete. The specific amount charged for the cooktop and oven was \$979.
- 333 Sawtech says in its defence that this work was not part of its contract. Reference to the specification at section 45.1 indicates that a Bosch, Whirlpool or Westinghouse oven was to be provided by the builder, and section 45.2 indicates that a cooktop from one of those manufacturers was also to be supplied.
- 334 Accordingly, I do not understand the defence raised by Sawtech. Obviously, Bellini is not a specified manufacturer, but having regard to the fact that only \$979 has been claimed for both an oven and cooktop, it is hardly surprising that the builder made no fuss about the make of the items ultimately chosen.
- 335 I accept the owners’ claim for the oven and the cooktop, and allow \$979 in respect of them.



336 As invoices for \$5,720, \$380 and \$979 respectively have been allowed, the total damages awarded for these items are \$7,079.

**Complete paling fence - \$1,300 and \$5,500**

- 337 The specification at section 58.20 required the builder to install timber paling fences throughout the property.
- 338 As noted, Sawtech summonsed Mr Habib of Amana Constructions to give evidence. He was shown an invoice from his company dated 22 February 2015 for \$2,500 in respect of “Supply and install of 42 lm and 1.8 paling fence”. (Sic)
- 339 The invoice gave no details of which individual had performed the work, or how long it had taken, or how much materials had cost.
- 340 Mr Habib was shown a letter to the owners from solicitors dated 29 April 2015 written behalf of the neighbour at 203 Wickham Road, complaining that the fence between 203 and 205 had been removed without his permission.<sup>19</sup> When he was asked why the owners would have received that letter if the fence was in place, he said “I was not there”. I find his evidence unhelpful.
- 341 I accept the evidence of Mr Fotopoulos that it was necessary for him to procure a contractor to build the rear fence and the side fence. The fences were clearly made. He claims damages in respect to materials purchased for the fences, and the contractor’s account for building them.

Lifetime Pine Pty Ltd invoice for materials

- 342 Mr Fotopoulos put into evidence an invoice from Lifetime Pine Pty Ltd in respect of materials for \$1,300. The invoice was dated 18 May 2015, which is several days after the builder was formally terminated. The date of the invoice supports the owners’ contention that the invoice related to fencing completed after Sawtech had left the site. I note the invoice is from a third party. I am prepared to accept the invoice, and allow damages in respect of it assessed at \$1,300.

Reliance Fencing

- 343 In respect of labour, the owners sought damages in respect of an account from Reliance Fencing No.0290 dated 24 September 2015 in the sum of \$5,500 which was addressed to Mr Fotopoulos. The scope of work referred to was a 35 m side paling fence, and a 17m back fence.
- 344 I have a significant concern about the quantum of the Reliance Fencing invoice as Sawtech put into evidence a quotation it had received from Amazing Fencing (VIC) Pty Ltd for the construction of a 30.8m three rail treated pine fence to be constructed on the left-hand side of the property for \$2,768 inclusive of GST. This quote works out at approximately \$90 per

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<sup>19</sup> Letter from Hassall’s Litigation Services Pty Ltd dated 29 April 2015 which was tendered as Exhibit A 29 stop

lineal metre of fence. At \$90 per lineal metre, the Reliance Fencing's quotation should have been close to \$4,700 inclusive of materials.

- 345 Although the Reliance Fencing invoice was stamped as "Paid", no direct evidence was given by the owners regarding its payment notwithstanding that Sawtech on several occasions during the hearing complained about the lack of evidence from the owners regarding payment generally. The owners had an opportunity to submit their personal bank statements in order to demonstrate payments made in completing the rear house. They took the opportunity to table a number of transfers from their own account to Mason Construction's account, but they did not tender any document to prove payment of the Reliance Fencing account. No one was called from Reliance Fencing with a view to proving payment of the invoice.
- 346 In the circumstances, I am not satisfied that Reliance Fencing was paid \$5,500, or indeed anything in relation to fencing.
- 347 However, the fencing was clearly in place of the time of the inspection, and an allowance must be made for it.
- 348 At a rate of \$90 per lineal metre of fence, based on the quotation obtained by Sawtech from Amazing Fencing, I assess a reasonable sum for the construction of the 35m side fence and the 17m rear fence at \$4,700 inclusive of materials. As \$1,300 has been allowed for materials invoiced by Lifetime Pine, the relevant allowance for labour is \$3,400.
- 349 The total allowance for fencing, accordingly, is \$4,700.

#### **Complete ends of carport walls - \$1,914**

- 350 The owners claim reimbursement of an undated Mason Construction invoice No.M003 for \$1,740 plus GST, or \$1,914, in connection with the completion of the rear house carport walls. The scope of work, according to the Mason Construction invoice, included finishing the framing, installing blue board to the framing, and rendering the blue board. The invoice related to both labour and materials.
- 351 Mr Mitchell mentions the need to complete the end of the unit 1 (front house) carport walls. No details are given.
- 352 Sawtech disputes this claim. It says that the end wall had been completed. It also says that the cost of installing it was \$450, and so the owners' costing is also attacked.
- 353 As the undated Mason Construction invoice was created for the hearing and hence had not evidentiary value, I do not rely on it. I also note that the invoice contained no detail about who performed the work, when it was done, and how long it took. And no details of the materials claimed are set out. The invoice also billed for work that was not justified on the basis of the very limited evidence provided by Mr Mitchell. I reject the claim in its entirety, and allow nothing in respect of it.

### **Complete concrete driveway - \$11,400**

- 354 Section 58.4 of the specification requires the builder to install a concrete driveway.
- 355 Mr Fotopoulos gave evidence that “MK Concreting” had been engaged to pour the driveway. He put into evidence an invoice No.1217 from MK Concreting Services Pty Ltd in respect of the pouring of an exposed customised black oxide drive of 128m<sup>2</sup>, at a rate of \$85 per square metre, or \$10,880. \$400 was also charged for the use of a bobcat. The invoice also included a charge of \$120 in respect of extra concrete poured for pits. If this item is included, the total amount claimed exclusive of GST is \$11,440, which is the amount claimed by the owners. However, the \$120 claimed in respect of the pits must be disregarded for present purposes, as the pits have been dealt with elsewhere. The total amount claimable in respect of the driveway accordingly is \$11,280 plus GST. With GST, the total is \$12,408. Such is the state of the owners’ book work that they did not claim the GST inclusive amount. There may be reasons for this, however, and their claim must be limited to the sum of \$11,280 which they have claimed for the driveway.
- 356 Mr A R Syed attacked the quantum claimed by the owners, stating that Sawtech had allowed only \$8,000 for the driveway, and had actually received a quote for \$5,000. However, he did not put this quotation into evidence, and so there is no basis for me to even consider whether the driveway could have been done for \$5,000.
- 357 In my experience, a figure of \$11,400 for a driveway of this size is not unreasonable. Moreover, I note that Sawtech put into evidence invoices from MK Concreting Services on other jobs in 2016 and 2017 addressed to it. These demonstrate that Sawtech continues to use MK Concreting Services as a subcontractor. From this it is reasonable to infer that Sawtech regards MK Concreting Services as being competent, and reasonable in its pricing.
- 358 On balance, I am prepared to accept that Mason Construction spent \$11,280 on having MK Concreting Services complete the concrete driveway, and I will allow Mr and Mrs Fotopoulos that sum in damages.

### **Complete South Wall of unit 1 (front house) garage - \$2,794.**

- 359 Mr Fotopoulos said that Mason Construction finished the front house garage wall and eaves at a cost of \$2,540 plus GST, or \$2,794.
- 360 Mr A R Syed, at the hearing, disputed that this work was part of Sawtech’s contract. However, this contention is inconsistent with Sawtech’s position as expressed in its defence, which was that the work was to be completed in the final stage, and that a carpenter had been engaged. Further, it was asserted that material was already on site. The eave was 3 metres long, and the estimated cost was \$250.

- 361 I consider that there is no doubt that completion of the south wall of the front house garage was within Sawtech's contract because the garage appears on the contract drawings.<sup>20</sup>
- 362 The scope of work charged for by Mason Construction in its undated invoice includes finishing off the framing, supplying and installing the blue board, and then rendering it, and supplying and installing the missing eaves, and painting the eaves. It did not specify who did the work, on what date, and how long it took, and the materials claimed were not specified.
- 363 Not only is the invoice undated, and therefore not to be accepted as evidence for the reasons explained, but it raises suspicion for another reason. This is the claim that Mason Construction rendered the blue board. This claim is inconsistent with the invoice from Firsttouch Rendering for the same work.
- 364 In relation to the rendering, the owners tendered in relation to another claim an invoice from Firsttouch Rendering dated 5 July 2015 which included the work of rendering the wall of the front house garage. The work involved was the application of two coats of acrylic, and one coat of texture/colour. I accept the inference that this work had not been done at the time Sawtech left the site, and I will allow the cost of rendering the wall of the garage as part of the work carried out by Firsttouch Rendering. However, no specific sum for rendering will be allowed here.
- 365 Mr Mitchell's report indicated that the south wall of the unit 1 garage required completion, "including eaves lining". This qualification suggests that the south wall was substantially advanced. This is consistent with Sawtech's contention that the eaves remained to be done.
- 366 For the reasons that the Mason Construction invoice was not a contemporaneous record, that it lacked detail, that it claimed for work which was not supported by Mr Mitchell's limited evidence, and also that it covered rendering which the owners had claimed separately by seeking recovery in respect of the invoice from Firsttouch Rendering, I find against the owners in respect of this invoice.
- 367 As Sawtech conceded that the cost of finishing the eaves was \$250.00, I allow this figure.

**Supply and installation of bathroom vanities and bench tops including the kitchen benchtop - \$1,861.61**

- 368 Mr Mitchell included in his list of incomplete items "Supply and install bathroom vanities and bench tops including the kitchen bench top."
- 369 Mr A R Syed said that Sawtech had supplied the vanities and bench tops. Mr Fotopoulos conceded this, but added that he had to arrange for a plumber to connect the vanities and to fit the taps.

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<sup>20</sup> See, for instance, drawing No P983A/3, sheet 1 of 14 wall; and drawing No P983K, sheet 11 of 14.

