

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D232/2005

CATCHWORDS

Contract – repudiation – termination of contract - measure of loss – anticipated profit - proof of profit reasonably expected – difficulty in assessment no bar – forfeiture of deposit - impossible to find that damages suffered exceeded forfeited deposit – whether appropriate to award nominal damages– misleading and deceptive conduct and conspiracy – proof of loss essential element in claims for damages – no loss proven because of forfeiture of deposit which was greater than the damages assessed – claims dismissed –witnesses – credit of - rejection of evidence of witness no basis for contrary inference

APPLICANT	Hoang Tran Investments Pty Ltd (ACN 007 229 656)
FIRST RESPONDENT	2M'S Constructions Pty Ltd (ACN 109 705 348)
SECOND RESPONDENT	Mamas Toumazou
THIRD RESPONDENT	Bullion Holdings Pty Ltd (ACN 095 929 945)
FOURTH RESPONDENT	Elisa Martine Steel
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	17- 27 October 2006; 19 February – 2 March 2007 Written submissions received between 17 and 25 October 2007. Final oral submissions made on 18 December 2007
DATE OF ORDER	13 February 2008
CITATION	Hoang Tran Investments Pty Ltd v 2M'S Constructions Pty Ltd (Domestic Building) [2008] VCAT 316

ORDER

1. The Applicant's claims against the First, Third and Fourth Respondents are dismissed.
2. Order the Second Respondent to pay to the Applicant \$20,000.

3. No order is made with respect to the claim by the First Respondent against the Applicant.
4. The claim by the First Respondent against the Third and Fourth Respondents is dismissed.
5. The claim by the First Respondent against the Second Respondent is dismissed.
6. Costs are reserved for further argument.
7. The restraining orders made on 20 October 2006 are discharged. Liberty to apply is reserved with respect to the undertakings given.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr R. Edmunds of Counsel
For the First Respondent	Mr J. Forrest of Counsel
For the Second Respondent	In person
For the Third and Fourth Respondents	Mr D. Littlejohn of Counsel and in person

REASONS

Background

1. In this case the Applicant (“the Developer”) seeks to recover a deposit of \$20,000 it paid to the First Respondent (“2M”) pursuant to an agreement they entered into on 21 July 2004 (“the Original Agreement”) for 2M to carry out concreting work (“the Tran job”) on a multi-unit development at 8 St James Avenue, Springvale for a price of \$645,700 (incl. GST). The Developer says that the Original Agreement was repudiated by 2M. It says that it accepted the repudiation and entered into a fresh agreement (“the Replacement Agreement”) with the Third Respondent (“Bullion”) to do the Tran job.
2. The claim is defended by 2M which says that it did not repudiate the Original Agreement, that it was at all times ready and willing to carry out the Tran job and that it was the Developer that repudiated the Original Agreement by refusing to proceed with it and by entering into the Replacement Agreement with Bullion. It says that it is therefore entitled

to retain the deposit. It also seeks damages from the Developer for the loss of the profits that it would have made had it been allowed to carry out the Tran job and it also alleges a conspiracy involving the Developer and the other parties.

3. Apart from these claims:
 - (a) The Developer claims that its actions, said by 2M to amount to a repudiation of the Original Agreement or conspiracy, were induced by reliance upon representations of the Second Respondent (“Toumazou”) made on his own behalf or on behalf of Bullion and/or the Fourth Respondent (“Steel”). It says that if the representations were false it seeks damages and/or contribution from Toumazou, Bullion and/or Steel.
 - (b) Damages are claimed by 2M from Toumazou for having procured the breach of the Original Agreement by the Developer by misleading and deceptive conduct which also, it is alleged, amounted to a conspiracy between himself and (it seems) the Developer, Bullion and Steel.
 - (c) Damages are claimed by 2M from Bullion for having agreed to carry out the Tran job with knowledge of all the circumstances. The basis of this claim is said to be that Toumazou’s misleading and deceptive conduct which procured the breach of the Original Agreement by the Developer was authorised and permitted by Steel and further, that it amounted to the conspiracy referred to. Damages are also claimed from Steel.

The persons and entities involved

4. The Developer is a company controlled by its Director Mr Hoang Tran. (“Tran”). Tran conducts a number of apparently successful businesses and is an astute and educated man. Although a migrant from Vietnam he has been living in Australia since 1977 and studied Economics at Monash University for two and a half years.
5. The sole director of 2M, Mr Milenkovic (“Milenkovic”), is an experienced builder who, in the course of his business and before the events giving rise to this litigation occurred, had engaged Toumazou to carry out concreting work on various of his projects, in some cases, on a profit sharing basis. The capacity in which Toumazou carried out this work does not appear directly from the evidence but it is likely that he did it as an employee of Bullion.
6. Milenkovic and Toumazou agreed to incorporate 2M to carry out major concreting work with a view to that company taking over the concreting business of Bullion, except for small jobs which Bullion would continue to do. The two directors of 2M were to be Milenkovic and Toumazou and they would have equal shareholding.

7. Toumazou is an experienced concreter and is and was at all material times an undischarged bankrupt. By reason of his bankruptcy he is and always has been disqualified from being a director of 2M although he was appointed as such at or about the time 2M was incorporated. I accept that neither Tran nor Milenkovic knew about Toumazou's bankruptcy at any material time but I do not believe that Toumazou was unaware of it as he claims.
8. Steel was the de facto wife of Toumazou but ceased to be so from early in the relevant period. She is the sole director of Bullion, a company set up using funds she obtained from an inheritance. Bullion is the entity which employed Toumazou and for which, at least up to the time it was decided to incorporate 2M, he did his concreting work. Despite this, I am satisfied that it was a company bona fide controlled by Steel and not by Toumazou. Steel was not a party to the agreement between Milenkovic and Toumazou to set up 2M and knew nothing about it until shortly before the first of two meetings (referred to below) which were held to discuss the take over of Bullion's business.

The "cancellation" of the Original Agreement

9. The dispute largely revolves around the termination of the Original Agreement. As to that, Tran said that in about early September 2004 Toumazou told him that he had had a falling out with Milenkovic and that he could not or would not work further with him. He said that Toumazou told him that 2M was a new company that had not traded and did not have the resources or capital to do the Tran job. He said that on or about 8 September 2004 Toumazou also told him the Original Agreement was at an end and would have to be cancelled and he (Toumazou) produced a document ("the Cancellation Document") dated "8/9/04" which the two of them signed. The Cancellation Document (Exhibit'E') reads as follows:

"We the undersigned Mr Tran and Michael Toumazou of 2M's Constructions, hereby agree the agreement for 2M's for the job at 8 St. James St. Springvale is at an end.

All monies paid and deposited will be refunded forth-with." (sic.)

10. The case for 2M is that by signing the Cancellation Document and then entering into the Replacement Agreement the Developer has repudiated the Original Agreement. It says that it accepted the repudiation by a letter from its solicitor's dated 27 May 2006.

The hearing

11. The matter came before me for hearing on 17 October 2006 and proceeded until 27 October when it was adjourned to 19 February 2007. The hearing then proceeded until 2 March 2007. Mr R. Edmunds of Counsel appeared for the Developer, Mr J. Forrest of Counsel appeared for 2M. Mr D. Littlejohn of Counsel appeared for Bullion and Steel in

October 2006 but thereafter they were unrepresented. Mr Toumazou was unrepresented throughout.

12. After the evidence was led the parties wished to make written submissions. These had not been received when I departed overseas on Long Service Leave on 10 May and they had still not been filed when I returned to Australia in August. I finally received them between 17 and 25 October. Efforts were made by Listings to arrange a mutually convenient date for final oral submissions which the parties wished to make. These were finally made on 18 December 2007.
13. The principal witnesses as to the dispute were Tran, Milenkovic, Toumazou and Steel. For reasons that will appear throughout these reasons I have substantial concerns about the reliability of Tran's evidence, some misgivings about Milenkovic's evidence, more misgivings about Steel's evidence and no confidence at all in Toumazou's evidence. I have no reason to doubt the truthfulness of the other witnesses but their evidence was only peripheral. The expert evidence was given by a Quantity Surveyor, Mr Faiffer who did a great deal of work on the question of damages with the material he had. I accept his evidence.
14. The hearing was lengthened considerably by 2M's attempt, which was ultimately unsuccessful, to prove a conspiracy involving Bullion and/or Steel. This attempt led to the introduction of a large amount of evidence that would otherwise not have been relevant or at least, would probably not have been led. Most of this revolved around earlier projects, claimed by Milenkovic to have been undertaken in the name of Bullion but for the benefit of 2M. It also involved Milenkovic's disappointment at Toumazou changing his mind about the joint venture arrangement they had agreed to enter into and moving his allegiance, at least in a commercial sense, back to Steel and Bullion. As I pointed out at the hearing it is not appropriate for me to determine anything other than the causes of action raised in the proceedings.

Conclusions

15. I find that Toumazou's attempt to move his labour from Bullion to an entity beyond Steel's control was done without her knowledge. When she finally had to be told because Bullion had at least de facto control of the business premises and the equipment she initially discussed the matter but ultimately refused to cooperate. Faced with this situation Toumazou then elected to remain with Bullion and breach the agreement he had with Milenkovic. He then provoked the breach by the Developer of the Original Agreement without the knowledge and consent of Milenkovic.
16. There is no direct evidence, nor evidence to support an inference, that Steel knew about or authorised that. Certainly, by later entering into the Replacement Agreement, Bullion got the benefit of doing the Tran job but it was not that which caused any loss to 2M. It was the repudiation of the

Original Agreement by Tran and there is insufficient evidence to show that Bullion or Steel knew about or authorised that.

17. The claims by both the Developer and 2M against Bullion and Steel therefore fail. The Developer's claim against 2M also fails. The claim by 2M against the Developer would have succeeded on the merits but since the damages assessed are less than the deposit of \$20,000 which it has retained it is not appropriate to make any order.
18. Because I am not satisfied that the loss suffered by 2M exceeds the amount of the deposit, I cannot find that 2M has suffered any loss as a result of Toumazou's conduct. Accordingly, although I am satisfied that Toumazou did engage in misleading and deceptive conduct and did interfere with the contractual relations between 2M and the Developer, those claims against Toumazou are dismissed. It was unnecessary to consider the claim for conspiracy because again, no damage is proven.
19. The reasons for these conclusions follow.