- 370 Mr Fotopoulos also deposed that he had arranged for Mason Construction to level the benchtops and to supply the face panels. When this topic was revisited late in the hearing, he added that the back panel on the island bench was loose, and was also 60 mm too long.
- 371 The owners claim damages in respect of a Mason Construction invoice for \$1,861.61. Reference to this invoice indicates that the scope of work included levelling the kitchen island bench, supplying and installing 2 face panels, supplying and installing kitchen flashbacks, caulking, and labour and materials. The invoice is undated, and does not include details of who did the work, nor the date upon which the work was performed, or how long it took. Furthermore, the materials used are not specified.
- 372 Sawtech disputes this invoice, asserting that the appliances had been supplied, and had been installed by the plumber.
- 373 On the basis that the undated Mason Construction invoice was, for the reasons explained, of no evidentiary value, and also because it does not record even basic details about who did the work claimed, I am not, on balance, persuaded that the work was carried out, let alone that it was worth \$1,861.61. I assess damages at \$nil in respect of this claim.

#### **Site cleaning - \$6,140.20**

- 374 Mr Fotopoulos gave evidence that Mason Construction had carried out a site clean. Reference was made to an invoice for \$6,140.20 inclusive of GST.
- 375 Sawtech denies the claim on the basis that the site clean would have been carried out in the final stage.
- 376 Reference to the Mason Construction invoice indicates that it covers at least six components of work, only three of which are concerned with cleaning up the site. The first item was removal of waste from the site to make it safer before work began. This may be a reference to a clean up immediately after Sawtech had left the site, but this is not clear as the date of the alleged work is not stated. The amount claimed for this activity is \$2,360. A related item is labour and tipping fees of "\$490". A further item concerned with clean up is "Excavate excessive soil piled up and very Dangerous with debris". (Sic) The amount claimed for this item is \$1,375. I now discuss these three items in turn.

#### **Removal of waste**

- 377 No details are given in the Mason Construction invoice about which workers removed waste from the site, when the work occurred, and how long it took. As the undated Mason Construction invoice is not of evidentiary value for the reasons explained, I am not prepared to accept the assertion of this work was carried out, let alone that it cost \$2,360. I allow nothing for this limb of the invoice.

### Bin hire

378 However, attached to the Mason Construction invoice are two invoices from Binshoot Bin Hire dated 8 June 2015 and 15 August 2015. The first is for the hire of 3 x 3 m<sup>3</sup> bins at a cost of \$250 each. With GST this invoice comes to \$825. The second invoice relates to the hire of 2 x 12 m<sup>3</sup> bins, at a cost of \$1,200 inclusive of GST. I am prepared to allow these invoices as they were rendered by a third party, and contain appropriate detail. I award a total of \$2,025 in respect of the bin hire invoices.

379 The bins must have been filled by someone. The difference between the \$2,360 claimed by Mason Construction for removal of waste, and the bin hire fees allowed of \$2,025, is \$335. That does not appear to be an unreasonable allowance for loading three 3 m<sup>3</sup> bins and two 12 m<sup>3</sup> bins and I allow that figure also.

380 In summary, the total allowance for hiring and loading bins is \$2,360.

### Labour and tipping fees

381 I note that the Mason Construction invoice was accompanied by a handwritten invoice from Teddy Transport Pty Ltd which covered the hire of “a possitrack and tandem truck” for six hours at \$80 per hour, a total of \$480, together with tip fees paid to Alex Fraser, Clayton of \$22. I accept these items, and allow their total of \$502. I am not convinced that GST, which was claimed, should be allowed, as the hire invoice for the heavy equipment was not tendered, and it seems likely that the Alex Fraser tip fee included GST. I allow \$502 for this invoice.

### Excessive soil

382 I reject the claim for excavation of excessive soil, as no details are given of who did the work, when it was done, or how much it cost.

### The other items

383 The other items claimed relate respectively to putting up a temporary fence to make the site safe, covering pits in neighbouring properties, supplying and installing tarpaulins on the roof to stop rain from entering, supplying and installing temporary downpipes away from the house, supplying and installing site gates, and supplying and installing tree protection.

384 I am not prepared to allow the other items here. If a site fence and a site gate were put up, they could have been claimed separately, with the relevant fence and gate hire invoices attached. The pit covers should have been claimed, if they have not been claimed elsewhere, in relation to the completion of the stormwater drainage system. The down pipe plumbing almost certainly should have been claimed, if it has not been claimed, in a plumber’s invoice. No detail is provided about the need for tree protection, and this is not part of site clean up in any event.

385 I disallow each of these “other items”.

386 In summary, I have allowed \$2,360 in respect of bins and \$502 for labour and tipping fees. The total allowance in respect of site clearing is \$2,862.

**Caps to top of front fence piers and render both sides of front fence - \$630.91 and \$6,000**

387 The owners claim damages in respect of an invoice from Mason Construction for \$630.91 and from Firsttouch Rendering for \$6,000.00.

388 Sawtech disputes that the front fence was part of its contract.

389 I find against the builder in respect of this particular contention, because the specification in section 58.23 requires the builder to erect a front brick fence, a dividing fence to the driveway, and a front path and gate. The fence was to be 1800mm high, and have four 470 mm pillars. I accordingly find that the front fence was part of Sawtech's contract. The issue accordingly narrows down to quantification.

390 Reference to the Mason Construction invoice indicates that the scope of work was the supply and installation of bluestone caps to piers to the front fence, at a cost of \$573.56 plus GST, or \$630.91. The invoice is undated, and no details are given about when the stone caps were placed, who did the work, and how long it took. However, the caps are in place. In the absence of any attack on quantum by the builder, I am prepared to allow the invoice in full at \$630.91, as it does not appear to be unreasonable.

391 The Firsttouch Rendering invoice was dated 5 July 2015. The scope of work included rendering the fence (2 coats acrylic, one coat texture and colour), rendering the rear/side boundary of the slab, and the rendering of the unit 1 garage. I have accepted above the legitimacy of the owners' claim for rendering the wall of the front house garage<sup>21</sup>, and rendering the cut-off slab on the rear boundary<sup>22</sup>. I accept the balance of the invoice in so far as it relates to rendering of the fence, and allow the Firsttouch Rendering for \$6,000 (inclusive of GST) in full here.

392 In summary, a total of \$6,630.91 is allowed in respect of the capping and rendering of the front fence.

**Flashing, capping and spouting to east boundary wall and south wall of unit 1 garage - \$3,151.83**

393 The owners here are claiming damages in respect of an invoice from Mason Construction in the sum of \$3,151.83. The scope of work described is "Down pipe and roof works carried out" and the particulars given are:

Supply and install missing Quad Gutters

Supply and install all downpipes to unit 2 and unit 1 Garage

Supply and install missing cappings and flashings

Materials and Labour included

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<sup>21</sup> Paragraph 361

<sup>22</sup> Paragraph 203

- 394 The Mason Construction invoice is undated. No details are given as to who carried out the work, or when it was carried out, or how long it took. Furthermore, materials are not particularised.
- 395 As the Mason Construction invoice is not a contemporaneous record and has no weight, in my view, and as it omits key details regarding the work performed, I am not satisfied on balance that the work referred to was actually carried out by Mason Construction. I comment that the work should have been carried out, in any event, by a licensed plumber, who would have certified the work on completion. I find against the owners in relation to this particular claim, and allow nothing in respect of it.

**Supply and install shower screens and mirrors - \$1,969.50, \$352 and \$108.81**

- 396 Mr Fotopoulos referred to the Bayside Concepts' invoice dated 25 May 2015, which had been tendered already, as it included a figure \$1,950 plus GST in respect to the installation of a shower screen. The resulting claim ought to have been \$2,145. However, the claim was limited by the owners in their written submissions to \$1,969.50.
- 397 Mr A R Syed did not dispute that the shower screen had not been installed, noting that this would have been performed during the final stage.
- 398 I am accordingly prepared to find in favour of the owners in respect of this item, and allow \$1,969.50.
- 399 Mr Fotopoulos also referred to a Mason Construction invoice for \$352 inclusive of GST, which related to the supply and installation of a mirror in the first floor bathroom, and the supply and installation of a mirror in the ground floor bathroom. Even though this invoice was undated, and accordingly is one of many invoices created for the litigation, I am prepared to allow the claim on the bases that the mirrors have been installed, and the amount claimed appears to be reasonable.
- 400 Finally, Mr Fotopoulos claimed in relation to a Bunnings invoice for \$108.81. On the basis that the invoice is for 2 mirrors and associated components such as wall plates, I allow this claim also.
- 401 In summary, the three claims allowed under this heading total \$2,430.31.

**THE OWNERS' NEW CLAIMS IN SCHEDULE B**

- 402 As noted in the introduction to this section, most of the owners' claims are set out in their written submissions. However, those submission omitted some claims which had been the subject of evidence, and were not waived at the hearing. They are now dealt with.

**Completion of tiling**

- 403 The specification, in section 51, set out the requirements for tiling.
- 404 The owners contended that Sawtech had not completed the tiling when it left the site. Mr Fotopoulos in evidence referred to the photos of wet areas



contained in Mr Mitchell's report. In my view, those photos demonstrate that the bathroom tiling not been completed.

- 405 The owners sought damages in respect of an invoice from Mason Construction in the sum of \$4,127.88 inclusive of GST relating to the completion of the tiling.
- 406 As noted, Sawtech summonsed Mr Habib of Amana Constructions to give evidence. He was asked about an invoice for \$2,200 issued on 15 January 2015 in respect of "Laying of Floor and wall tiles to all the Wet areas as per the plans". Mr Habib confirmed that the tiler referred to was "Hamad", and that he had done the work, but had not been paid.
- 407 I note that Mr Habib was asked about this invoice immediately after he had given his unhelpful evidence about the painting invoice. His evidence that he had not been at the site until the previous Tuesday, and had not supervised any work, is equally relevant to this invoice. He did have personal knowledge of what work had been carried out by the tiler Hamad. I find that neither his evidence, nor the Amana Constructions invoice for \$2,200 dated 15 January 2015, are helpful.
- 408 I return to the Mason Construction invoice for \$4,127.88. I note that it contained details of repair and completion of tiling work carried out in the first floor bathroom, the ground floor bathroom, and in the laundry. I note that the tiling was not finished when Sawtech left the site, but it was complete at the time of the inspection on the second day of the hearing. Accordingly something must be allowed for the completion of tiling.
- 409 The Mason Construction invoice was undated, and is not a contemporaneous business record. It did not indicate who carried out the tiling work described, nor the dates upon which the work was done. I accordingly am not satisfied that the cost of the tiling work was \$4,127.88. I do not accept that is a reasonable figure for the completion of tiling. Doing the best I can, I allow \$2,000 for the completion of tiling.