The incorporation of 2M

20. Before Christmas 2003 Toumazou suggested to Milenkovic that they should start a company to carry out concreting projects together. At that time all the concreting work that Toumazou was doing was as an employee of Bullion. That was Steel's company and she was both his de facto wife and the mother of his daughter. In these circumstances it seems surprising that he would want to move his activities to a company half owned by Milenkovic, who was a builder without specialised concreting skills, and work for that company instead. However it appears that his relationship with Steel had deteriorated and perhaps he was seeking someone else to work with in place of Steel. If so, that would fit with what later occurred but there is no direct evidence of his motives apart from his own assertions that he thought it might lead to an improvement of his relationship with Steel. In view of the financial impact that his plans would inevitably have on her company and consequently on her, I find it hard to believe that he genuinely had such a belief. I think it more likely that he just wanted to be free of her control.
21. Before the new company was incorporated a new project was started in Brooklyn for a Mr Hatziladas. The money for this was received by Bullion and there is a dispute as to whether the profits were to remain with Bullion or go to 2M when it was eventually incorporated. That dispute is not the subject of these proceedings and so it is not something I should attempt to resolve.
22. On 24 June 2004 2M was incorporated and a bank account was opened on 3 July 2003. In July 2004 Milenkovic and Toumazou set up an office for 2M in an office at 61 Lakewood Boulevard owned by Mr Hatziladas ("the Lakewood premises"). Bullion already had machinery and equipment stored in the Lakewood Premises. There is a further dispute as to whether

some of that machinery and equipment belonged to 2M or was bought with 2M's money but again, it is unnecessary and would be inappropriate for me to attempt to decide that dispute. It is sufficient to say that Bullion claimed ownership of it and would not sell or transfer it to 2M.

23. According to Milenkovic, Mr Hatziladas verbally agreed to let them use the Lakewood premises until he could secure permanent tenants and in exchange, they were to complete the internal fit out of the factory. Steel claimed that Bullion had a lease over the Lakewood premises. Again, it is unnecessary to decide that dispute. It is only necessary to say that Steel, rightly or wrongly, refused to move out and claimed Bullion had a lease.

The Original agreement

24. There is considerable dispute as to the facts leading up to the acceptance of 2M's quotation to do the Tran job. It was suggested by Tran, Toumazou and Steel that Bullion had already quoted to do the Tran job and Steel further suggested that Bullion's quote had been accepted by the Developer. There were also disputes as to how many times Tran and Milenkovic met, when they first met and who worked out the price and when.

Milenkovic's version

25. Milenkovic says he was introduced to Tran in the first half of July at Tran's office. Tran told them about the Project and showed them the plans. After the meeting Milenkovic requested a quotation for the reinforcement from a supplier, Transcrete, and gave that company a copy of the plans. He also requested a quotation from a panel company, the Precast Company, for the supply of concrete panels. Toumazou and he then calculated that the cost of doing the work would be \$371,800 and arrived at a tender price of \$683,309. Milenkovic then prepared the quotation on 2M's letterhead. He and Toumazou met Tran at his office on 21 July. Tran said that the cost was too high and they agreed to reduce it to \$645,700 on the basis that they would cast the panels on site. The quotation was then amended by Milenkovic and they met Tran again at his office on about 28 July where, after making some annotations to the quotation, it was signed. There was no agreement as to when the Tran job was to start.
26. Comparing this account with the documents, the quotation from Transcrete (Exhibit 25) is dated 13 July 2004 and is for \$63,826.58 excluding GST. The total with GST would presumably be \$70,209.24. There were two quotations from the Precast Company. The first (Exhibit 63) is dated 13 July 2004 and is addressed to Lynchpin Constructions, a company for which Bullion has done work before. That is for the supply and installation of panels for a price of \$208,800 plus GST of \$20,880, making a total of \$229,680. The second quote (Exhibit 26) is dated 20 July 2004 and is addressed to 2M. It is for a price of \$198,000 plus GST of \$19,800, making a total of \$217,800.

27. Toumazou's calculations (Exhibit 25) contain two lists of costings for the job. The first is a three page calculation, the first page being a rougher version of the third. The bottom half of the first page and the intermediate page are taken up with inclusions. This has the appearance of a draft quotation and arrives at a price of \$683,309, which is consistent with Milenkovic's account.
28. The second calculation is on the two succeeding pages in a darker pen and arrives at a figure of \$371,800 which is described as "Cost no GST". All three sheets of paper making up these five pages are apparently torn from the same note book. Because the first page of the second calculation appears on the reverse side of the last page of the first calculation it is clear that the second was prepared after the first. This is inconsistent with Milenkovic's evidence, which was that the calculation arriving at the \$371,800 figure was done before the first calculation. It is possible of course that Toumazou then did a further calculation arriving at the \$683,309 figure and that it is that that Milenkovic is referring to. There is no such calculation in evidence but Toumazou did suggest there were further papers to do with the calculations that had not been produced.
29. The two calculations allow the following figures for steel reinforcement and concrete panels, and I compare these with the subcontractor's quotation in each case:

	Reinforcement	Panels
Transcrete quotation (13 July)	\$70,209.24	
Panel Company Quotation		
13 July to Lynchpin		\$229,680.00
20 July to 2M		\$217,800.00
First calculation	\$75,500.00	\$220,000.00
Second calculation ("Cost no GST")	\$70,000.00	\$198,000.00

30. The figure for panels in the second calculation is, when one deducts the GST, exactly the same figure as the Panel Company Quote to 2M, given on 20 July. However it is considerably less than the 13 July quote to Lynchpin. This would suggest that the 13 July quote was not used in the second calculation but might have been used in the first. The figure for the steel reinforcement is close to the Transcrete quotation and is perhaps rounded but I cannot infer that the figure in that calculation was necessarily derived from it. The figure for steel in the first calculation does not suggest that it is based on the Transcrete quotation.
31. This would suggest that, perhaps the Transcrete quotation and the 20 July quotation from the Panel Company were received after the first calculation was made but before the second calculation was made.

32. Mr Forrest pointed to references to the two subcontractor's quotations to be found in the notes made on the first calculation. He said these demonstrate that the first calculation must have been made after those quotations were received. I do not think that necessarily follows. Next to the figure for reinforcement appears "Q/6-13704", which is the number of the Transcrete quotation and next to the figure for the panels appears "Quote No 17-016". That is the number of the 13 July quotation and, because it is similar to the number of the 20 July quotation, which was "No 17-016A", it could be referring to either. The positioning of these suggests they were squeezed into existing spaces in the document, making it more probable than not that they were inserted after the body of the first calculation had been written.
33. I therefore find that the figures in the first calculation were probably written before the written quotations were received from Transcrete and from the Panel Company and before a firm figure had been obtained from those suppliers.
34. A typed draft quotation for the Tran job (Exhibit 13) incorporates the figures from the handwritten notes and provides the quoted price of \$683,309.00 as Milenkovic suggested but it is in the name of Bullion. It is undated and Tran denied having seen it. The document was only tendered for identification but no quotation for that sum in the name of 2M has been produced by Milenkovic.

Milenkovic's credit

35. Milenkovic's evidence that the lower price was agreed to because the panels were to be cast on site seems at odds with the quotation the Developer accepted (Exhibit D) which not only does not say that panels will be cast on site but includes as part of the Tran job: "Supply and place tilt panels." Although it could be argued that panels cast on site could be said to be "supplied" the wording seems inappropriate, particularly where this was, according to Milenkovic, such an important part of the agreement. However Bullion ultimately cast the panels on site in order to improve the profitability of the Tran job.
36. Milenkovic kept no diary and relied upon recollection. He said he regarded some of Mr Toumazou's business practices as being "a bit dodgy" but was nonetheless ready to go into business with him.
37. After the falling out with Toumazou and Steel, Milenkovic did not contact Tran to tell him that, despite what had occurred, 2M would still proceed with the Tran job, nor did he give Tran any indication of when the work would start. The Project was a major one and, although I do not find that there was a specific starting date agreed upon, it must have been apparent to Milenkovic that Tran wanted the Tran Job done as soon as practicable.

38. Milenkovic said that he tried unsuccessfully to ring Tran but produced no telephone accounts or other corroboration of that. Corroboration is not a legal requirement but it seems unlikely that he could not have contacted Tran by telephone if he had tried to do so. He also said that he visited Tran's office twice and found no one there. Tran conducts a number of businesses from that address so it seems unlikely that, with some better effort on his part, he could not have visited at a time when someone was there.
39. It also seems odd that he could not have made any other contact with Tran. Why not write him a letter? He says he had no address and that the office was at the end of a laneway. Photographs of the door to Tran's office (Exhibit 66) show the name of a company followed by an address and telephone and fax number. Milenkovic did not suggest that he wrote to Tran at that address or that he sent a fax to him at the fax number. He went there but found no one in attendance. He rang but the telephone rang out. Just how many times he visited and how many times he rang is not clear. What is clear is that, if Tran were to conduct his businesses, he must have been in attendance more than occasionally. Milenkovic could not have had any knowledge of what Toumazou was saying to Tran so it was important for him to make contact. He did not do so.
40. The explanation for Milenkovic's conduct might be that he was more concerned about Toumazou and Steel refusing to proceed with what he regarded as an agreement to (in effect) transfer the concreting business from Bullion to 2M and their failure to account for money received on the other jobs than he was about the loss of the benefit of the Original Agreement. This is consistent with the letter he wrote to Toumazou and Steel on 27 August (Exhibit 31) where he goes into the dispute about the other projects and the money received for them in great detail but does not mention the Tran job at all except for two passing references.

Tran's version

41. Tran said that, on 25 June 2004, he gave Toumazou a copy of the plans to enable him to prepare a quotation. On 7 July he received from Toumazou a quotation for Bullion to do the Tran job for a price of \$621,190.00. After discussing the price with Toumazou they agreed upon a price of \$587,000.00. The quoted price was crossed out in the quotation and the figure of \$587,000.00 was substituted. Toumazou was to prepare a final quotation for the agreed price.
42. Tran rang Toumazou several times about the final quotation and they met again in his office with Milenkovic whom he introduced as his "partner" in 2M. He produced the 2M quotation. There were some discussions of additional works which Toumazou and Milenkovic wanted to consider. They met again on 27 July when the quotation (Exhibit "D") was signed.

Tran's credit

42. Tran acknowledged in cross examination that when he said in his evidence that something was true he meant that it was "generally" true. He also agreed that he might not take care with what is in a written document. It is difficult then to know what to make of his evidence.
43. In a letter of 1 February 2005 that he wrote to 2M demanding the return of his deposit Tran said that he had received no reply to his "numerous phone calls" until the end of October 2004 when Toumazou rang to tell him that he should find someone else to do the concreting work. He then said in the penultimate paragraph of that letter that it was not until December 2004 that he had no choice but to find someone else to do the concreting work. Since he signed an agreement with Toumazou on 8 September to cancel the contract and accepted a quotation from Bullion on 16 September to do the work for the same price, the letter is, to say the least, substantially inaccurate.
44. Although he insisted that he had been assured by Toumazou and Milenkovic that work would start by mid August a letter of demand from his solicitor of 16 March said that work was to commence on site prior to 1 September 2004. When this was pointed out to him in cross examination he said that there was no difference between the two. He did not suggest that his solicitor was mistaken although he did blame his solicitor for other inconsistencies between the documents and his evidence.
45. In the Cancellation Document which was signed on 8 September Toumazou agreed, purportedly on behalf of 2M, that the deposit would be refunded. It was not refunded and no demand for its repayment was made by Tran until 1 February. Tran initially denied that he had treated the deposit of \$20,000 already paid on the Original Agreement as the deposit under the Replacement Agreement, although he did agree that he had retained more than \$20,000 from Bullion.
46. The accepted quotation from Bullion that formed the Replacement Agreement (Exhibit "F") contains the following words in Tran's handwriting: "Deposit of \$20,000 is taken. This quotation to replace Quotation 1001 / 21.7.04". (The quotation referred to is Exhibit "D" which formed the Original Agreement).
47. I am satisfied that the deposit the Developer had already paid to 2M pursuant to the Original Agreement was considered by Tran to be the deposit paid to Bullion under the Replacement Agreement. His explanation to the contrary is not credible. Indeed, he finally acknowledged under cross examination that the words "deposit is taken" indicated that it was a credit and he agreed that he was not going to pay Toumazou or Bullion another \$20,000.00.

48. Tran produced notes at the hearing (Exhibit J) which he claimed were made contemporaneously with the events recorded in them. I think it more probable than not that they are a re-creation because:
- a They relate only to Toumazou;
 - b The paper looks clean and undamaged by handling which one would not expect from a record kept continuously over what was a substantial period;
 - c There is a consistency with the ink used between entries as well as the margin widths;
 - d Tran said that the paper did not belong to a pad but the papers are numbered and certainly appear to have come from a pad. The left side of each sheet bears indentations consistent with a page have been torn from a pad;
 - e There are no irrelevant entries that one might expect from a genuine contemporaneous record;
 - f The pages are described as “notes” in his solicitor’s letter of 11 August 2006. In that letter they are said to have been prepared at the end of September 2004. When this was put to Mr Tran in cross examination he denied that was the case and blamed his solicitor;
 - g Six entries are “Nothing happened” or “Nothing”. One might wonder why anyone would one write that in a genuine contemporaneous record.
 - h The notes are incomplete in that they do not include things that happened that were very relevant to the project, such as the collection of the plans.
 - i They refer to contacts that are not mentioned in Tran’s witness statement.
49. Tran said in his witness statement that he first met Milenkovic on 24 July. He then agreed in evidence that he met him on 13 June. He first said that he only met Milenkovic twice but then agreed it was three times. His evidence about the collection of the plans is inconsistent with his own witness statement. Again, he blamed this on his solicitors. He said that he was first told about Bullion’s price for the Tran job on 7 July yet the notes that he claimed were genuine say that it was 1 July. In his witness statement he said there were two meetings but he agreed in evidence that there might have been only one. He did not insist on 7 July as the date for that meeting but his evidence as to that meeting requires an earlier offer by the Applicant because he said the Toumazou went away and came back.
50. Finally and most telling, on 24 June 2007 the Developer obtained a written quotation for the Tran job from one Jeff McGuiness Concreting (Exhibit 3). That was for a price of \$670,000, but someone has crossed

out that figure in red ink and substituted the figure “\$655,000”. Underneath that, Tran has written, “10/7/04 OK” and signed it. That would suggest that, on 10 July 2004, Tran was proposing to engage Jeff McGuinness Concreting to do the Tran job for that figure of \$655,000. When asked about this he agreed that he had negotiated that price but said that he put it on the file saying “This price is OK.” He denied having accepted it. I think it unlikely that he would have done that if Bullion had already agreed, even orally, to do the Tran job for \$645,700. He might have put it on the file but it would have been pointless to sign it and say the price is “OK”. However it would have made sense if he had not already received a quotation from Bullion or from 2M to do it for a lower price.

51. I felt that, throughout his evidence, Tran said what he thought would advance the Developer’s case rather than attempt to give an accurate account of his recollection of the events. I am not satisfied that he was a truthful witness and although I do not ignore his evidence entirely it would be unsafe to base any finding of fact solely upon it.

Toumazou’s version

52. Toumazou agreed that Tran gave him a set of plans in late June. He then asked Steel to prepare a quotation. He said that he costed the concrete and Steel “arranged Transcrete” in relation to the steel reinforcement. He said that Steel typed the quotation, which was for a price of \$621,190.00 and signed it. He said that he took it to Tran who reduced the price to \$587,000.00 (*these prices are without GST*).
53. He said Steel then gave him a further written quotation from Bullion at the new price, possibly on 17 July, but he “probably got rid of it” because at that time he had decided to “go with the other company” (ie, 2M). He said that he went back to Tran with a new quote under the name of 2M in late July at “the adjusted quote figures”. He said that his costings were Exhibit 25 but there were also other pages of calculations that he did that are missing.

Toumazou’s credit

54. This account does not accord with the appearance of the calculations as previously referred to which do arrive at a figure of \$621,190 before GST. When GST is added, the calculation is for a price of \$683,309.00. The form of quotation from Bullion to the Developer (Exhibit 13) also states a price of \$621,190.00 without GST. When GST is added, the quote is for \$683,309.00. The figures in Exhibit 13 include \$75,500 for reinforcement and \$220,000, each without GST. These are exactly the same as in the first calculation. However, Exhibit 13 is not signed by Steel and in any case, Exhibit 13 was not tendered absolutely.
55. It is not an overstatement to say that it was Toumazou’s scheming, first behind Steel’s back and then behind Milenkovic’s back that caused this

dispute. His behaviour throughout appears to have been driven by his own self interest and a disregard for the interests of others. On his own evidence, he discarded Bullion's quotation for the Tran job and secured the contract instead for 2M, a company in which he had an interest. If that is correct, he did it while professing to act as an employee of Bullion. As to his credibility as a witness, his demeanour in the witness box was most unimpressive and his denial that he knew that he was bankrupt is not believable nor is his professed ignorance of the altered date on the alleged earlier quotation.

56. He claims he was unaware he was bankrupt until he was told late in 2006 in the course of these proceedings. Part of the bankruptcy file was tendered which shows that the Creditors petition upon which the sequestration order was made was served by post pursuant to an order for substituted service.

Steel's version

57. Steel said that Toumazou provided her with the plans in the first week of July. She took the plans and prepared a quotation and signed it on behalf of Bullion. On 7 July she instructed Toumazou to obtain Tran's signature on the quotation. As to the calculation of the price, she said: "With the exception of steel the costing could be calculated without obtaining a firm quotation from third party supplier. In this regard I contacted Transcrete (Aust) Pty Ltd and gave them relevant parts of the plans supplied by Mr Tran." She did not say in her witness statement whether Transcrete gave her a price before they sent the quote of 13 July but she said that in her evidence. She said that when Toumazou came back after the meeting with Tran he told her that Tran had proposed a price of \$587,000.00 and if Bullion could do it for that price it had the job. She asked him if there was enough profit in it if the price was reduced and he said there was. She contacted suppliers and prepared another quote which she gave to Toumazou on 17 July.

Steel's credit

58. Under cross-examination Steel insisted that she had a price from Transcrete before she prepared the quotation for the Developer. She said that she was "pretty sure" that she dropped off plans to Transcrete to enable them to provide a price. She later said that a verbal price was given by Transcrete but said that she did not remember whether she spoke to them. I gained the impression from her evidence that she was talking about what should have happened rather than what she recollected. There was no documentation about the price of the steel reinforcement apart from the formal quotation, Exhibit 13, which was only tendered for identification and so is not in evidence. She did not explain how she or Tomatsou got the figure for the panels before the date of the quotation from The Precast Company.
59. Steel's credit was also attacked in regard to a loan application made through a Miss Milledge, who alleges that Steel asked her to backdate

some documents. Steel was cross-examined extensively on these documents but denied the allegation and asserted facts that might motivate Miss Milledge to give false evidence against her. The only relevance of this evidence was as to Steel's credit and so I am not examining that matter further. Counsel is bound by the answer he received. In any event, I am not satisfied with Steel's evidence as to the dating of the alleged quotation and that is relevant to the dispute as well as to her credit.

The alleged earlier Bullion quotation

60. The main difficulty with Tran's account lies in the alleged Bullion quotation of 7 July. The original of this quotation is Exhibit 11. It bears the date "07/7/04" but the "07" has been altered from "17". That is clear from Exhibit C" which is a photocopy of the document bearing what seems to have been its original date "17/7/04". There is a faint "7th" discernible immediately below the date on Exhibit "C". Tran said that he wrote that on Exhibit "C" and the "07" in the date on the others. He then said that he changed the "1" to a "7" and then he said he did not remember. One is left to wonder why a document that was signed on 7 July should have been dated initially 17 July. If it was a genuine mistake, why not simply cross out the 17 and substitute a 7? The most likely reason for changing the "1" to a "0" is to conceal the fact that the date has been changed which gives rise to the question: "Why attempt to conceal an innocent change?"
61. In cross-examination Tran said he could not understand how that change happened. After further questioning he said that he dated the document "7/7/07" and he did not know who had written in the number "1". He denied having written the faint "7th" below the date on Exhibit "C" and denied having altered the "1" to a "0". His suggestion that the date was altered for "7" to "17" is not credible given the appearance of the three exhibits. That and the shifting nature of his evidence generally are matters of concern. I do not believe I can place any reliance on what he says about these documents.
62. Toumazou similarly denied any knowledge of how the alteration came about. Steel said that she had prepared the original quotation but denied she had written or altered the date. The evidence of them both as to Steel having signed the quotations before they were taken to Tran is not believable, given that both Exhibit "C" and Exhibit "7" are, from their appearance, plainly photocopies of Exhibit "11". The latter is the original document (albeit, a photocopy itself) and bears Steel's signature but in the two photocopies, there is no signature, indicating that the signature was affixed to the original after it had been photocopied. Since the photocopies contain the alterations that were made by Tran at the meeting, Steel cannot have signed the original before the meeting as she and Toumazou claim.