#### **Caulking of control joints - \$818.40**

- 410 Mr Fotopoulos gave evidence that a subcontractor named Proflex Caulking had carried out caulking of the expansion joints in brickwork at a cost of \$744 plus GST, a total of \$818.40. Reference to the tendered invoice of Proflex Caulking dated 26 May 2015 indicates 93 lineal metre of caulking was done, at a cost of \$8 per meter, which explains the underlying claim of \$744.
- 411 The invoice carried a handwritten notation to the effect that it had been paid on 4 June 2015. The owners tendered a receipt from the Commonwealth Bank demonstrating that \$818.40 had been paid from Mason Construction's account on that date. I accordingly accept that the invoice was paid.
- 412 Sawtech did not dispute that the caulking remained to be done. It conceded that it was to be performed in the final stage. Its defence was that it held a quote for \$450. However, this was not tendered.

- 413 As the owners have satisfied me that Mason Construction paid Proflex Caulking \$818.40, it is reasonable to infer both that the work was actually performed by Proflex Caulking, and that the price was reasonable.
- 414 I allow to the owners damages in the sum of \$818.40 in respect of this item.

**Make good damage to plaster work from air conditioning piping - \$962.50**

- 415 Mr A R Syed sought to demonstrate that Sawtech had performed a substantial amount of plasterwork by tendering a copy of Sawtech's Westpac bank statement which evidenced payments by cheque of \$1,200 and \$4,000 on 13 February and 16 February 2015 respectively. Mr A R Syed said that these cheques were for cash and were delivered to a plasterer named Feras. An invoice from Hume Plasterboard dated 13 February 2015 for \$3,898.62 was also tendered as proof of payment for a wide range of plasterboard and fixing products.
- 416 Mr Mitchell did not list damage to the plasterwork as a defect in his report, which suggests that there were no blemishes in the plasterwork on 1 April 2015 at the time of his inspection.
- 417 Mr Forrest made no comment about plasterwork in his report, which is understandable given that Mr Mitchell had not raised plasterwork as an issue. Under cross examination, Mr Forrest said that internal plasterwork had been completed throughout the property in "my observation", but added that he couldn't say that he had checked everywhere.
- 418 Mr Fotopoulos gave evidence that Mason Construction had undertaken rectification of plasterwork throughout the property. Part of that related to damage caused when the air-conditioning pipes were rectified, but not all of it. He referred to an undated Mason Construction invoice for \$875 plus GST, or \$962.50, in respect of the patching of defective plaster walls throughout the property, including the application of 2 base coats, 1 finishing topcoat, and sanding ready for painting.
- 419 I have already found against the owners in respect of their claim in relation to the change in the configuration of the air-conditioning system. It follows that any consequential damage to the plasterwork must be borne by the owners.
- 420 In circumstances where there is an issue as to whether there were defects in the plasterwork when Sawtech left the site, and where the owners have not provided any statement regarding plaster rectification work carried out which separates costs associated with the moving of the air-conditioning pipes from costs associated with other alleged defects in the plasterwork, I find against the owners in respect of the whole invoice and allow nothing in relation to it.

**Front gate lock - \$2,390.40**

- 421 I note at the outset that the heading is slightly inaccurate, and should refer to "front gate and lock." There is a preliminary issue as to whether this

work was part of Sawtech's contract. Mr A R Syed took this point at the hearing.

422 The specification in section 58.23 refers to the construction of a front brick fence, with gate, together with other items. Mr Fotopoulos referred to drawing No P983 L, sheet 12 of 14. This certainly shows a brick fence 1800mm in height and 230mm wide with 470x470mm brick piers. Because of these references in the contract documents, I accept that the construction of a front gate was a part of the builder's works under the contract.

423 Mr Fotopoulos referred to undated Mason Construction invoice No.M012 for \$2,173.09 plus GST, a total of \$2,390.40. The scope of work described.

Front gate and lock for unit 1 front fence.

Supplied and installed powder coated gate frame post 50/50mm x 2.

Supplied and installed Gate powder coated 50/50mm frame.

Supplied and installed gate lock

Supplied merbu lining boards to gate

Materials and Labour included. (Sic)

424 The invoice is undated, and for the reasons explained carries no evidentiary value. It is an invoice for much more than the provision of a gate lock. However, there is no indication of who carried out the work, when they carried it out, or how long the work took. In my experience, a price of \$2,390.40 inclusive of GST is more akin to the price which might be charged for the construction of a front gate, with frame and lock, on a one-off basis to a consumer by a specialist fencing contractor, than the price which might reasonably be charged by a builder for the construction of such a gate during the course of construction of a house.

425 In accordance with my obligation to accord fairness to the parties as best I can on the evidence available, I allow \$1,500 to the owners in respect of the gate and lock.

### **Telephone line - \$660**

426 The specification in section 27.9 required the builder to provide wiring for the telephone point.

427 Mr Fotopoulos' evidence was that the owners had to get an outside contractor in to install a new telephone line. A line had been installed, but it "didn't pick up a signal." He tendered an invoice from 3rd Planet Excavations Pty Ltd dated 6 July 2015 in the sum of \$600 plus GST, a total of \$660. The scope of work was "Dig Trenching connect to pit. Form 66.01 1 & 2 supplied for compliance/subdivision purposes."

428 Mr Syed's evidence appeared to be contradictory. When asked whether a telephone line had been run to the rear house, he was adamant that it had been. However, when I asked him why the owners had paid \$660 to have a telephone line installed, and queried where the evidence was that the

telephone line had been laid, Mr Syed had answered “I never said it had been laid”. He then explained that “the pipe was there”.

- 429 I then put it to Mr A R Syed that the trench had been dug, but no wire had been placed. He did not disagree.
- 430 Mr and Mrs Fotopoulos tendered a Clause 66.01 Form 1 completed by 3rd Planet Excavations, which confirmed that all lots already had access to telecommunications network infrastructure, and that either a starter conduit or lead-in connections had been installed from the infrastructure. However, lots had not been connected to telecommunication services.
- 431 They also tendered a Clause 66.01 Form 2 completed by 3rd Planet Excavations which confirmed that no fibre ready pit and pipe facilities had been constructed.
- 432 Under cross examination, Mr Fotopoulos conceded that these forms were required only when an owner wanted to subdivide.
- 433 I am not satisfied that it is fair that Sawtech should be burdened with the cost of 3rd Planet Excavations digging a further trench and completing paperwork for a subdivision, when the owners believed that a telephone line to the rear house had been put in. The owners’ complaint was that the telephone line carried no signal, not that it was missing.
- 434 In the light of Mr A R Syed’s evidence that a conduit for the telephone line had been placed, but no line had been installed, the necessary rectification work would have involved pushing a telephone line through the conduit, and connecting it at one end at the trench, and in the house to the phone point.
- 435 Even if the owners’ initial assumption that a telephone line had been installed, but was not working, had proved to be correct, the rectification work would have been similar.
- 436 Accordingly, I find that the owners cannot recover as damages the cost of having constructed a new trench and having supplied to them 2 completed forms issued under Clause 66.01 for the purposes of subdivision.
- 437 As the owners have sought to impose on Sawtech a charge for which they are not responsible, and have given no evidence as to the cost of the appropriate rectification work, I find against them, and allow nothing for this item.

#### **Faulty Antenna - \$485**

- 438 This claim came up in the last phase of the hearing. An invoice from Australian Antennas in respect of work carried out at the rear house on 13 February 2016 for \$485 inclusive of GST was tendered. The owner’s evidence was that their tenants had complained that their television didn’t work. The managing agent arranged for Australian Antennas to attend at the site and fix the problem. The scope of work charged for by Australian Antennas (and invoiced to the managing agent, and then deducted from

rent, as indicated by the owners) included removal of the old antenna, its replacement with a new antenna, and installation of a TV point through the wall cavity.

- 439 Mr Fotopoulos gave evidence that the cable connecting the existing antenna to the TV point had been cut. He suggested it had been sabotaged.
- 440 Mr A R Syed was not in a position to dispute this suggestion.
- 441 As there was evidence that there were other instances where Sawtech's works had been deliberately damaged, which were discovered by the owners or their contractors after the termination of the Sawtech contract, I am prepared to countenance that the TV antenna cable had been deliberately sabotaged, as alleged by Mr Fotopoulos.
- 442 If it had not been sabotaged, then, on the basis of the evidence that Australian Antennas had investigated and repaired the antenna, I accept at least that it was not working for the tenants.
- 443 Whatever the specific cause of failure of the antenna, it should have been working. I accordingly consider that it is appropriate that Sawtech should pay for the cost to rectification of the antenna and the cable. It may well be that a new antenna did not have to be installed. However the owner's managing agent is not to be criticised, in my view, for authorising this repair in circumstances where the tenants were entitled to have a working television. I allow recovery of damages of \$485 to the owners in relation to the antenna.

### **Roof repairs - \$1,850**

- 444 At site inspection on the second day of the hearing, the owners noted that there were insufficient tiles in place at the box gutter to stop vermin from entering the roof space. The owners moved quickly, and on the fourth day of the hearing tendered an invoice from Greens Roofing for \$1,850 dated 23 March 2017 which set out a scope of work which included fixing the problem of vermin entering the roof, and also creating weep holes in the lower roof, and replacing some broken tiles.
- 445 The owners clearly accepted the quotation because in the last phase of the hearing they tendered an invoice from Greens Roofing dated 6 April 2017 for repairs to the roof. It was for \$1,850 inclusive of GST.
- 446 I am mindful that the owners have been in possession of the site since May 2015. In these circumstances, I am reluctant to hold Sawtech liable to pay damages in respect of all of the work covered by the Greens Roofing invoice. However, from the description of the work contained in the Greens Roofing quotation of 23 March 2017 it seems that there was a need for extra tiles to be put in place to prevent vermin from entering the roof space. In my view, these tiles should have been placed by Sawtech when the roof was constructed.
- 447 I am not satisfied that Sawtech is responsible for the replacement of broken tiles which have been patched up. No broken but patched tiles were

identified by Mr Mitchell in his report, and it may well be that some tiles have been broken by trades getting up on the roof after Sawtech left the site.