63. Finally, next to her signature, Steel has dated the document in her handwriting "07/07/04". That is a very unusual way for someone to hand write a date on a document and is unlike dates she has put in her letters but it copies the altered date at the top of the document.
64. Since the evidence led to prove Exhibit 11 is either not credible or wholly unsatisfactory, I am not satisfied on the balance of probabilities that it is a genuine document. I make no positive finding that there was no earlier quote. I simply do not find that there was. If there was one, it may well have been Exhibit 13. Whatever it was, it seems likely that it was prepared after 7 July 2004. In favour of their having been an earlier quotation is the fact that there are two quotations from the Panel Company, the first of which is not made out to 2M. It was not made out to Bullion either but it leads me to think that there was an earlier time when Toumazou obtained a price for the panels for the Tran job.
65. In any event, none of the accounts, even if believed, would support a finding that there was any concluded agreement between the Developer and Bullion to carry out the Tran job that pre-dated the agreement entered into with 2M and that seems to have been the reason for all this evidence.

Conclusion as to the Original agreement

66. I am left with the situation where there has been an obvious alteration to a very material document and all three of the people involved with its production and use deny any knowledge of the alteration. Further, the attempt to change the date by altering the appearance of the numeral suggests an attempt to conceal the fact of the alteration. Steel's evidence of having signed the document before it was taken to Tran is not believable. The evidence of both Steel and Toumazou as to the costing of the job is inconsistent with that of Milenkovic and Milenkovic's account is also supported by the dates on the written quotations from the suppliers. Steel and Toumazou have given evidence which I do not accept and, when confronted with the altered document, Tran gave what I think were evasive answers.
67. I have the difficulties with Milenkovic's evidence as stated above. That would suggest that the first calculation occurred after the suppliers' quotations were received which seems inconsistent with the appearance of the documents.
68. In all these circumstances, I make no finding as to how the Original Agreement between the Developer and 2M came about and I simply rely upon the document itself which is not denied.

The meeting or meetings to establish 2M

69. Milenkovic and his wife, Mrs Milenkovic, contend there were two such meetings. Toumazou and Steel say there was only one.

The alleged 31 July 2004 meeting

70. Milenkovic says that there was a meeting on 31 July 2004 between Milenkovic, his wife, Toumazou and Steel. The correctness of his witness statement in regard to this and the subsequent alleged meeting is confirmed by Mrs Milenkovic's witness statement. Toumazou and Steel deny there was such a meeting and so, if I find that it occurred, I have only the account of the Milenkovics as to what happened.
71. They said that it was agreed that there would be a cut off date of 5 July for the accounts to be adjusted between 2M and Bullion and that 2M would assume control over the Brooklyn job. They said that Toumazou wanted control of 2M to be in the hands of Milenkovic and himself with Steel and Mrs Milenkovic to have only an administrative role. They said that Steel was not prepared to accept that. Toumazou proposed that only smaller jobs would be done through Bullion. They said Steel expressed concerns over the arrangement because she would only have control over a small amount of money. They said that Steel was to contact Mrs Milenkovic after the meeting to go through the accounts but she did not do so.
72. I accept that this meeting occurred because Milenkovic was a more impressive witness than Toumazou or Steel and I have no reason to disbelieve Mrs Milenkovic's evidence.

The 14 August meeting

Milenkovic's version

73. It is agreed that this meeting occurred. The Milenkovics say they attended as did Toumazou and Steel. There was discussion about money received for various projects and how this should be accounted. Steel suggested that there be cross invoicing between the two companies and that the profits on the Brooklyn job should be used to purchase assets from Bullion. This was not agreed and there was further discussion of the accounts and how to categorise money that had been received. Toumazou and Steel claimed that an amount of \$200,000 received from Hatziladas was a loan and that some of the money was due to Bullion from an earlier project. A suggestion by Steel that she and Mrs Milenkovic should see an accountant was not agreed to by Milenkovic. Steel then said that she would continue to run Bullion from the Lakewood office until Toumazou "...pays me out". Steel then stormed out of the meeting and went and sat in the car.

Toumazou's version

74. Toumazou says that he and Milenkovic told Steel and Mrs Milenkovic that they could help set up 2M but then someone else would be hired to do the day to day accounting as there should only be two bosses (that is, Milenkovic and Toumazou). He then explained to Steel that 2M would be doing a job in Springvale and that it would lease the formwork,

equipment, trucks and machines from Bullion to do the job and so Bullion would make money out of it. He said that 2M would gradually acquire all the equipment from Bullion out of the profits.

75. He said that Steel would not agree and told him that he was giving away too much of their family's security to a stranger. He also said that Milenkovic stated that it would be impossible for Steel to operate Bullion from the Lakewood premises. Steel then told them the meeting was over and left.

Steel's version

76. Steel says that in about the first week of August Toumazou told her he wanted to attend a meeting at the Lakewood premises. The meeting was attended by the two of them and the Milenkovics. Her account of the meeting is similar to that of Toumazou. She said she pointed out that Bullion held a lease over the Lakewood premises and that all of its equipment was stored on site. Toumazou said that it was the plan for 2M to do its first job in Springvale and lease the equipment from Bullion and with the profits, it would gradually buy the equipment and stock. He said that Bullion would do the little jobs. Steel said that she thought the proposal was unreasonable and that, since neither of the wives would have any control both sides would be open to abusing their respective partners. She said that she did not agree to transfer the stock and machinery from Bullion. The others attempted to persuade her to agree, Milenkovic saying that if she were a good wife she would listen and do what her husband told her. She then left and, after leaving the meeting, decided to leave Toumazou.

Which version to accept?

77. Which ever version of the meeting I accept, it does not appear that Bullion or Steel ever agreed to the proposal that 2M was to do the Tran job using the equipment that it claimed to own at the Lakewood premises. At the conclusion of the meeting the position was unchanged. The contract to do the Tran job was between 2M and the Developer, the Lakewood premises were occupied by Bullion which claimed to have a lease over them and Bullion had possession of all the equipment, whatever rights 2M might have had in some of it.

The Original Agreement - Starting Date and Finishing Date

78. Tran's evidence as to the starting date was of a discussion that occurred after the quote was accepted. Additionally, his evidence as to this shifted several times from "as soon as possible to "September". Toumazou's evidence was conflicting and he is, in any case, a witness of little credit. Milenkovic denies that any starting date was agreed. He agreed they told Tran they would start as soon as possible but said that they did not give Tran any indication of when that might be. He said, however, that they

told Tran that it might be possible to start in September and that they would try and achieve that.

79. There is nothing in the contractual document about when the work is to be started. I am not satisfied that it was an express term of the Original Agreement that the Tran Job would be started at any particular time, nor is there any basis upon which such a term be implied (see *Codelfa Constructions Pty Ltd v State Rail Authority* (1981-1982) 149 CLR 337). This means in law that it would have to be started within a reasonable time (see *Halsbury* 4th Ed. Vol.9 para 479). Similarly, it is not established that there was any particular date by which the Tran Job was to be completed. Again, it would have to be done within a reasonable time.

How did the Original Agreement come to an end?

80. The Cancellation Document purports on its face to have been a document executed by or on behalf of 2M agreeing with the Developer that the Original Agreement was at an end. The Developer claims that, on the faith of this document, it treated the Original Agreement as at an end and entered into an agreement with Bullion to have the Tran job done by that company instead.

The signing of the Cancellation Document

81. Both Tran and Toumazou claim that before the signing of the Cancellation Document on 8 September, Toumazou rang Tran on 6 September. Their evidence of what was said is inconsistent but they claim that Toumazou told Tran that he had had a falling out with Milenkovic, that 2M could not do the job and that the Original Agreement would have to be ended. Mr Forrest submitted that I should disbelieve this evidence and find that any conversation, the signing of the Cancellation Document and the signing of the Replacement Agreement occurred simultaneously. Whatever suspicions Milenkovic might have, there is no evidence to support such a finding.
82. I find that some conversation occurred before the signing of the Cancellation Document and there is no reason to disbelieve that it was on 6 September. I find that in the course of that conversation Toumazou said that he could nonetheless do the Tran Job for Tran. I am not satisfied that it was suggested that 2M could not do the job because of lack of funds. Such evidence as there is to this effect conflicts with other evidence and the plain fact that the financial position of 2M had not changed in the meantime. All that had changed was the relationship between Milenkovic and Toumazou and the latter's changed allegiance from Milenkovic back to Steel.
83. The Developer's case is, first, that the Termination Agreement signed by Tran and Toumazou bound 2M because it had held Toumazou out as being its director and as having authority to negotiate and enter into contracts on its behalf.

84. There is no doubt that both Tran and Milenkovic believed that Toumazou was a director of 2M and there is no evidence that either of them knew that he was an undischarged bankrupt. Nevertheless, he is and was at all material times an undischarged bankrupt and so by operation of law he was never a director of 2M. (see *Corporations Act 2001 (CW)* s.206A and 206B(3)). Accordingly, he had no authority to act as a director of 2M.
85. Tran says that he asked Toumazou just before signing the Termination Document whether he was a director of 2M and he said that he was. This seems most unlikely and in view of the highly unsatisfactory nature of his evidence I do not believe it. Toumazou had earlier been introduced to him as a “partner” or “director” and he had no reason to suspect that he was not a director. Why then ask him to confirm that he was? This allegation does not appear in his witness statement yet in the witness box he said it was important for him to ask Toumazou that.

Toumazou’s authority to bind 2M

86. It is clear Toumazou had no actual authority to sign the Termination Document since Milenkovic was the only director and it was done without his knowledge. In the absence of any implied authority, what ostensible authority did he have?
87. The Developer argues that 2M is estopped in the circumstances from denying Toumazou’s authority.