448 In this connection it is relevant to note that Sawtech issued a payment claim for \$42,400 in respect of the roof on 21 January 2015. This was paid by the owners on 30 January 2015. This suggests that they were satisfied with the roof.

449 Neither the quotation nor the invoice break down the \$1,850 charged by Greens Roofing into a sum for the extra row of tiles, and a sum for the weep holes and a sum for the replacement of broken tiles. Doing the best I can with the evidence, I allow \$1,500 to the owners in respect of repairs to the roof.

### **Fence to rear unit 1 decking - \$6,901.60**

450 The builder's primary contention was that this work was not included in the contract. Reference to the specification indicates of the responsibility of the builder regarding fences is to be found in sections 58.20 and 58.23 of the specification. In section 58.20, the builder is required to erect "All Timber paling fences throughout property 205 Wickham Rd Moorabbin" (Sic). Obviously, this does not provide definitive guidance as to whether the fence at the rear of the front house, on the edge of the rear deck, was to be included. As section 58.23 was concerned with a brick front fence, this is clearly not relevant to the issue.

451 Reference to the stamped plans does not assist the owners, in my view. In drawing No.P983A/3 (114) the brick front fence and brick driveway fence, the Eastern side paling fence, the Western side paling fence, and the rear paling fence are all shown. However, no fence at the rear of the existing residence (the front house) is shown.

452 However, a rear timber deck to the existing house, and a timber fence around the rear deck, are shown on the landscape plan prepared by Keystone Alliance Landscape Design ("the Keystone landscape drawing") which was tendered by the owners. The initial Keystone landscape drawing is dated 13 September 2013, and accordingly came into existence a year before September 2014, when the contract came into effect. It was endorsed by Kingston City Council on 21 October 2013 as part of the planning permit issued, Number KP 546/11.

453 The deck and the timber fence shown in the Keystone landscape drawing are construction works, and not landscaping works. In my view, they ought to have been shown on the construction drawings.

454 I find, however, that they are part of Sawtech's scope of works, because they are shown on a plan that was endorsed for the purposes of the town planning permit on which the building permit was based. I find that the Keystone landscape drawing is a contract document.

455 I turn now to the owner's claim, which is for \$6,274.18 plus GST, or \$6,901.60. The claim is based on an invoice rendered by Mason

Construction. Reference to that invoice indicates that the scope of work is described as follows:

Fence to rear unit one decking.

Supply and install powder coated fence frame 50/50mm.

Supply and install 90/19mm Kauri pine screening.

Fence with 25% viewing as council requirements.

Materials and labour included.

- 456 The invoice was undated, and gave no indication of who carried out the work, on what date it was carried out, or how long it took.
- 457 I am sceptical about the invoice arising out of the fact that it was prepared for the purposes of the litigation, and was not a contemporaneous business document. However, the fact that the fence had been built was clear from site inspection. Mrs Fotopoulos tendered a photo which showed the fence frame up, but without the boards attached, which she said was taken in August 2017. Mr A R Syed did not contest this date, and I am accordingly satisfied that it was Mason Construction and not Sawtech that constructed the fence. Something must be allowed for it.
- 458 The Mason Construction invoice was for \$6,901.60. I would not have allowed this figure for a treated pine fence, but the fence in question had a powder coated steel frame and was completed with Kauri pine boards. Tendered with the Mason Construction invoice was an invoice from All Steel Fencing & Design Pty Ltd dated 15 June 2015 in connection with the supply and installation of a powder coated fence frame. The cost exclusive of GST was \$2,890. It is to be noted that this is just under half the total Mason Construction invoice.
- 459 The Mason Construction invoice was not attacked by Mr A R Syed at the hearing, and I am prepared to accept the invoice at face value, bearing in mind the cost of procuring the steel frame. I allow the owners \$6,901.60 in respect of this claim.

### **Landscaping - \$16,140.30**

- 460 Although Mr A R Syed protested at the hearing that landscaping was not part of Sawtech's contract, I consider that this is not in issue. Landscaping was expressly allowed for in section 58.11 of the specification, which required the builder to carry out basic front landscaping including excavation, bobcat, topsoil and some trees. Furthermore, I have found that the Keystone landscape drawing was a contract document.
- 461 The owners claim \$16,140.30 inclusive of GST for landscaping, and rely on an invoice rendered by Mason Construction<sup>23</sup>. Reference to this invoice indicates that the scope of work is as follows:

Landscaping

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<sup>23</sup> Exhibit A 60

Excavate excess soil and debris and remove from front yard to unit 1 and rear yard to unit 2.

Landscape unit 1 and unit 2 as per working drawings.

462 I am not prepared to allow this invoice for a number of reasons. First of all, I am not satisfied that the Keystone landscaping design required the builder to excavate and remove substantial amounts of excess soil. The need to remove a substantial amount of soil may have been evident to the parties, but I cannot identify such a requirement in the drawing, and the owners did not draw my attention to any such requirement.

463 Secondly, Mr A R Syed gave evidence late in the hearing that he and his team performed 4 days of landscaping work in December 2014. Mr Fotopoulos wanted 4 or 5 cubic metres of soil removed. It was placed alongside the driveway, and Mr Fotopoulos arranged at his own expense to have it removed by Teddy Transport. Mr Fotopoulos did not dispute this evidence, and I accept it. I find that it is inconsistent with the proposition, which is inherent in the owners' position, that substantial amounts of soil remained to be removed after Sawtech left the site.

464 Thirdly, the Mason Construction invoice for \$16,140.30 is undated. As such, I place no weight on it for the reasons explained. Furthermore, no details are given as to when the work was carried out, who carried out the work, and how long the work took.

465 Fourthly, the owners have claimed separately for damages in respect of site clean up, and in respect of that claim they rely on an undated invoice for \$6,140.20 inclusive of GST from Mason Construction for the removal of waste from the site to make it safe for the beginning of work, and the excavation of excessive soil piled up which was said to be dangerous with debris<sup>24</sup>.

466 In circumstances where the undated invoices were prepared specifically for the purposes of this litigation, and were not contemporaneous business documents, and where there appears to be a clear crossover in the scope of work described in the invoice for \$6,140.20 and the invoice for \$16,140.30, I reject the claim for \$16,140.30 for landscaping. However, that is not the end of the matter.

### **Suppliers' invoices related to Landscaping**

467 The owners tendered with the Mason Construction invoice a number of photocopied invoices relating to the acquisition of plants, grass, soil, paving and sleepers. They must be examined, as it was clear from the inspection on the second day of the hearing that a significant amount of planting had been done.

### **Din San Nursery**

468 Din San Nursery & Trade Market invoiced Mason Construction on 9 July 2015 in respect of a number of plants plus freight. The amount of the

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<sup>24</sup> Exhibit A 71



invoice was \$1,206.70, inclusive of GST. Reference to the invoice indicates that there is a close correlation between the specific species of plants purchased, and their respective numbers, and the plant schedule contained in the Keystone landscape drawing. There are variations, such as the Din San invoice did not include a Butterfly Maple, that it included 8 rather than 5 Weeping Lilly Pillys, that it included 20 rather than 16 Blueberry Lilies, and that it referred to only 22 rather than 34 Wattle Mat Rush bushes. As there are variations in favour of the owners in some instances, and the builder in others, I accept the invoice in total. I note that the date of the invoice fits with the owners' narrative regarding the completion of the rear house, I allow damages in favour of the owner in the sum of \$1,206.70 in respect of the Din San Nursery invoice.

#### Fine Tiles Pty Ltd

- 469 This company billed Mason Construction in relation to the provision of 20 bluestone pavers measuring 50mm x 50mm. The invoice was for \$240, and was marked "Paid". The date of the invoice was 20 May 2015, which of course was just days after Sawtech was terminated. Paving appeared in the Keystone landscape drawing, and was apparent at the site inspection. I allow this invoice in full, and award damages of \$240 in respect of it.
- 470 Fine Tiles also billed Mason Construction \$760 inclusive of GST in respect of 20 "HN Black M/Hole Swan" measuring 500 x 500. These presumably were pavers. The invoice is undated. There is no indication that it has been paid. There was no evidence from either Mr or Mrs Fotopoulos relating these pavers to the project. I am not prepared to award damages to the owners in respect of it.

#### Anco

- 471 Anco Seed and Turf Pty Ltd charged "John" \$645 inclusive of GST on 3 July 2015 for a pallet of a product described as "INSW, Sir Walter Buffalo." An area of lawn is called for in the Alliance landscape drawing, and I allow damages of \$645 in respect of this invoice to the owners.

#### Boundary Garden Supplies

- 472 The owners tendered a photocopied page containing an invoice from Boundary Garden Supplies dated 11 July 2015 in respect of a product called "yard", for \$64 and a second invoice of the same date from the same business in respect of the same product for \$74. What was being charged for is not clear, and the identity of the billed party is also not stated. I am not prepared to allow these invoices as there was no evidence from the owners linking this uncertain product to the project.

#### Bunnings

- 473 One photocopied invoice from Bunnings tendered, dated 10 June 2015, was for \$22.80 and related to a treated pine sleeper. Another invoice was dated 10 August 2015 and was for \$26.50, for a different sleeper. In the absence

of any evidence from either of the owners that the sleepers were used at 205 Wickham Road, I do not accept these invoices as part of the claim.

#### Fulton's Bayside Pty Ltd

- 474 The owners tendered photocopied tax invoices from this company as follows:
- a) 20 May 2015 for \$30 in respect of ¼ Lilydale;
  - b) 24 July 2015 for \$136.00 in respect of ¼ black mulch and other items;
  - c) 27 July 2015 for \$65 for "1 SMYF 52";
  - d) 13 August 2015 for \$82.00 in respect of "1 m black coloured" and two pairs of gloves;
  - e) 13 August 2015 for a truncated figure that appears to be \$15.00, but is more likely to be \$150, for sand and cement;
  - f) 17 August 2015 for \$165 in respect of 1½ Lilydale;
  - g) 18 August 2015 for \$38.00 some illegible items which appear to include sand and acid.
- 475 There was no evidence linking any of these invoices to 205 Wickham Road, and I am not prepared to award damages in respect of them.

#### Gottlieb's Builders' Supplies

- 476 The next invoice tendered was dated 1 September 2015 and related to 2 garden (illegible), 2 faceplates and 2 handles. The price was \$40. There is no evidence linking this invoice to 205 Wickham Road, and I disallow it.

#### Moorabbin Timber Pty Ltd

- 477 The owners also submitted an invoice in respect of what appeared to be 3600 x 900 x 19 panels, concrete mix and fixings. The date was obscured, and the invoice was for \$185.47. There is no evidence linking this invoice to 205 Wickham Road and I am not prepared to allow anything in respect of it.

#### Polytube

- 478 There was an invoice from an unknown company for \$14.90 in respect of Polytube. The invoice was dated 9 May 2015, which is before the date of termination of Sawtech. I allow nothing in relation to this invoice.

#### Old Malvern Pickets

- 479 The final invoice included by the owners in their batch of suppliers' invoices relating to landscaping was from Old Malvern Pickets and was for \$21. It was dated 3 June 2015 and related to the supply of four 1200 x 65 x 19mm Queensland hardwood pickets. In the absence of any evidence linking this invoice to 205 Wickham Road, I disallow it.

## Summary

480 In respect of landscaping, I have allowed the Din San account of \$1,206.70, a Five Tiles invoice for \$240, and the Anco invoice for \$645. The total amount allowed for landscaping accordingly is \$2,091.70.

## **OWNERS' CLAIMS LEFT OUT OF WRITTEN SUBMISSIONS**

481 It remains to deal with some claims notified by the owners in their pleadings but which have been omitted without explanation from their written submissions. They are as follows.

### **Garage Door**

482 Mr A R Syed in the second phase of the hearing agreed that the roller door to the garage was to be fitted during the final stage. However, he deposed that Sawtech had paid for the garage doors. A quotation from Airport Doors addressed to Deccan Homes (Sawtech's trading name) dated 24 February 2015 for 2 doors and remote controls was tendered by Sawtech late in the hearing,<sup>25</sup> together with a Westpac electronic payment receipt \$1,500 dated 1 March 2015. I accept these documents as evidence that Sawtech had ordered 2 garage doors (only one of which was needed for this project), and had paid \$1,500 to the supplier on account.

483 The owners also tendered a photocopy of an invoice from a supplier. Unfortunately, the name was obscured by a receipt. The quotation was in respect of the supply and installation of 1 x Panel Lift Sectional Door and 1 Panel Pro Motor including 3 remotes. It was for \$1,452. The receipt was from BD Doors & Openers and was in the sum of \$1,306.80. It was addressed to Mrs Fotopoulos, and was dated 17 August 2015. There was no evidence regarding the discrepancy between the receipt and the quotation but it seems clear that the garage door was paid for by the owners. I find that the owners paid \$1,306.80 for the supply and installation of the fitting of the garage door.

484 On the basis that Sawtech had not installed the garage door, and could presumably have cancelled the order for the door it no longer needed for the project, I am prepared to allow the owners damages in the sum of \$1,306.80. I note in passing that \$1,306.80 is very similar to half the cost of \$2,780 quoted to Sawtech for 2 garage doors and remotes, which demonstrates that the price paid by the owners to BD Doors & Openers for 1 door was reasonable.

### **Plumbing fit off including appliances, taps etc.**

485 The owners' contention is that they had to engage a plumber to complete plumbing works after Sawtech left the site.

486 Sawtech in its defence denied liability on the basis that the appliances were already installed.

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<sup>25</sup> Exhibit R63

487 The owners rely on an invoice rendered by Plumber Master numbered 26434 dated 2 September 2015 in the sum of \$4,793.42. The owners tendered a receipt from the Commonwealth Bank showing that \$4,793.42 had been drawn on the Mason Construction account and transferred to Plumb Masters' account on 4 September 2015.

488 This proof of payment suggests that the Plumb Master account relates to work actually performed, and that the account was reasonable.

489 The description of work in the Plumb Master invoice was as follows:

Connect up gas meter, on carrying out pressure test on the line leak was found.

The pipe appeared to be sabotaged by cutting thru the pipe in the ceiling space in the lounge.

Connecting up the water supply to the rear property it was also found that the water supply was sabotaged

A cut on the water supply was found in the corner of the building near the front door and also above the sliding doors to the rear courtyard in the ceiling space.

Removed bricks to access the leak and cut out section of pipe and replace section of pipe thewas also slashed.

Removed roof tiles and cut render out to access and repair.

Connect up rainwater tank and downpipes.

Connect up hot plate.

Fit off remainder of tapware.

Supply and install 450 pit in rear courtyard and connect to retention pit.

Run new waterline for hose tap in courtyard off rainbank.

Supply and install news HWS as existing one wasn't working.

(Sic)

490 The need for some of the work invoiced by Plumber Master is potentially explained by the sabotage alleged to have occurred to the gas pipe, and also in the water supply pipe in two places.

491 The owners put into evidence a photo of a piece of pipe which they said had been sabotaged. Mr A R Syed was not in a position to challenge the proposition that there had been instances of sabotage. Although I find it a little surprising that there was no evidence from an independent consultant such as Mr Mitchell concerning an allegation as important as sabotage, I note that the Plumb Master invoice is clear about the matter and has an internal consistency about what was found, and what was done to address the issues. I note that despite the size of the Plumb Master invoice, the relevant plumber was not called, and he could not be cross-examined. However, on balance, I accept the invoice as credible and find that the work claimed was done.

- 492 I find that Sawtech is liable to pay for the work necessary to rectify the instances of sabotage as I accept, on balance, that it is more likely that its tradespeople, rather than those of Mason Construction, carried out the acts of sabotage.
- 493 In respect of Sawtech's contention that the plumbing was complete when it left the site, I observe that some work was carried out by Plumb Master that could not have been carried out by Sawtech. This work included the connecting up of the rainwater tank and the downpipes, and running a waterline off the rain bank to a tap. These tasks could only be carried out after the water tanks were installed by Mason Construction.
- 494 The fitting off of the remainder of the tapware was a task that would ordinarily be carried out in the final stage. Mr A R Syed in the second phase of the hearing confirmed this, but said that Sawtech had fitted the taps during the fixing stage.
- 495 As Mr Mitchell included the fitting off of appliances and tapware as uncompleted items, I accept that the fitting off of the taps was carried out by Plumb Master.
- 496 One item charged for by Plumb Master was the supply and installation of a 450mm pit in the rear courtyard and its connection to the retention pit. These works are the subject of a separate claim, which has been dealt with elsewhere. Although I do not doubt that Plumb Master carried out this work, the issue is whether the owners can expect Sawtech to pay for it. I have found against the owners in relation to their claim about the pits. Accordingly, the Plumb Master invoice must be disallowed to the extent that it relates to these works.
- 497 Plumber Master also charged for installation of a new hot water service as the existing one wasn't working. No evidence was given about this, and I do not allow this limb of the claim.
- 498 As the Plumb Master invoice was not broken down into components I must make allowances for the work relating to the pit and the new hot water service. I discount the Plumb Master invoice down to \$3,500 because of these two disallowed items. This is the sum which I will allow as damages.
- 499 The owners also claimed \$9.52 in respect of a Bunnings invoice for sundry supplies. Sawtech in its defence denied liability for this invoice as the appliances had already been installed. In the absence of evidence about the invoice, I do not allow it.
- 500 In summary, I allow \$3,500 in respect of plumbing fit off.

### **Carpet**

- 501 When the owners originally particularised the claim, they sought damages of \$2,420 in respect of the supply and laying of carpet. Sawtech in its defence denied this claim, and said the carpet was to be laid in the final stage.

- 502 At the site inspection it was clear that carpet had been installed upstairs. It is appropriate that an allowance be made in respect of it.
- 503 The owners tendered an invoice from Carpet Matters dated 28 July 2015 in the sum of \$2,420 for the supply and installation of Tuftmaster “Angelia 99” dyed nylon twist pile carpet on underlay to two bedrooms, robes and hall.
- 504 The specification was vague regarding carpet. Section 52.1 require the builder to supply and install carpet from the builders range, as per the plan. The customer was entitled to choose the colour from the range.
- 505 The nature of the carpet was not specified. As the owners have chosen nylon carpet, I do not think Sawtech could complain that the owners have been extravagant. Indeed, Mr A R Syed made no attack on the carpet chosen.
- 506 I allow damages of \$2,420 in respect of the carpet.

### **Compliance Certificates**

- 507 The owners seek an order for the compliance certificates for stages that have been paid for.
- 508 Sawtech supplied a number of certificates to the owners. One is the insulation certificate that was put into evidence by Sawtech.<sup>26</sup> (The owners agree that insulation is not an issue). Furthermore, the window manufacturer Yangtai Rongtai Industrial Co Ltd supplied a certificate of compliance with AS 1288-2006 and AS 2047-2014,<sup>27</sup> which was tendered in the first phase of the hearing. Sawtech tendered an updated set “Certificate of Conformity” for the windows dated 8 May 2015 with an expiry date of 8 May 2020 in the second phase of the hearing.<sup>28</sup> Compliance certificates were issued by Brenton O’Grady in respect of below ground sewer and below ground stormwater and cold water plumbing<sup>29</sup>. Sawtech also supplied a certificate of compliance in respect of the stormwater design signed by John Khouri.<sup>30</sup>
- 509 Mr A R Syed conceded late in the hearing that Sawtech was not in a position to supply other certificates, as his colleague Mr Mahboob Ali Jan had “run away” without handing them over. By doing this, he was said to have let a number of people down.
- 510 Despite this concession having been made on behalf of Sawtech, I am not prepared to make an award of damages in favour of the owners in respect of the builder’s failure to provide some certificates, because the owners engaged Mason Construction to complete the rear house, and the owners have successfully applied for an occupancy permit.

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<sup>26</sup> Exhibit R16.

<sup>27</sup> Exhibit A42.

<sup>28</sup> Exhibit A54

<sup>29</sup> Exhibit A36; and Exhibit R25 (without handwritten notes on it)

<sup>30</sup> Exhibit R16

511 It would appear from this that the owners have obtained all the relevant certificates, or equivalent documentation, and provided them to the relevant building surveyor. Examples are the compliance certificate from Nick Leening in respect of a number of plumbing items,<sup>31</sup> and Emmanuel Lambrinakos in respect of refrigerated air-conditioning<sup>32</sup>, the certificates of electrical safety issued by William Prodanov,<sup>33</sup> and the statutory declaration from Mr Fotopoulos in respect of waterproofing.