Estoppel

88. Toumazou and Milenkovic introduced themselves to Tran as being the Directors of 2M. They did so in the context of negotiations leading to the Developer and 2M entering into the Original Agreement so I find that the representation that they were its directors was a representation made by 2M. The Developer argues that Tran relied upon the representation in that he accepted Toumazou’s signature on the Termination document.
89. The representation alleged is that Toumazou was a director of 2M. Therefore, it is argued, 2M is estopped from denying that Toumazou had the authority implicit in such an office. A director’s power to execute documents in the name of a company is dealt with in s.127 of the *Corporations Act 2001*, which states:

“127 Execution of documents (including deeds) by the company itself

(1) A company may execute a document without using a common seal if the document is signed by:

- (a) 2 directors of the company; or
- (b) a director and a company secretary of the company; or
- (c) for a proprietary company that has a sole director who is also the sole company secretary--that director.

Note: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the company. “

90. Section 129(5) states (where relevant):

“(5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices. “

91. Since the representation relied upon was that Toumazou was one of two directors, it was not a representation that he could execute a document pursuant to s.127(1)(c). To execute the document under the other two subsections would have required the signature of Milenkovic. Hence s.129(5) cannot be relied upon

92. As to ostensible authority, Mr Forrest referred me to the exposition of the principle by Diplock CJ to be found in the case of *Freeman & Lockyer v Buckhurst park Properties(Magnal) Ltd & anor* ([1964] 2 QB 480. On p.503 his Lordship says (at p.503):

“An ‘apparent’ or ‘ostensible’ authority on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.”

93. A mere representation by 2M that Toumazou was a director was not a representation that he could sign on his own a document that would bind the company disposing of a significant asset, particularly when Tran was told, as he was, that there had been such a serious falling out between the “directors” and that they could no longer work together.

94. His Lordship continued (at p.504):

“The second characteristic of a corporation, namely, that unlike a natural person it can only make a representation through an agent, has the consequence that, in order to create an estoppel between the corporation and the contractor, the representation of the authority of the agent which creates his

‘apparent’ authority must be made by some person or persons who have ‘actual’ authority from the corporation to make the representation.”

Hence, Toumazou’s own representation as to his authority cannot be relied upon since he had no actual authority to represent that he was authorised to sign the termination document.

95. Another difficulty lying in the way of an estoppel is that, if 2M was, by reason of a deadlock between its directors, incapable of performing the Original Agreement then it must follow that it was also incapable of agreeing to discharge it. Tran was told that there was such a deadlock and so the Developer was on notice that Toumazou on his own could not have the authority of 2M to sign the Cancellation Document.
96. Mr Forrest referred me to a number of cases concerning the indoor management of companies but in this case there was no “indoor management” question. Toumazou told Tran about the actual position *vis a vis* himself and Milenkovic. In any event, the circumstances, namely, what he was told and the proposal for a replacement agreement to be entered into with Bullion, should have put Tran on enquiry as to whether Toumazou was authorised to do what he was doing.
97. I am not satisfied that Toumazou had either actual or ostensible authority to execute the Cancellation Document or otherwise agree to the termination of the Original Agreement.

Repudiation by 2M?

98. In its defence to the counterclaim the Developer says that between 21 July and 1 September 2004 Toumazou represented to it that 2Ms could not undertake the Tran jobs because:
 - Toumazou could not work with Milenkovic, due to a dispute between them;
 - 2M had never traded, had no assets, plant or other equipment or capital and was incapable of carrying out the works;
 - 2M would not be able to commence the works by 1 September or complete them by 30 November.
99. The Developer contends that by Toumazou making these statements 2M repudiated the Original Agreement. Since the representations made by Toumazou without authority they could not evince any intention by 2M that it would no longer be bound by the Original Agreement.

Failing to commence the work

100. The Developer also claims that 2M’s failure or refusal to commence work, in accordance with the terms of the Original Agreement or at all, amounted to a repudiation of the Original Agreement. As previously stated, there was no agreement as to a particular starting date. It is not established that, as at 8 September, a reasonable time to commence the Tran Job had expired, much less that by reason of such expiration 2M had

evinced an intention no longer to be bound by the Original Agreement. In any event, since suppliers had been contacted and shop drawings had been prepared it could not be said that the work was not commenced. This part of the claim therefore fails.

Abandonment

101. In the alternative it is put that the Original Agreement was abandoned by 2M. There was no specific abandonment and a mere lack of contact cannot found such an inference. Tran did not try to contact Milenkovic although he had all of his contact details.

Impossibility

102. It is also suggested that it was impossible for 2M to carry out the work because Milenkovic and Toumazou could not work together. Milenkovic denies that and it is possible that, if Toumazou had realised that he was caught by the Original Agreement, they might have co-operated, however reluctantly, to get the Tran job done. That scenario is unlikely in the circumstances but not impossible so I cannot find that it was impossible for 2M to carry out the work on this account. In any event, although it was clearly contemplated by the parties that Toumazou would be involved in the work it was not a term of the Original Agreement that he would be. Another person could have been engaged to take his place if that were necessary.
103. It is also suggested that the Tran job could not have been done because Steel would not allow 2M to use the formwork and other equipment necessary to carry it out. Milenkovic's answer to that was to say that the profits from the earlier jobs were used to purchase some of the materials it would have needed and that much of the equipment held by Bullion in fact belonged to 2M. That is a partnership dispute outside the scope of this proceeding and I do not decide it. Even if he is right, he could not have physically obtained the equipment without Steel's cooperation unless he issued proceedings to enforce 2M's rights and he would not have been able to do that in time to use the equipment on the Tran job.
104. However Milenkovic argued and Mr Faiffer acknowledged that formwork and equipment could be obtained from another source, albeit at a price that would reduce the profit. Hence I cannot find that it was impossible for 2M to carry out the work on this account either.
105. Finally it was suggested that because 2M had no money apart from the \$20,000 deposit it was financially incapable of carrying out the contract. There is no reason to suppose that, because 2M had no money of its own it could not have performed the Original Agreement. Its director, Milenkovic, had the financial capacity to provide the necessary funding whether Toumazou cooperated or not. Reference was made in the submissions to Milenkovic's statement that only a fool would have put money into the company but that comment is taken out of context.

Milenkovic has provided very substantial funds to 2M to enable it to conduct these proceedings.

Repudiation by the Developer

106. Tran executed the Termination Document on behalf of the Developer. It is clear from the terms of the document that the Developer intended that it would not thenceforth be bound by the Original Agreement and it would not perform its obligations under it. It amounted to a renunciation of its obligations under the Original Agreement, whether or not the time for performance had arrived. Such conduct amounts to a repudiation (*Halsbury* 4th Ed. Vol 9 Para 550). Further, shortly afterwards it entered into the Replacement Agreement. This was not in itself a breach but when taken together with the execution of the Termination Document it clearly evinces an intention of the Developer that it was not proposing to proceed with the Original Agreement.
107. An act of repudiation does not itself determine a contract. The innocent party must elect to accept the repudiation and bring the contract to an end. This was done by a letter from 2M's solicitor's dated 27 May 2006. The acts of repudiation referred to in that letter are both the execution of the Termination Document and the entering into of the Replacement Agreement.

Termination of the Original Agreement and consequences

108. I therefore find that the Original Agreement came to an end on or shortly after 27 May 2006 when the Developer's repudiation was accepted by 2M. I now turn to the consequences of that finding and the various claims made by the parties against each other.

The Developer's claim for the return of the deposit

109. Since the Original Agreement came to an end because the Developer refused to perform it, the Developer's claim for the return of the deposit fails. That is the nature of a deposit (*Halsbury* 4th Ed. Vol 9 para 672).

The claim by the Developer against Toumazou

110. The Developer claims that, if Toumazou was not authorised to sign the Termination Document on behalf of 2M then he procured the termination of the Original Agreement between 2M and the Applicant by the representations he made to Tran. Since those representations were false, he is guilty of misleading and deceptive conduct for which he is liable in damages to the Developer. Those damages are, it is said, equivalent to what it might be ordered to pay to 2M.
111. I accept that this is the case. There is no doubt from the wording of the Termination Document that Toumazou represented that he was authorised to sign it in behalf of 2M and I have found that he was not. It is possible of course that Tran might have proceeded without the representation as to Toumazou's authority but there is no evidence as to that.

112. I am satisfied that the representation was made and that Tran signed the document on the faith of it. The fact that he was at least partly involved in the attachment of 2M's letterhead onto the Termination Document indicates that he was concerned about Toumazou's authority at the time he attached it but I do not know when he did that. It is unlikely that he would have signed the Cancellation Document if he had been aware that Toumazou had no authority to sign it.

113. Section 9(1) of the *Fair Trading Act 1999* provides as follows:

“9. Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

114. Section 159(1) of the same Act provides:

“159. Actions for damages

(1) A person who suffers loss, injury or damage because of a contravention of a provision of this Act may recover the amount of the loss or damage or damages in respect of the injury by proceeding against any person who contravened the provision or was involved in the contravention.”

The claim by the Developer against Bullion and Steel

115. The Developer claims that Toumazou negotiated the Replacement Agreement as agent of Bullion with its authority. This was not denied by Bullion but the event giving rise to the damages sought by 2M is not the Replacement Agreement itself but rather, the termination of the Original Agreement and the loss of the benefit of that agreement. By entering into the Replacement Agreement and by executing the Cancellation Document, the Developer repudiated the Original Agreement. That repudiation was by the Developer not Bullion.

The claims brought by 2M

116. Since it has lost the benefit of the Original Agreement by reason of the breach, 2M is entitled to an award of damages if it has suffered any loss as a result of the breach. I deal with the assessment of those damages below.

117. It is further pleaded by 2M that the Developer knew of the dispute between Milenkovic and Toumazou, knew that Toumazou was associated with Bullion and wanted to procure the subject of the contract for himself or Bullion and that he signed the Cancellation Document without having Milenkovic sign it. With this knowledge, the Developer wanted to end the contract with 2M and enter into a similar contract with Bullion. Since 2M has already succeeded in its claim against the Developer for breach of contract is unnecessary to consider this claim.

The claim by 2M against Toumazou for misrepresentation

118. I cannot make any finding about what precisely was said between Tran and

Toumazou at the time the Cancellation Document was signed because of the unsatisfactory nature of their evidence. However they joined in producing the Termination Document, Toumazou purported to sign it on behalf of 2M and I think it unlikely that Tran would have agreed if he had known that Toumazou had no authority to do so.