512 In summary, nothing is allowed for certificates.

#### **Fee paid to building surveyor in respect of variation to building permit**

513 Late in the hearing Mrs Fotopoulos tendered an invoice from Arki Building Surveyors for \$330 in respect of the issuing of a variation to the building permit by reason of the termination of Sawtech. I consider that this loss is recoverable by the owners, as it is a loss which flows naturally and directly from Sawtech's breach of contract. I allow \$330 damages to the owners in respect of the amended building permit.

#### **SUMMARY**

514 It is convenient to tabulate the owners' claims, and my findings in respect of them, as follows:

##### Original claims

a) Floor sand and polish	\$3,400.00
b) Painting	\$900.00
c) Carpenter fit off and hardware	\$00.00
d) Robe fit out to bedrooms 1 and 2	\$825.00
e) External Hinged door	\$423.50
f) Window and door infills	\$313.50
g) Supply and fit 2 water tanks and bases	\$4,175.73
h) Electronic appliances and electrical fit off	\$7,079.00
i) Complete paling fences	\$4,700.00
j) Carport walls	\$00.00
k) Driveway	\$11,280.00
l) South wall Unit 1	\$250.00
m) Bathroom vanities	\$00.00
n) Site clearing	\$2,862.00
o) Caps on piers and rendering	\$6,630.91

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<sup>31</sup> Exhibit A37.

<sup>32</sup> Exhibit A38

<sup>33</sup> Exhibit R67 stop

p) Flashing, capping and spouting	\$00.00
q) Shower screens and mirrors	\$2,430.31

New claims

r) Completion of tiling	\$2,000.00
s) Caulking of control joints	\$818.40
t) Make good damage to plaster	\$00.00
u) Front gate and lock	\$1,500.00
v) Telephone line	\$0.00
w) Faulty antenna	\$485.00
x) Roof repairs	\$1,500.00
y) Fence to rear deck	\$6,901.60
z) Landscaping	\$2,091.70

Claims left out of written submissions

aa) Garage door	\$1,306.80
bb) Plumbing fit off	\$3,500.00
cc) Carpet	\$2,420.00
dd) Compliance certificates	\$00.00
ee) Fee paid to building surveyor	\$330.00

Subtotal \$68,123.45

**SCHEDULE C CLAIMS**

**Waterproofing - \$13,735**

515 The owners, in their written submissions, confirm their claim is based on the proposition that they have not received any waterproofing certificate from the builder. They rely on Mr Mitchell's report at section 8. Mr Mitchell stated that the waterproofing to the wet areas did not comply with the Building Code of Australia and Australian Standards. Eight photographs were supplied with a view to illustrating a number of alleged non-compliances. A large part of this section of Mr Mitchell's report appeared from its tabular form to be reproduced from some standard.

516 Mr Mitchell's recommendation was that the entire floor and wall tiling, including the ground floor shower base, had to be removed and rectified including by the provision of new waterproofing membrane. The cost of this work estimated, by Mr Mitchell inclusive of margin and GST, was



\$13,735. This is the sum the owners are claiming in respect of waterproofing.

517 Mr Forrest in his report confirmed that Mr Mitchell's report was a composite of various sections of AS3740. He made the point that the photographs attached to the Mitchell report indicated "that tiling works were in progress, and that various waterproofing aspects were to be complete[d] (around pan and wall outlets)."

518 Importantly, he said the rectification works described represented:

a complete restart to all areas which is not supported by facts or evidence that the membrane did not exist...

He went on to add:

The report does not identify any defective works as a Major Defect for replacement and no invasive evidence has been provided to verify the lack of a membrane.

519 In the light of this head on collision between the evidence of the two experts, I would have been hard pressed to have made a finding of liability in favour of the owners, bearing in mind that Mr Mitchell did not attend at the hearing, and accordingly could not be cross-examined.

520 Moreover, I note that at the inspection which took place on the second day of the hearing, no mention was made of any problems in the wet areas arising from any alleged failure of waterproofing. No evidence was given at the hearing that any tenant had raised any such problem.

521 For these reasons also, I would have been inclined to have found against the owners if this was where the matter rested.

522 However, I consider the issue is to be decisively determined against the owners because of Mr Fotopoulos' evidence that he had given a statutory declaration to the building surveyor to the effect that the waterproofing was satisfactory, for the purposes of obtaining an occupancy permit.

523 Mr Fotopoulos sought to maintain his claim in respect of the waterproofing, despite having told the building surveyor that the waterproofing was satisfactory, by explaining in the course of cross-examination that his declaration to the building surveyor had been false.

524 Putting aside the philosophical conundrum of how I can be expected to accept sworn evidence from Mr Fotopoulos to the effect that his declaration submitted to the relevant building surveyor regarding the waterproofing was false, I do not think this concession helps Mr Fotopoulos in the prosecution of his case. All it does is lead me to the conclusion that very little weight can be attached to any part of his evidence, on the basis that he appears to be prepared to say at any point whatever is necessary for him to say to achieve his immediate aim.

525 I find against the owners in respect of the waterproofing claim.

### **Wall cladding - \$2,743**

- 526 In respect of this item, the owners confirm that they are seeking damages of \$2,743, being the rectification cost assessed by Mr Mitchell. In respect of liability, they rely on Mr Mitchell's report at item 9.
- 527 Mr Mitchell included in his report a couple of photographs which indicate that the roofline and the cladding line were not parallel. He suggested that at this stage of construction the most appropriate action would be to adjust the roofline. This would involve removing a sufficient number of roof tiles to allow adjustment to the roofline, packing the underlying battens to achieve a straight line, and then reinstating the removed tiles. He quantified the cost at \$2,743 included a contingency of 10%, a margin of 35% and GST.
- 528 Mr Forrest agreed that the cladding line was not parallel to the roof. He agreed that the defect should be attended to "for visual purposes". He said this would involve one day's labour including painting and cleaning, and the erection of a scaffold. He estimated the cost at \$1,500, and said he thought Mr Mitchell's costing was inappropriate.
- 529 I prefer Mr Forrest's assessment over that of Mr Mitchell, as Mr Forrest attended the hearing to give oral evidence, and was available for cross-examination. Mr Mitchell, on the other hand, was not available to defend his opinion.
- 530 I accordingly find that the owners are entitled to an award of damages of \$1,500 in respect of the rectification of the cladding.

### **Ducted vacuum, intercom system, camera system - \$10,450**

- 531 In respect of these items, the owners claim damages of \$10,450. This figure is derived from a quotation from Amps Alive Electrical Pty Ltd dated 23 September 2015 which was tendered late in the hearing. The scope of works set out in that invoice includes the supply and installation of a ducted vacuum system including the removal of damaged pipes and the addition of new ones, the supply and installation of a new intercom system and electrical wiring, and the supply and installation of a camera system and electrical wiring.
- 532 The contractual basis for the claim is to be found in the specification at section 27.12, which called for the installation of a particular package which included a ducted vacuum system with four inlets, four security detectors, and a video intercom with one monitor.
- 533 Mr Fotopoulos acknowledged that a pipe had been installed for the vacuum system, but said that the builder was not entitled to payment because Mr A R Syed had run the pipe himself, and had not used the services of a plumber.
- 534 Mr A R Syed's response was that it was a PVC pipe, as supplied in the kit, and did not need to be installed by a plumber. He said he was qualified to place the pipe as he held DBU registration at the time.

- 535 In the absence of any expert evidence on the part of the owners that it was necessary for a plumber to install the vacuum pipe, I find for Sawtech in relation to this particular issue.
- 536 Regarding the other items, my attention was drawn to Mr Mitchell's report, where he suggested at item 18 of his list of incomplete works that the video intercom and security camera needed to be fitted off.
- 537 Mr A R Syed deposed that the wiring for the intercom system had been put in place, but the intercom had not been fitted, as fitting off would be performed in the final stage. He accordingly confirmed the owners' position that the intercom was not in place.
- 538 Mr Syed also conceded that the security camera was not in place, but said the wiring had been put in by Sawtech's electrician.
- 539 I accept Mr A R Syed's evidence that the wiring had been installed for the intercom and the security camera. I also accept the owners' contention that the vacuum unit, the monitor and the security camera had not been installed. I consider the owners are entitled to damages in respect of the cost of having these items installed.
- 540 Mr A R Syed said that these components had been used on other jobs. He gave evidence that the complete package of equipment, including fittings and cables, would cost him \$1,200.
- 541 The Amps Alive invoice relied upon by the owners was not broken down into labour and parts, and accordingly no assistance from it can be derived as to the cost to the owners of acquiring the vacuum unit, the video intercom or the security camera that need to be installed. When Mr Lambrinakos was at the hearing, he was not asked about these matters.
- 542 Doing the best I can on the evidence available, I will allow the owners \$2,000 damages in respect of both the cost of obtaining the relevant package of equipment, and having a licensed electrician attend to fit off the intercom and the camera using the wiring already installed.

**Brickwork - \$3,542**

543 The owners confirm in their written submissions that they claim \$3,542 for the rectification of brickwork. They rely on a quotation from Chameleon Masonry Pty Ltd trading as Nawkaw dated 12 April 2017.

544 Reference to this document indicates that the quotation relates to the treating of the brickwork with Nawkaw colour treatment. The scope of work is described as follows:

Using a hand-application of our product NECT 90, we propose to apply Nawkaw Masonry Colour Treatment to recover all over bricks at front and rear elevations (external only) to better blend with surrounds as directed by Charmaine Fotopoulos.

- 545 As the owners are entitled to receive bricks of the colour specified in the contract, rather than those directed by Mrs Fotopoulos, the claim for damages based on the Nawkaw invoice must fail.
- 546 Having made this point, it is appropriate to deal with the owners' claim that acid washing of the bricks carried out by the builder affected the colour of the bricks specified. I consider that this would be a valid claim if it was sustained on the facts. However, at the inspection, the external facing bricks at the rear house appeared to be satisfactory in terms of colour. At the hearing, Mrs Fotopoulos complained the bricks had become brown, and said she "did not like it". No steps were taken by the owners to demonstrate that they materially differed in colour from the specified bricks. Accordingly, I am not satisfied that the specification has been breached. This particular claim is accordingly dismissed.
- 547 However, this does not dispose of all claims made by the owners regarding the brickwork at the hearing. Mr Mitchell in his report identified a number of defects in the brickwork other than damage to the face of the brickwork caused by brick cleaning. Furthermore, Mr Rosa, the other expert called on behalf of the owners, gave evidence about defective brickwork. In these circumstances, I consider that the owners' failure to particularise in their written submissions the damages they are seeking in relation to the other defects identified by Mr Mitchell and Mr Rosa, must be an oversight. Accordingly I propose to deal with the alleged defects.
- 548 The first of the defects other than damage caused by brick washing identified by Mr Mitchell was that the brickwork did not comply with the Victorian Building Authority's Guide to Standards and Tolerances ("the VBA Guide"), which stated that in a masonry veneer wall a gap should be left under window sills to allow for timber shrinkage. Secondly, he identified a breach of the VBA Guide insofar as bed joints in adjacent walls were defective as they were not on the same horizontal plane. He also identified a void or hole in mortar which was not a weephole or a vent, and was hence a defect.
- 549 I make a minor point about Mr Mitchell's report, which is that the clause numbers of the VBA Guide to which he refers do not seem to align with the 2015 edition of the VBA guide. Nonetheless, the defects in the alignment of mortar beds he referred to, both in the vertical and horizontal planes, were readily observable at the inspection which took place on the second day of the hearing.
- 550 Mr Rosa gave consistent evidence, showing non-aligned mortar work at a joint, mortar beds meeting at a joint other than in a horizontal plane, and vertical alignment of joints in excess of the recommended tolerance contained in section 3.1.3 of the VBA Guide. He also included a photograph showing where a brick had been saw cut to accommodate an even line in the mortar bed.<sup>34</sup>

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<sup>34</sup> Refer Mr Rosa's report, which was tendered as Exhibit A 95, paragraphs 35, 37, 38 and 39.

- 551 Mr Forrest agreed that there were defects in the brickwork, but he disagreed with Mr Mitchell's costing. He said Mr Mitchell's estimate of \$23,371 equated to the cost of a bricklayer laying 15,000 bricks. He said that this meant redoing all the brickwork. His assessment was that it would cost \$4,180 inclusive of GST to have one bricklayer remove and clean bricks and carry out all the necessary rectification work.
- 552 Mr A R Syed did not dispute the existence of the defects on behalf of the builder, but deposed that had the owners required him to attend to these defects, he would have done so. He gave evidence that brickwork had been done defectively on the front wall of the house, and when Mr Fotopoulos complained, he directed the bricklayer to demolish and reconstruct the brickwork. He later put in a photograph of the area of brickwork that had been rectified. I accept Mr Syed's evidence on this point. Accordingly, I think it is appropriate to infer that had Mr Fotopoulos required the defects at the back of the rear house which Mr Mitchell and Mr Rose highlighted, to be rectified, Mr Syed would also have attended to their rectification.
- 553 Mr A R Syed gave a credible explanation as to why he had not been required to rectify the remaining defects in the brickwork at the back of the house. This was that he had been told by Mr Fotopoulos that it was intended by the owners that the rear of the house was to be rendered. I accept Mr Syed's evidence on this point also.
- 554 On the basis of Mr A R Syed's evidence concerning the rectification of the front wall, I accept that he could easily have had the other defects at the rear rectified while his bricklayer was on site, had Mr Fotopoulos wanted this. Accordingly, I consider that it would be unfair to now impose on Sawtech an obligation to rectify defects which had been waived by the owners while the contract was on foot, with two exceptions.
- 555 The first exception relates to the brickwork under the sills, which has not allowed for the required gap for shrinkage clearance. This is a defect which must be rectified, as it cannot be cured merely by being rendered. The second exception relates to the instances where there are holes or gaps in bricks. These bricks must be replaced, as rendering will not suffice to conceal their condition.
- 556 Mr Forrest did not break down his estimate of \$4,180 into components of rectification work. Doing the best I can on the evidence, I find that 25% of Mr Forrest's figure, rounded down to \$1,000, is an appropriate assessment of damages in respect of the defective sill brickwork and the required patching of broken bricks.

### **Windows - \$unspecified**

- 557 The owners' complaint was that the windows supplied by the builder were not as specified. No dollar figure was assigned to this claim by the owners

in their written submissions, but there was no indication that it had been abandoned.

- 558 The specification in section 28.1 called for aluminium double glazed sliding windows and doors constructed by Southern Star Windows. The builder delivered windows manufactured in China by Yantai Rongtai Industrial Co. Ltd.
- 559 Mr Mitchell in his report said that on the day of his inspection the manufacturer's name was not evident, and that the builder should identify the manufacturer, and supply a glazing compliance certificate. He said that if this could not be achieved, the windows should be replaced with those specified.
- 560 In the event, the builder prior to the hearing procured a statement from Yantai Rongtai Industrial Co Ltd confirming the windows and doors had been glazed in accordance with AS1288-2006 and AS2047-2014.
- 561 At the hearing, the owners amended their claim from one for the cost of replacing the windows in their entirety, which had been assessed by Mr Mitchell at \$19,748, to a claim for the difference between the cost to the builder of supplying the windows manufactured in China and the cost of supplying Southern Star Windows.
- 562 When Mr Forrest gave evidence on behalf of the builder, he said that the owners had no entitlement to even this reduced claim, because the windows were certified as compliant to the relevant Australian Standard and were fit for purpose.
- 563 I disagree with Mr Forrest's view. The owners had specified a particular brand of windows and doors and, unless the specification had been varied, the owners were entitled to receive what they had specified and paid for. The builder should not be rewarded for flouting the contract specification.
- 564 Having made that point, I note the evidence given by Mr A R Syed late in the hearing to the effect that Sawtech used windows sourced from China in all its projects. He listed 4 specific addresses, including Kingsport Boulevard, Point Cook, and Roberts Avenue, Box Hill South and Eley Street Clayton. He said that he had taken Mr Fotopoulos to inspect each installation. He said that Mr Fotopoulos had agreed that the windows were "top-quality" and had agreed to a change of the specification.
- 565 It is useful to compare this evidence with the evidence concerning the windows which came out in the first week of the hearing. During cross-examination, Mr A R Syed put to Mr Fotopoulos that he had visited a property at Point Cook. Mr Fotopoulos agreed that he went to an address in Point Cook or Truganina, and "dropped off Rafay" (that is, Mr A R Syed). But Mr Fotopoulos then added that he denied importing Chinese windows.
- 566 Mr A R Syed then asked Mr Fotopoulos whether he had been to a specific house in Roberts Avenue, Box Hill South. Mr Fotopoulos ultimately acknowledged that he had gone there.

- 567 When asked whether he had been to a house in Clayton, Mr Fotopoulos confirmed “I went that way.”
- 568 On the basis that Mr A R Syed was able to nominate the specific addresses of at least three houses constructed by Sawtech that Mr Fotopoulos effectively conceded he had been to, I accept Mr Syed’s evidence that he took Mr Fotopoulos to these houses in order to inspect Chinese sourced windows which had been installed in them by Sawtech.
- 569 In these circumstances, Mr A R Syed’s evidence that Mr Fotopoulos agreed to a change in the window and door specification is, in my view, very credible.
- 570 Mr Syed, in response to a direct question from me, confirmed that the specification for the windows had been varied.
- 571 For all these reasons, I find that the specification for the windows was changed from a requirement that they be manufactured by Southern Star Windows to Chinese sourced windows of the type shown to Mr Fotopoulos.
- 572 On the basis of this finding, the owners’ claim in respect of the windows must fail. I allow the owners nothing in respect of it.

### **Summary of Schedule C claims**

573 This concludes my assessment of the owners’ entitlements in respect of the Schedule C Claims. I have found that the owners are entitled to damages in respect of the following defects in the following amounts:

• waterproofing	\$0.00
• wall Cladding	\$1,500.00
• ducted vacuum, intercom system, camera system	\$2,000.00
• brickwork	\$1,000.00
• windows	\$0.00
<u>Subtotal for Schedule C</u>	<u>\$4,500.00</u>

### **CLAIM FOR LOSS OF RENTAL FROM THE REAR HOUSE**

- 574 The owners in their written submissions claim \$15,000 in respect of lost rent for 30 weeks between from 6 April 2015 until 2 November 2015, which is three days before the occupancy permit issued in relation to the rear house.
- 575 It is convenient to deal with the claim in two segments. The first is the claim up to 15 May 2015, which is when the contract was terminated. The second segment relates to alleged delay in renting the premises after 15 May 2015.

576 Before the two claims are addressed, it is necessary to consider the manner in which delay was dealt with in the contract.

### **No liquidated damages applicable**

577 The contract provided in item 17 that the rate for liquidated damages per week was “\$N/A.” There have been cases in the Courts regarding the interpretation to be placed on such a designation, and on the designation “\$Nil.” to which it has been compared. None of these cases were referred to by the parties. In the circumstances, I propose to give the designation “\$N/A.” its ordinary and natural meaning, which is that liquidated damages are “not applicable.” The upshot is that under the terms of the contract, there can be no claim for liquidated damages for delay.

578 I note that this is the interpretation acknowledged by the owners, who acted as if they had no entitlement to liquidated damages under the contract. Specifically, by email dated 4 March 2015 they asked Sawtech to sign an acknowledgement that liquidated damages would run at the rate of \$600 per week from 4 April 2015. The form they prepared stated “this will override the signed building contract item no 17 & 17a where it is stated N/A.”

### **General damages for delay available**

579 Just because liquidated damages are not available to the owners does not mean that they are without any remedy for delay. Usually, under a building contract, general damages for delay are available if the builder breaches the contract and brings the works to completion at a date later than the contractual date for completion. The owner’s right to general damages for delay will be extinguished where the parties agree that liquidated damages are payable, as they operate as both a “sword” and a “shield.” Liquidated damages are a sword insofar as they operate to give the owner a right to claim specified damages for each day or week by which the builder is late in completing the works. However, they operate as a shield in order to cap the builder’s liability for delay.

580 As I have found in the present case that liquidated damages are “not applicable”, I consider that the owners will be entitled to claim general damages for delay, if they can demonstrate that Sawtech was late in completing the works.

### **Sawtech’s obligation to complete**

581 The obligation of Sawtech under clause 8.4 of the contract was to reach “Completion” of the “Works” by the “Completion Date”. The Completion Date was to be calculated by reference to the actual commencement date and the “Construction Period”.

582 The Construction Period including specified delay days was defined in item 9.2K of the contract appendix as 180 days. However, the builder under clause 8.4 of the contract was to be entitled to an extension of time for any reason permitted under the conditions of contract, or otherwise. As a matter



of common law, the permitted reasons include any act or omission of the owners.