119. The evidence from Toumazou about the telephone call before the signing of the Cancellation Document was to do only with the cancellation. There was not, he claimed, any discussion about Bullion doing the work. This seems unlikely, particularly in the context of the Developer and Bullion entering into a contract to do the Tran Job only a few days later for the same price. Tran is an astute businessman and the other quotation he had received from Mr McGuinness was for more money. It seems likely that he would have asked Toumazou for an assurance that, if the Original Agreement were to be ended, the Tran Job would still be done for the same price. I therefore accept Tran's evidence is that he was given an assurance that Toumazou would still do the job for him.

The claim by 2M for interference with contractual relations

120. Mr Forrest argued that the repudiation was for the purpose of causing damage to 2M's business or alternatively, was a conspiracy to injure it in its business or amounted to a wrongful interference with its business relations. I can understand the conspiracy claim against the other parties to the alleged conspiracy but not against the Developer. These claims are of a type generally brought in tort against a stranger to a contract that wrongfully interferes in its performance. The contractual relations referred to here are those between the Developer and 2M.
121. As against Toumazou, the case is made out. He knew of the existence of the contract between 2M and the Developer and he intentionally caused the Developer to break it. He did this with the intention of later securing the benefit of the contract for Bullion. That is sufficient (see *Lumley v Gye* (1853) 2 E.&B. 216). He is liable in damages for any loss suffered by 2M as a result.
122. Similarly, it is suggested that the breach by the Developer amounted to unconscionable conduct within the meaning of s.8 or s.8A of the *Fair Trading Act 1999*. This is an odd claim to bring against the Developer because, if it was a breach, 2M has its remedy in contract. It does not need to establish that the breach was unconscionable.
123. Since I have found that the Developer repudiated the contract and is liable to 2M in damages it is unnecessary to consider whether it is also liable on an alternate tortious ground. However all of these claims are available against Toumazou, Bullion and Steel if there is evidence to support them. In the case of Toumazou, his involvement is beyond doubt. As to Steel and Bullion there is a lack of direct evidence of involvement.

The claim by 2M against Bullion and Steel

124. The claim against Bullion and Steel is that, after execution of the Termination

Document:

- (a) Toumazou, “in concert with his de facto wife, Elisa Steel, director of Bullion”, provided the Developer with a quotation dated 16 September 2004 for the same works.
- (b) Toumazou “arranged for Bullion to perform the same works the subject of the Contract” for the Developer without 2M’s knowledge or consent.

It was not denied that the quotation was given or that the work was done but it was not the giving of Bullion’s quotation or Bullion doing the work that caused any loss to 2M. It was the breach of the Original Agreement by the Developer that Toumazou and Tran brought about. The question then is, whether Steel and Bullion were involved in, or were responsible for, that.

Who really controlled Bullion?

- 125. Mr Forrest submitted that I should find that Bullion was established with Steel as its director due to Toumazou’s previous business failings. He said I should find that he was the person who “substantially controlled Bullion”, despite Steel’s assertions to the contrary. The evidence does not support such a finding.
- 126. Bullion was set up at about the time Toumazou became bankrupt and it does seem that he determined, after some period of inactivity, to continue his concreting activities through the medium of that company. However Bullion was incorporated by Steel and it appears that she has invested substantial sums of her own money in it. There is no evidence that any of its assets belonged at any time to Toumazou. The evidence is that he was employed by Bullion. The company conducted its business using his labour, skills and business contacts but that does not justify a finding that the business was really his. It is clear that Toumazou was the one who found the work, did the costings with some assistance from Steel and another employee and supervised the workmen on site. However Steel typed the quotations and did the accounts and the contracting party in each case was Bullion, not Toumazou. He had authority to use a credit card in the name of the company and negotiate with customers but it was Steel who signed the cheques.
- 127. She was the director of Bullion. She invested substantial sums of money in it and there is no evidence to suggest that Toumazou invested anything at all. Toumazou’s scheme to move his activities to 2M failed when Steel refused to allow it to use the equipment or premises that Bullion claimed to own.. If Mr Forrest’s suspicions were well founded her cooperation would not have been needed. As the real controller of Bullion he could have caused it to do as he wished.
- 128. I cannot find that Bullion was really controlled by Toumazou and not by its director, Steel.

Was Steel or Bullion involved in the repudiation of the Original Agreement?

129. Steel says that, after the meeting of 31 July she did not speak to Toumazou for several days. She moved out of the family home on Friday 20 August and moved in with a friend, Mandy Adelman. Her evidence as to this is corroborated by Ms Adelman who said in her witness statement that Steel lived with her until June 2006. Steel went to see a solicitor and also went to Queensland, although she is not sure in what order these events occurred.
130. Steel said that Toumazou came to see their child on or about 8 September. She said that he gave her a letter of apology (Exhibit 38) dated 8 September and asked her to go back to him. She said that while it was in their interests to keep the business running she did not want to go back to him. As stated above, the Cancellation Document was signed by Tran and Toumazou on that same day, 8 September.
131. Steel said that she returned to the office in mid September and it was then that Toumazou told her that the Springvale job discussed at the meeting was the Tran job and that if “somebody” did not start it soon “somebody” would be sued. She said she then re-issued her earlier quotation and instructed Toumazou to obtain Tran’s signature. She said Bullion then did the work but the Developer retained \$52,000 because of its legal costs in this proceeding.

Allegedly sharp business practices / dishonest conduct

132. Mr Forrest attacked Steel’s credibility on a number of grounds. He said that I should find that she allowed Toumazou to engage in sharp business practices and engaged in them herself. He said that she and Toumazou had applied for finance, had requested that some documents be backdated, had described herself as Mrs Toumazou and had transferred shares in a related company with knowledge of Toumazou’s bankruptcy. He said there was good reason to doubt Steel’s evidence that she had lived apart from Toumazou since 20 August 2004 as she claimed.
133. There was indeed some evidence as to these matters. I have already said I have some reservations about Steel’s credit and indeed, the credit of a number of witnesses in this case. In particular, I am not satisfied with the evidence of Tran, Steel and Toumazou concerning the alleged earlier contract with Bullion and I make no finding that such a contract existed. But all of that would only entitle me to reject or qualify her evidence. It would not enable me to make a positive finding where there is no evidence to support it.

Evidence as to Steel’s involvement

134. There is no evidence to contradict Steel’s account of her movements following the meeting nor is there any direct evidence to show that she had any knowledge of Toumazou’s action in procuring the execution of

the Cancellation Document. The only two persons who would certainly know if she were involved are Toumazou and herself and they both deny it. To make a finding that she procured, or conspired with Toumazou either alone or together with Tran to bring about the breach of the Original Agreement I would need to draw an inference to that effect.

135. On 7 September a letter was sent by Toumazou to 2M's solicitors (Exhibit 35) joining issue with matters raised in their letter dated 1 September to Toumazou. In the last paragraph Toumazou states: "So not to be faced with legal action from Ms. Steel I have sent her a letter of apology." The letter of apology (Exhibit 38) is dated the following day, 8 September, which is the same day as the Cancellation Document was signed.
136. The apology opens with the following two sentences: "After much consideration I believe that I was in error to presume that I had any rights to make an agreement with any outside party as far as Bullion Holdings and yourself are personally involved. I acted inappropriately and deeply regret my actions." (sic.)
137. In giving evidence Toumazou did not impress me as being articulate at all in the English language and used simple words. When asked by Mr Forrest to explain the meaning of the first sentence in Exhibit 38 his attempted explanation was so inarticulate I could not understand it. When asked to spell the word "unintelligible" he was unable to do so. There are grammatical errors in all three documents but they display a command of English that Toumazou clearly does not have. Although I accept that he signed both letters and the Cancellation Document I doubt that he composed any of them. He suggested at first that he wrote them with the aid of a dictionary but this would not explain the grammar or the choice of words. Steel denied that she wrote or composed them.
138. When cross-examined about the Cancellation Document Toumazou denied that Steel had composed it. After cross examination about his capacity to write the document he finally said that someone helped him prepare it and suggested that it "might have been" his nephew. At first he was unsure whether he had shown it to Steel before taking it to Tran but then he denied that he had done so.
139. I think Steel, who is considerably more articulate, would have been capable of composing the documents referred to and it would have suited her to have done so but that is no evidence that she did.
140. The Cancellation document in its original form was Exhibit 55, which is a photocopy of an original signed document and does not have 2M's letterhead. That document, or its original, was then photocopied to produce Exhibit E. A comparison of this latter exhibit with Exhibit D shows that the letterhead was obtained by photocopying the top of Exhibit D together with, either the original or a copy of, Exhibit 55. I make that finding because the staple holes and another mark that appear on Exhibit

D appear also appear as copies on Exhibit E. Since Exhibit D was, on 8 September in the custody of the Developer, Tran must have made it available to whoever produced Exhibit E or alternatively, manufactured Exhibit E himself. Toumazou denied any knowledge of how 2M's letterhead came to be on the document and his denial in this instance sounded genuine.

141. Steel said that she was away from Bullion's office from 24 August until 9 September. Bank records show that she was in Melbourne on 25 August, in Queensland on 30 August and in Melbourne on 6 September. She said that for the first week after she came back she was busy setting up a new office. Even so, she must have had something to do with the running of Bullion because she was the sole signatory to the bank account. Immediately following the break up she had arranged for the staff to be paid for that week but it is unclear how Bullion could have continued without her after that. In the past she had signed blank cheques for Toumazou to use but she had now left him and said she distrusted him. She paid wages after her return and no mention was made as to any special arrangement for payment of wages while she was away. I think it likely that she was involved with Bullion during this period at least to that extent.
142. Mr Forrest submitted that I should infer that she and Toumazou discussed the Tran job but I can draw no such inference. The threats of litigation by Milenkovic that were of immediate concern at that time related to the Brooklyn and Browns Road jobs and an alleged failure to account to 2M for money received. Toumazou and Steel had had a substantial falling out and had to re-establish some type of working relationship. I cannot make any assumptions as to the extent of their communications.
143. Even if one ignores their denials, the notion that Steel told or authorised Toumazou to terminate the Original Agreement is only one of several possibilities. Toumazou might have done it on his own without Steel's knowledge in order to win her favour. Tran might have been the moving force, since it is clear that he was anxious for the work to proceed. As stated above, he cooperated to allow the affixing of 2M's letterhead to the Cancellation Document so he had some involvement. Finally, the signing of the document could have happened as Toumazou has described or as Tran has described, although I think it unlikely that the author of the Cancellation Document was either Toumazou or Tran.
144. For these reasons, however unsatisfactory her evidence may have been, I cannot draw an inference that Steel authorised or directed Toumazou to prepare or execute the Cancellation Document or otherwise procure the repudiation of the Original Agreement by the Developer.