583 The contract had a special condition contained in section B, which indicated the finish date was to be between December 2014 and January 2015. On its face, this special condition creates confusion, as the contract was initially executed on 23 January 2014, and ordinarily a construction period of 180 days would mean that the works should have been finished at some point soon after the middle of 2014.

584 However, as the contract came into effect in September 2014, and the evidence was that the substantive work on the rear house, other than the plumbing, got underway in the middle of that month, completion by the middle of March 2015 might reasonably have been expected.

#### **The agreement to complete by 3 April 2015**

585 In these circumstances, it is not surprising that the parties reached an agreement in late January 2015 that the rear house was to be finished by 3 April 2015, and that after that date Sawtech would pay “rent” to the owners. Mr A R Syed acknowledged this arrangement in his evidence late in the hearing.

586 It was very likely this agreement to which the owners were referring when calculating their loss of rent from 6 April 2015.

#### **The claim for loss of rent from 6 April 2015**

587 In order to sustain their claim for damages from 6 April 2015 the owners will have to demonstrate that there was no basis for an extension of time to be granted to the builder by reason of any of their own acts or omissions.

#### **Delay caused by owners**

588 Mr A R Syed gave evidence that between 14 January and 17 March 2015 there was a two-month delay at the front house which had the effect of preventing the connection of electricity to the rear house. Certification of the internal electrical work at the rear house did not occur until 18 March 2015. Mr A R Syed contended that this affected Sawtech’s liability to compensate the owners for lost rent after 3 April 2015.

589 The owners at the hearing did not dispute Mr A R Syed’s contention that it was a delay at the front house, for which the owners were responsible, that prevented the connection of electricity to the rear house. For this reason, I accept Mr A R Syed’s argument that Sawtech should be allowed an extension of time in which to complete the rear house, from 3 April 2017. As the delay to which Mr A R Syed referred was of two months duration, the resulting extension of time protects Sawtech from any claim for general damages for delay up to, and past, the date of termination of the contract, namely 15 May 2015.

### **The claim for delay after 15 May 2015**

- 590 I now turn to the owners' entitlement to general damages for delay after 15 May 2015. The owners' contention is that they are entitled to damages up to and including the date that the relevant building surveyor actually issued the occupancy permit. They impliedly invite me to assume that every day between the date of termination of the contract and the date the occupancy permit was issued, is a day of delay for which the builder is responsible.
- 591 The first point to be made is that any claim for damages for delay is to be measured from the date upon which Sawtech would have been contractually bound to have completed the works, if the contract had not been terminated. If two months extension of time is allowed from the previously agreed completion date of 3 April 2015, the adjusted date for completion would have fallen on about 29 May 2015.
- 592 The next point is that the time frame in which rectification and completion works have been performed by the owners has been obscured by the fact that almost all of the invoices from Mason Construction were undated. It is very difficult to form a view as to when the works, which would have been completed by Sawtech if the contract had been left on foot, were actually completed by the owners.

### **When were the works completed by the owners?**

- 593 Some of the works which Sawtech would have completed if it had remained on the site include the landscaping works. The trade and supply invoices indicate that these works were being completed as early as the last half of May, but there was also much activity in July 2015. Perhaps surprisingly, having regard to the fact that landscaping is often finished at the end of a project, the invoices from suppliers suggest that the landscaping work was finished in July/August.
- 594 The garage door was purchased from B&D Doors & Openers in August 2015, but the works clearly continued after that month. We know this because the final plumbing work carried out by Plumb Master was billed on 2 September 2015, and the Chef range hood was sold by The Good Guys to Mason Construction on 3 September 2015.
- 595 I acknowledge that the owners referred to an invoice from Elwood Trade Services dated 5 October 2015, but for the reasons already given, I have found that invoice to be false. It accordingly is not evidence that the works continued into October.
- 596 On the evidence of the trade and supply invoices that I have accepted, and noting the date of The Good Guys invoice for the range hood, I conclude that the works had been substantially finished by the owners by the end of the first week of September 2015.

## **The occupancy permit**

- 597 The occupancy permit upon which the owners rely was dated 5 November 2015. However, reference to that document<sup>35</sup> indicates that it was issued on 5 November 2015, but the final inspection, “upon completion of all building works” took place on 1 October 2015.
- 598 If the works were substantially finished by the end of the first week in September, the question arises: why did it take the owners about 14 weeks to complete the house? The owners gave no evidence about the weeks and days leading up to the issue of the occupancy permit. Why it was necessary for the final inspection to take place on 1 October 2015 was not explained.

## **Findings relevant to the claim for damages for delay in completion of the rear house**

- 599 Doing the best I can on the limited evidence available, I find that a reasonable time in which the owners should have completed the work for which Sawtech would have been responsible had the contract not been terminated, was eight weeks.
- 600 In their written submissions, the owners based their claim for rent of \$500 per week on an appraisal prepared by Buxton dated 27 February 2015, which they tendered.<sup>36</sup> Reference to that document indicates that Buxton assessed the rental of the rear house “in the vicinity of \$470-\$500 per week.”
- 601 The owners also tendered a residential tenancy agreement in respect of the rear house which required the tenants to pay rental of \$2,390 per month from 26 January 2016.<sup>37</sup> This equates with \$28,680 a year, or \$552 per week.
- 602 Noting that rent of \$552 applied under the lease from January 2016, and bearing in mind Buxton’s appraisal in 2015, I find that the appropriate figure to be adopted for assessment of damages for delay for the period of eight weeks from the end of May 2015 is \$500 per week.
- 603 I accordingly find that the owners’ are entitled to damages for delay in the completion of the rear house of \$4,000.

## **SUMMARY OF DAMAGES AWARDED TO THE OWNERS**

### **Summary of damages allowed in Schedules A, B and C.**

- 604 In respect of Schedule A, I have allowed a total of \$22,470.65<sup>38</sup>. In respect of Schedule B, I have allowed a total of \$68,123.45.<sup>39</sup> And in respect of Schedule C, I have allowed a total of \$4,500.<sup>40</sup>

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<sup>35</sup> Exhibit A 140

<sup>36</sup> Exhibit A 34

<sup>37</sup> Exhibit A 96

<sup>38</sup> See paragraph 244 above.

<sup>39</sup> See paragraph 514 above.

<sup>40</sup> See paragraph 573 above.

### **Credit due to Sawtech**

605 However, this does not mean that the owners are entitled to an award totalling \$95,094.10 in respect of rectification of defects and completion. This is because, as has been conceded by the owners, the extent of their recovery will be affected by the unpaid portion of the contract sum. As discussed, Sawtech is entitled to have credited to it, in reduction of its liability for damages for uncompleted work, the balance of the contract sum which would have been paid to it by the owners, had it completed the contract. The relevant credit is \$46,900.<sup>41</sup>

606 This credit of \$46,900 is to be applied against the costs which I have found have been incurred in completing the contract works. Accordingly, it is to be applied against the Schedule B claims and against the Schedule C claims. The total of the schedule B claims and the Schedule C claims is \$72,623.45. When the credit of \$46,900 is applied, the balance is \$25,723.45.

### **Net award to owners for rectification and completion works**

607 The upshot is that I find that the owners are entitled to an award of damages in respect of the rectification of defects totalling \$22,470.65 (the Schedule A claims) together with an award of damages in respect of the cost of completing the contract works net of the unpaid balance of the contract sum, namely \$25,723.45. The total award of damages to which I find the owners are entitled for rectification and completion works is, accordingly, \$48,194.10.

### **Damages for loss of rental from the rear house**

608 I have found above that \$4,000 should be allowed for this claim.<sup>42</sup>

### **Total award of damages to the owners**

609 The upshot is that I find the total amount of damages to be awarded to the owners, exclusive of interest, is \$52,194.10.

### **DAMAGES IN THE NATURE OF INTEREST**

610 As this proceeding concerns a domestic building dispute, the Tribunal has jurisdiction under s53(3) of the *Domestic Building Contracts Act 1995* to award damages in the nature of interest, basing the amount awarded on the interest rate fixed from time to time under s2 of the *Penalty Interest Rates Act 1983*, or on any lesser rate it thinks appropriate.

611 At the hearing, the parties both indicated that they would be happy to have any interest which they became entitled calculated at the rate applicable under s2 of the *Penalty Interest Rates Act 1983*. Accordingly, I shall calculate the owner's entitlement to damages in the nature of interest using that rate.

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<sup>41</sup> See paragraph 112 above.

<sup>42</sup> See paragraph 603 above.

612 I find that it is appropriate apply interest from the date that the owners instituted their proceeding. The Tribunal's file indicates that the filing fee was processed on 22 May 2015. I will adopt this as the starting date. The relevant calculation using the interest rate applicable from time to time under s2 of the *Penalty Interest Rates Act 1983* is as follows:

- a) For the 10 days between 22 May 2015 and 31 May 2015, interest under s2 ran at 10.5% per annum. Interest on \$52,194.10 for 10 days at 10.5% per annum is \$150.15.
- b) For the 611 days between 1 June 2015 and 31 January 2017, interest under s2 ran at 9.5% per annum. Interest on \$52,194.10 for 611 days at 9.5% per annum is \$8,286.71.
- c) For the 289 days between 1 February 2017 and 16 November 2017, interest under s2 ran at 10.00% per annum. Interest on \$52,194.10 for 289 days at 10.00% per annum is \$4,132.63.
- d) The total interest calculated on the base of \$52,194.10 is accordingly \$12,569.49.

## **SUMMARY**

613 The owners are entitled to an award of damages in the sum of \$52,194.10.

614 The owners are, in addition, entitled to an award damages in the nature of interest in the sum of \$12,569.49.

615 The total damages to which the owners are entitled, inclusive of damages in the nature of interest, is accordingly \$64,763.59.

616 As it was Sawtech that repudiated the building contract, it has no entitlement to damages, and its counterclaim is accordingly dismissed.

## **COSTS AND REIMBURSEMENT OF FEES**

617 As is possible that one party or the other made an offer to settle the proceeding prior to its conclusion. As any such offer may have an effect on costs, it is appropriate that I give the parties an opportunity to make further submissions about costs. I will give the parties liberty to file within 30 days further submissions regarding costs, and regarding any application under s115B of the *Victorian Civil and Administrative Tribunal Act 1998* for an order for reimbursement of fees.

## **MEMBER C EDQUIST**