Vicarious liability

145. Mr Forrest submitted that, as Toumazou's employee, Bullion was vicariously liable for his actions in making the representations to Tran

about 2M, arranging for the execution of the Termination Document and the execution of the Replacement contract.

146. An employer is vicariously liable for the actions of its servant for acts done by the servant when purporting to act in the course of such business as he is authorised, or held out as authorised, to transact on the employer's behalf (*Halsbury 4th Ed.* Vol.16 para 740). The business that Toumazou was authorised to transact was negotiating contracts with potential customers. A person so authorised does not purport to act within that authority when he makes false representations as to his authority to bind another company or induces a third party to break a contract it has with that company. He might be expressly authorised to do that but in the absence of any evidence of such express authorisation, none can be implied.

Misleading and deceptive conduct.

147. Mr Forrest submitted that Toumazou had engaged in the following misleading and deceptive conduct:
- (a) Failing to advise 2M that he was an undischarged bankrupt;
 - (b) Continuing to manage 2M as if he were a director when, as an undischarged bankrupt, he was disqualified by law from doing so;
 - (c) Executing the Termination Document without 2M's knowledge or consent;
 - (d) Arranging for Bullion to prepare a quotation for the Tran Job;
 - (e) Arranging for Bullion and the Developer to enter into the replacement contract;
 - (f) Arranging for Bullion to perform the Tran Job;
 - (g) Representing to Tran that he was a director of 2M; and
 - (h) Making the representations (a) to (f) to Tran.
148. Of these, (a), (b), (c) and (g) really relate to his misrepresenting his authority to act on behalf of 2M. Clauses (d), (e) and (f) are things that he did that may or may not have a legal consequence but are not representations.
149. Mr Forrest said that it was unconscionable in the circumstances for Toumazou to have acted in this way. It is unnecessary to consider that claim because I have already found that Toumazou committed the tort of interference with contractual relations and is liable in damages to 2M for any loss that it suffered as a result.
150. Mr Forrest submitted that I should find that these acts by Toumazou amounted to unconscionable, misleading and deceptive conduct on the part of Bullion and Steel. However, it is not established that they were

involved in any of this conduct except for entering into the Replacement Contract and doing the Tran Job.

Entering into the Replacement Agreement

151. The Replacement Agreement was entered into before 27 May 2006, when the repudiation was accepted by 2M, and so the Original Agreement was still on foot. One of the acts of repudiation relied upon by 2M was the Developer entering into the Replacement Agreement. However it is no tort to enter into a contract with a party to do work while that other party is still contractually bound to allow someone else to do the same work. To commit the tort of interference with contractual relations in regard to the first contract one must intend one's action to bring about a breach of that contract (*Halsbury 4th Ed.* Vol.45 para 1518). Mr Forrest submitted that there was no doubt that they intentionally procured the breach but there is no evidence that either Steel or Bullion had such an intention. All that is proven is that they intended to enter into a contract with the Developer to do the Tran Job and probably believed (albeit mistakenly) that an earlier contract between 2M and the Developer had been terminated.
152. There was nothing unconscionable, misleading or deceptive on the part of Bullion or Steel in submitting the quotation, entering into the Replacement Agreement with the Developer or carrying out the work.
153. For these reasons, I am not satisfied that any cause of action against either Steel or Bullion has been made out.

Assessment of Damages

154. As to the assessment of damages, Mr Forrest referred me to a number of passages in the High Court decision of *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64. I accept his submission that, in assessing damages in contract for loss of profits, 2M is entitled to compensation for the loss of the profits that it might reasonably have expected to receive had the Original Agreement been performed; that is, the outcome that, on the balance of probabilities, is likely to have been attained rather than what might have been merely expected or hoped for. This is no easy task because it is an enquiry into what might reasonably have happened and in this case that is very difficult to say. Nevertheless, I must do the best I can on the evidence led.
155. Any loss would be the money 2M might reasonably have expected to have received less what it would reasonably have cost it to do the work. In assessing the cost, Mr Forrest invited me to adopt the calculations made by Toumazou (and perhaps Milenkovic) which were Exhibit 27, but these were pricings for the purpose of a tender. Despite their experience, neither of them is proven to be an expert in the assessment of the cost of carrying out building work. In assessing the profit that is reasonably likely to have been attained I must look to the evidence of the Quantity Surveyor, Mr Faiffer.

Mr Faiffer

156. Mr Faiffer assessed the cost to 2M of carrying out the scope of works included in the Tran Job as being \$648,194 including GST. Since that is more than the contract price, in the absence of other evidence I would have to find that the work would have been carried out at a loss. However after referring to his instructions, which were that 2M had its own pool of labour, its own formwork, ply and timbers, he said that the work could have been satisfactorily carried out for less than the contract price of \$645,700.

Profit on the job

157. Mr Faiffer said that a contractor would be “looking for” a profit margin of 12.5 % of the contract price, or \$80,712. That may well be so, but the question is whether it would have been realised. He added:

“In addition, it is not unreasonable for the Contractor to expect that by using his own labours, material and equipment and by using his own business acumen to negotiate favourable sub-contractor and supplier prices that he would **not** *[sic.]* pick up substantial savings. I have estimated these as being some \$105,500 worth. Further, by working within the agreed contract I have identified a number of potential variations and extras totalling some \$79,200 plus \$5,000 these carry a heavy profit margin/penalty (say to 30%) to the client. Whilst the Contractor may not achieve all the savings or carry out all the variations/extras the potential final profit/margin on this project could have been in the order of some \$211,472 or more depending upon the site cast panel techniques employed and the Contractor’s own business acumen.” *[I treat the word in bold as a typographical error and ignore it].*

In a supplementary witness statement he suggested possible further pick ups and savings.

158. The question is not what might happen but rather, the profit that, on the balance of probabilities, is likely to have been earned. To assess the probability or otherwise of any of these sums being earned, they must be examined with care.

159. Mr Faiffer said that an “increase in margins” could come from two areas, namely:

- (a) Pick ups from the cost of labour, plant and materials allowed for in the price;
- (b) Profit on variations and extras from:
 - (i) Carrying out some of the work excluded in the contract from the scope of works; and
 - (ii) Additional work.

160. For ease of reference I will number each potential source of profit Mr Faiffer referred to, although this numbering system does not appear in his reports.
161. As to the items excluded from the scope of works in the contract, he said it was possible (with the varying degrees of likelihood he expressed) that the Developer would have requested 2M to do the following items at the following “possible” charges:

Item	Possible charge	Likelihood
1 Obtaining permits	\$2,000	Most likely
2 Pits and Grates	\$4,000	Highly likely
3 Kerbs and channels	No figure	No comment
4 Agricultural pipes	\$1,000	Not uncommon
5 Blinding concrete (if needed)	\$3,000	Very likely
6 Landscaping	\$30,000	Could tender
7 Minor areas of block work	\$2,000	May be
8 Removal of existing rubble	\$3,500	Might be
9 Backfilling of crushed rock	\$5,000	Likely
10 Waterproofing	\$9,000	May well have
11 Supply and erect steel	\$3,500	Very high
12 Concrete testing if requested	\$1,200	May be
13 Scaffolding	\$15,000	May be

162. Comparing this with what ultimately happened when Bullion did the Tran Job, Tran did (1) and (6) himself. Items (2) and (4) were done by his plumber. Kerbs and channels (3) were included in the contract. Blinding concrete (5) was not used nor was there any concrete testing (12). The landscaping was done by Tran’s son. There was no evidence that there was any existing rubble to be removed (8) nor was there any roof steel (11) to be erected. Scaffolding (13) was included in the contract to the extent that it fell within the description “Safety”. It is unclear whether there was any backfilling of crushed rock (9) by Bullion when it did the work or any block work (7) done. Bullion did the waterproofing but only charged \$2,000 for it.

163. As to “pick ups”, Mr Faiffer suggested the following potential savings:

Pick up	Amount
Sale of soil excavated from site	\$10,000
Use of own labour to place sand and concrete	\$6,000
Use of contractor’s own labour and formwork	

and supports	\$35,000
Reinforcement cost less than allowed for	\$6,000
Placement of steel might take less time	\$3,500
Casting panels on site	\$45,000

Sale of soil

164. The soil was wet clay without much topsoil. In regard to a possible sale of it Mr Faiffer said in cross-examination that Milenkovic might have “fluked” something or might have been able to dump it somewhere for nothing. He then suggested that if the soil was not contaminated and if it did not have to be taken too far or could be disposed of more profitably than allowed for in the excavation figure of \$22,000, a saving might have been achieved. This seems altogether too hypothetical. There is no evidence that the allowance for excavation was unreasonable and there is insufficient to support a finding that any pick up would have been obtained here, particularly one of this magnitude.

The casting of the panels

165. Mr Faiffer’s range for this was \$45,000 to \$60,000. Bullion cast the panels on site and it is clear that Milenkovic also wanted to do so. The only question is whether he would have had the necessary expertise available to do it. As Mr Faiffer said in his witness statement:

“The contractor [ie, Milenkovic] advises that he would have site or stack cast the panels utilising the basement ground slab as his casting bed. This requires much further thought and planning as you can’t just stack cast then lift. Sufficient space must be available to both maintain the stacks and panels and position the crane so as it may lift and erect the panels.”

166. This would suggest that casting the panels on site is no easy task. The fact that in the initial costing a price was allowed for purchasing panels shows that even Toumazou contemplated buying them in. That is the obvious option for a contractor who is not able to make them himself. If Milenkovic did not have the expertise, could he have bought it in and if so, what would the cost of that have been? Should an allowance be made for possible lost time, materials or other consequential damage arising from a mistake that might have been made by an inexperienced team trying to cast the panels and what should such an allowance be? This is all speculation. I am quite unable to say there is a likelihood that 2M would have achieved this saving. Valuing it only as a chance that has been lost I will assess it at \$5,000 because the potential saving is great but the chance of achieving it is small. That is a most arbitrary figure but, however unlikely, it is a possibility. Most of the others are not.

Reinforcement supply

167. The quote from the supplier was less than the amount allowed for and even after allowing for cranga a saving may be achieved of \$6,000. This

was confirmed by Mr Faiffer's own take off for the reinforcement. He describes this as a potential saving and I take it into account.

Reinforcement placing

168. I am unclear what Mr Faiffer means about this item. I think what he is saying is that Toumazou allowed for 1,080 hours in his rough costing for reinforcement placing and priced it at \$33,600. Mr Faiffer costed that work at \$37,800. If it were done at the cost Toumazou had allowed for there is a potential saving from Mr Faiffer's costing of \$6,000.

Concrete

169. He said that a further saving of \$5,000 "may be in order" for the purchase and placement of concrete. This is because Milenkovic showed him some receipts for concrete indicating a lower price than he had allowed. On that basis I find that there might have been such a saving.

Own labour and materials

170. As to the suggestion that Milenkovic had his own labour materials and formwork I am not satisfied that he did. I am satisfied that he could have obtained materials and labour but at a cost and I do not understand Mr Faiffer's allowance of a saving to be based upon buying labour and materials in. Milenkovic said he could have borrowed some items but it is unclear what he could have borrowed and upon what terms.

Possible variations

171. Mr Faiffer said that the possible variations would have been as follows:

Possible variation	Possible charge
Trenching and/or conduits for services	\$2,000
Penetrations through the structure for services	\$1,000
Management and coordination of overall project	\$5,000

Tran denied he would have engaged 2M to do any of this. The first two were done by others (not Bullion) and the supervision was by Tran's son. I am not satisfied there was any likelihood at all of 2M having been given any of this work.

Reasonable expectation

172. Milenkovic's experience is primarily as a builder. He has had some experience in supervising the laying of concrete in the jobs referred to in the evidence but he is not a specialist concreter. I think an expectation that he would have had the skill and knowledge to make "substantial savings" beyond what would normally be expected from a concreting job is fanciful.

173. He had no specialist formwork or equipment of his own for concreting work and no established crew of workmen skilled and experienced in laying concrete. Of course he could have obtained all of that and he said

that he could have borrowed various items but those possibilities are insufficient for me to assume that it is likely that he could have made savings through having his own equipment and labour.

174. As to whether it was likely or even possible to achieve any of these additional profit sources Mr Faiffer acknowledged in his evidence that he had no direct knowledge of Milenkovic's business or expertise and necessarily relied upon what Milenkovic had told him. He also referred to this process in his evidence as a "Geoffrey Robertson Hypothetical". I am concerned with reasonable expectations rather than hypothetical possibilities.

Work to lock up stage

175. Other works that Mr Faiffer thought the Developer might engage 2M to do was the work to lock up stage. Tran denied that he would have agreed 2M to this. He said that he had already obtained quotes from other people to carry out the other aspects of the project. Although it is possible that he might have engaged 2M to do any of the things that Mr Faiffer referred to in his evidence it is no more than a possibility. Indeed, I think it most unlikely that any of these theoretical profits would have been earned. I am not satisfied that there was any real likelihood of this additional work being given to 2M.

At what price?

176. Further, even if 2M was given any extra work, the price the Developer would have been prepared to pay would probably have been considerably less than Mr Faiffer suggested. For example, Mr Faiffer suggested that \$30,000 would be charged for the landscaping whereas Mr Tran said that he got his son to do it at a cost of only \$11,000. Mr Faiffer had priced the work from the drawings whereas the scope of work actually carried out was far less than it should have been, hence the difference. Mr Faiffer suggested a figure of \$45,000 for the roof which was no doubt a proper price whereas the Developer had it done of a little under \$30,000. This indicates that I should not assume that any contract entered into by 2M with the Developer would have been particularly profitable.
177. There are other similar examples in the evidence where Mr Faiffer's figure is considerably higher than the amount the Developer paid to the supplier concerned.

Attempts to assess Bullion's profit

178. After examining invoices and other documents obtained from discovery, relating to what it cost Bullion to do the Tran job, Mr Faiffer found that they totalled about \$583,000. Of this he queried a number of figures. He said that costs totalling \$71,615 (Exhibit 51) can be directly apportioned to other jobs. He said two further categories totalling \$83,951 cannot be directly apportioned to any job due to insufficient information. Hence he

suggested that the \$583,000 would be “an inaccurate sum” and that further work was required.

179. The documents he refers to were tendered for identification. Mr Faiffer states his interpretation of them, taking each at face value. There was no evidence from anyone as to why they were included amongst the discovered documents supposed to relate to the Tran job if in fact they did not relate to it. Importantly, no one from Bullion was cross-examined about them.
180. If Mr Faiffer is correct in his interpretation of the invoices and one deducts the \$71,615 from the figure of \$583,000 one arrives at a figure of \$511,385 as the cost of the materials and labour used by Bullion. The contract price was \$645,700, so the excess, which includes GST would be \$134,315. Deducting the GST of \$58,700 the profit would have been \$75,615.
181. In examination in chief Mr Faiffer said that the labour and materials that could be directly related to the job amounted to \$420,00 but that assumes that no part of any of:
 - (a) the invoices attributable to the work done in the yard;
 - (b) Mr Nasello’s invoices and
 - (c) the invoices that he cannot directly apportion to the Tran job;relate to that job. I cannot ignore them because it is clear that at least some, and possibly even all, of them do relate to the Tran job. If they are added back in, the sums revert to what I have stated above.
182. In a further report he said that “at face value” there were a further \$34,149.85 worth of labour invoices of which only \$18,385.17 related to the Tran job with invoices for an additional \$9,309.62 worth of plant and materials. He added that he was not convinced that the whole of those costs were legitimate charges. If one takes these amounts off the profit is reduced to \$47,920.21 but only if all the charges are legitimate.
183. Despite all Mr Faiffer’s efforts, it does not seem to me that it is possible to calculate, from the evidence, the actual profit made on the job by Bullion with any confidence that the figure arrived at is even approximately accurate. Indeed, Mr Faiffer said in cross-examination that he was unable to calculate the profit that Bullion made. He did not think that he had enough information to do it (*Transcript p.60*).
184. In any event, it is not a question how much profit Bullion made but rather, what 2M would reasonably have expected to make. In this regard I cannot regard Bullion and 2M as being on the same footing. Whatever one might say of him as a witness, Toumazou is an experienced concreting contractor with a team of workmen skilled and experienced in that area. Bullion already had plant and equipment to do the job, albeit the invoices tendered show that he did hire some props and purchase some form ply.

Even if I had been able to ascertain with any reasonable degree of accuracy what profit Bullion made I cannot assume that because Bullion made that profit 2M would have made it too. The circumstances are simply not the same.

Mr Rosier

185. A report from another Quantity Surveyor, Mr Rosier, was only tendered for identification and so it is not in evidence as proof of its contents. Mr Faiffer said of each of Mr Rosier's assessments that it "may be a reasonable scenario" but in neither instance has Mr Faiffer adopted Mr Rosier's figure. To say that something "may" be reasonable is not the same as saying that it is reasonable. I am really left with Mr Faiffer's evidence.

Conclusion as to loss of profit

186. Mr Faiffer assessed the total cost of the works including GST at \$648,194, this being "the going rate" for commercial work. He described the contract price of \$645,700 (including GST) as "discounted". It would seem from his evidence that a profit on the job could only be achieved by savings on the "going rate" for the various items of labour and materials or by increasing the scope of work.

187. Mr Faiffer's statement that "...it is my opinion that the works could be satisfactorily carried out for less than the agreed \$645,700) incl. GST thereby increasing the hidden margins and profits included" is qualified by the rest of the report which makes it clear that that depends on the extras and pick ups that he refers to. Looked at individually, with only a few exceptions, none of these possibilities seems to me to be more probable than not.

188. The exceptions are as follows:

Supply of reinforcement	6,000
Saving on concrete	5,000
Placement of steel	6,000
Waterproofing (paid to Bullion)	2,000
Loss of chance to cast panels	5,000

189. The first three are not definite savings but possibilities only. Allowing two thirds of those figures gives an anticipated saving of \$11,330. The last is a gross figure. Mr Faiffer said that the profits for extras can be as much as 30%. If I allow that there is an anticipated profit of \$600. I have already valued the loss of the chance to cast the panels on site at \$5,000. That makes a total improvement of the "bottom line" of the equation of \$16,930. If I take that away from Mr Faiffer's assessed cost of doing the work, the cost is reduced to \$631,264. Taking that away from the contract price, results in an anticipated profit of \$14,436 and that is the amount of damages that I assess.

The deposit

190. Since the deposit has been forfeited and since that amounted to more than the damages I have assessed, 2M has suffered no loss. It had occurred to me that perhaps it should nonetheless be entitled to an award of nominal damages for breach of contract but that ignores one of the characteristics of a forfeited deposit which is that it is applied in or towards satisfaction of damages suffered (see *NLS Pty Ltd v Hughes* (1966) CLR 583 @589 per Barwick CJ). Hence I think the correct analysis is that damages were recoverable for the breach but are satisfied from the forfeited deposit. Accordingly, it is not appropriate to award nominal damages and no order should be made.
191. As to the claim against Toumazou, since the forfeited deposit exceeded the damages as assessed, there is no “loss, injury or damage” within the meaning of s.159(1) of the *Fair Trading Act 1999* nor any loss arising from his wrongful interference with the contractual relations between the Developer and 2M. In both cases, damage is an essential part of the cause of action. If no damage is proven the claim must fail. In this case, I have found that, by not having to do the Tran Job and receiving the forfeited deposit instead, 2M was better off.
192. The measure of damages in the claim against Toumazou by the Developer is the lost deposit of \$20,000 and there will be an order against him for that sum.

Conclusion

193. The following orders will be made:
- (a) The Developer’s claim will be dismissed because the amount sought was paid as a deposit and it then repudiated the agreement. The innocent party, 2M was therefore entitled to forfeit and retain the deposit.
 - (b) No order will be made with respect to the claim by 2M against the Developer because its damages are already satisfied by the forfeiture of the deposit..
 - (c) The claim by 2M against Steel and Bullion will be dismissed.
 - (d) The claim by 2M against Toumazou will also be dismissed because it is not proven that, after forfeiting the deposit, 2M suffered any loss or damage by reason of his conduct.
 - (e) The restraining orders made on 20 October 2006 are discharged. Liberty to apply is reserved with respect to the undertakings given.
 - (f) Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER

