VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. D416/2014

CATCHWORDS

Applicant owner found to have incurred loss and damage because of the misleading and deceptive conduct of a registered builder, the second respondent, who obtained warranty insurance but took no part in the applicant's works.

First respondent sought apportionment against person who performed the works, the third respondent, and the relevant building surveyor, the fourth respondent, as alleged concurrent wrongdoers pursuant to the provisions of Part IVAA *Wrongs Act 1958 (Vic).*

First respondent's apportionment proceeding against fourth respondent subsequently dismissed by consent.

Owner subsequently settled with first respondent prior to hearing, but first respondent remained a party for the purpose of apportionment.

Applicant's claim against the second respondent found to be an apportionable claim, notwithstanding that apportionment was not sought by the second respondent by way of defence.

Respective liability of each of the first, second and third respondents to the applicant found to be limited under Part IVAA *Wrongs Act 1958.*

APPLICANT	Yongjie Lu
FIRST RESPONDENT	Jiangent Li
SECOND RESPONDENT	Dang Hai Nguyen
THIRD RESPONDENT	Tim Yang
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Hearing
DATE OF HEARING	11-12 May 2016, 19 September 2016 (Further Written Submissions from the Applicant), 5 October 2016 (Further Written Submissions from the Second Respondent)
DATE OF ORDER	30 November 2016.
CITATION	Lu v Li (Building and Property) [2016] VCAT 1998

Note:

The Tribunal notes that on 17 December 2015, the first respondent's proceeding against the fourth respondent was dismissed by consent of the applicant, the first

respondent (upon whose application the fourth respondent was joined), and the fourth respondent, with no order as to costs.

INTERIM ORDERS

1. By consent of the first respondent granted by a proposed consent order dated 9 August 2016, the applicant does not continue his proceeding against the first respondent, but the first respondent remains a party to the proceeding for the purpose of any apportionment under Part IVAA of the *Wrongs Act 1958*.
2. The applicant has incurred loss and damage of $104,877.07 by the conduct of the first, second and third respondents.
3. The first respondent must pay to the applicant 15% of the applicant's loss and damage, the amount of such proportion to be assessed.
4. The second respondent must pay to the applicant 60% of the applicant's loss and damage, the amount of such proportion to be assessed.
5. The third respondent must pay to the applicant 25% of the applicant's loss and damage, the amount of such proportion to be assessed.
6. **The applicant having already recovered some of his loss and damage from another party or parties, the principal registrar is directed to list the proceeding for a further hearing before Member Kincaid, for the purpose of fixing the amounts payable by the first, second and third respondents pursuant to orders 3, 4 and 5 above, and for hearing any application for costs, allow 3 hours.**
7. Prior to the further hearing, the applicant must file and serve an affidavit, setting out the amount recovered from any other party or party in diminution of his loss and damage.
8. Costs reserved.

A Kincaid
Member

APPEARANCES:

For Applicant	Mr D Pumpa of Counsel
For the First Respondent	No appearance.
For the Second Respondent	Mr Nguyen, in person
For the Third Respondent	No appearance

REASONS

INTRODUCTION

1 The principal question in this proceeding is whether a registered building practitioner, the second respondent, who obtained in his own name as "builder", certificates of insurance in respect of certain domestic building works purportedly to be carried out by him for the applicant, but who took no part in the works carried out, should be liable to the applicant for completion and rectification costs subsequently incurred by the applicant.

THE PARTIES

2 Mr Yongjie (Jason) Lu (the "**applicant**") was the registered proprietor of a property at Camp Road, Broadmeadows (the "**property**"). Prior to selling the property, he constructed two units. He also carried out refurbishment works to the existing house on the property.

3 Mr Dang Hai Nguyen (the "**the second respondent**") is a registered building practitioner, with license DBU-10247.

4 The applicant entered into a building contract dated 6 April 2011 (the "**contract**"), with Ryan Cooper Homes ABN 37 633 696 ("**RCH**"), by which RCH purportedly agreed to construct the two new units, and to refurbish the house.

5 Mr Jianfeng Li (the "**first respondent**") was the business name holder of RCH until 1 July 2013 from which date, I was informed, the business was incorporated.

6 The address stated in the contract for RCH was 45 Hawtin Street, Templestowe, Victoria. This was the address of the first respondent.

7 Mr Tim Yang (the "**third respondent**") purported to sign the contract on behalf of RCH.

8 The total amount payable by the applicant under the contract was $340,000 (the "**contract sum**"). I find from the evidence that this amount was the total of $190,000 payable for Unit 1, and $150,000 payable for Unit 2.

9 Mr Sam Coco of SFC Building Surveyors ("**Mr Coco**") was the relevant building surveyor. He issued a building permit for the works dated 5 August 2011.

10 Notwithstanding that he was not a registered builder, I also find from the evidence that the third respondent subsequently attended at the property on a daily basis, and undertook the works.

THE APPLICANT'S CLAIMS

11 By his Points of Claim dated 3 May 2015, the applicant alleged that in consequence of misrepresentations made by the first and second respondents, he incurred loss and damage.

12 The applicant claimed by way of damages the amount that he had to spend in excess of the contract sum.

13 The applicant also claimed $200,000 in the alternative, being the loss of the benefit of the mandatory builder's warranty insurance.

14 In the middle of 2015, the applicant sold the two new units. Having done so, he no longer claims to have lost the benefit of policies of warranty insurance.

15 By Amended Points of Claim dated 26 October 2015, the applicant put his claim against the second respondent on the basis that he falsely represented to the relevant warranty insurer that he was or would be the builder when, the applicant says, he never was nor intended to be. In making the false representations, the applicant says, the second respondent engaged in conduct that was misleading or deceptive or likely to mislead or deceive, and which also breached a duty of care he owed to the owner, as a registered building practitioner, to perform his work in a competent manner and to a professional standard.[1]

16 The applicant says that, but for the second respondent's false representations, causing the insurance policies to be issued, the third respondent would never have been put in a position to carry out the works. He says that if that did not occur, he would have engaged a registered builder to carry out the works who, the applicant submits, would have done so to a professional standard, therefore avoiding the cost and time overrun for which he now makes a claim.

THE FIRST RESPONDENT'S APPORTIONMENT CLAIM

17 By Points of Claim dated 25 September 2015, the first respondent joined the third respondent and Mr Coco as fourth respondent to the proceeding, as alleged concurrent wrongdoers within the meaning of section 24AH of the *Wrongs Act 1958 (Vic)* (the "**WA**"). In respect of Mr Coco, the first respondent alleged, in effect, that Mr Coco ought not to have issued the building permit.

INVOLVEMENT OF THE PARTIES IN THE PROCEEDING

18 I was informed by counsel for the applicant at the start of the hearing that the applicant had settled his claim against the first respondent.

19 I was also informed that the first respondent would remain a party however, only for the purpose of any apportionment under the provisions of Part IVAA of the WA. The first respondent did not participate in the hearing.

20 The second respondent filed documents by way of defence, and appeared at the hearing in person.

21 The third respondent took no part in the proceeding, and did not appear at the hearing.

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[1] Building Regulation 1502.

22 On 15 December 2015, the Tribunal dismissed the first respondent's proceeding against Mr Coco by consent, with no order as to costs. Being no longer a party to the proceeding, Mr Coco did not appear at the hearing.

LEGISLATIVE FRAMEWORK

Builder must obtain required insurance

23 Section 136(2) of the *Building Act 1993* (the "**BA**") provides:

> A **builder** must not carry out or manage or arrange the carrying out of **domestic building work** under a **major domestic building contract** unless the builder is covered by the **required insurance**.

24 The required insurance is described in Victorian Government *Ministerial Order No S98* dated 23 May 2003 (the "**Order**"). The Order provides that a builder who is entering an "insurable domestic building contract" must obtain a warranty insurance policy which covers the building work to be carried out under the contract. The necessary coverage is described in the Order.

25 An "insurable domestic building contract" means a domestic building contract, as defined in the *Domestic Building Contracts Act 1995* ("**the DBCA**"), where the contract price is greater than the prescribed sum. Prior to 1 July 2014 (that is, relevantly to the events the subject of this proceeding), the prescribed sum was $12,000.[2]

Only registered builders having the required insurance are to carry out major domestic building contracts

26 Section 3 of the DBCA provides, in part:

> **major domestic building contract** means a **domestic building contract** in which the contract price for the carrying out of **domestic building work** is more than $5,000…

27 Section 29 of the DBCA provides:

> A builder must not enter into a **major domestic building contract** in Victoria unless
>
> (a) that person is registered as a builder under the BA

28 Section 24A(2) of the BA provides as follows:

> (2) The **relevant building surveyor** may consider an application for a building permit for **domestic building work** that is to be carried out under a **major domestic building contract** but must not issue the permit unless he or she is satisfied that–
>
> (a) the work is to be carried out by a **builder** who is registered under Part 11 in the appropriate class of domestic builder and is covered by **the required insurance**

29 The purpose of these provisions is that only registered builders, having the required insurance, are entitled to enter into major domestic building contracts in Victoria.

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[2] Clause 6 of Ministerial Order No S98.

30 Insurance is "required" where the contract price for the carrying out of domestic building work is more than the prescribed sum, now $16,000.[3] At the time of events giving rise to this proceeding, the prescribed sum was $12,000.

31 The effect of section 24A(2) of the BA is that a building permit should not be issued for any proposed domestic building works under a major domestic building contract without satisfying the relevant building surveyor (in this case, Mr Coco) that the work is to be carried out by a builder registered under the appropriate class of domestic builder, and without also producing evidence of the required insurance.

RELATIONSHIPS BETWEEN THE PARTIES

32 The applicant and the second respondent had never met, prior to their doing so at the Tribunal in the context of this proceeding.

33 The second respondent took no part in the building works, nor did he ever visit the property.

34 The applicant was introduced to the first respondent through a mutual acquaintance. The applicant discussed his proposed project with the first respondent, and the first respondent informed the applicant that, being a builder, he would be prepared to provide a quote for the project.

35 The first respondent knew the third respondent. They met in 2006, when the first respondent did some casual work for the third respondent, who was then working as a removalist.

36 The further amended defence of the first respondent dated 25 September 2015 alleges that in about 2011, in order to assist the third respondent in his efforts to establish a business, the first respondent allowed the third respondent to be a joint holder of the RCH bank account. The further amended defence also alleges that he instructed the third respondent to use the RCH bank account for his own business activities, and not for any business activities for and on behalf of RCH.

37 The second and third respondents were acquainted. The second respondent gave evidence that he was informed by the third respondent that the third respondent knew someone (who I find was the applicant), who wished to develop his property, and that the third respondent requested the second respondent to obtain warranty insurance certificates with a view to the second respondent undertaking the proposed works.

38 On 11 May 2011, after receiving an application from the second respondent, QBE Insurance Australia Ltd (the "**warranty insurer**") issued to the second respondent a Certificate of Insurance in respect of each of the new units.

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[3] See clause 6 of the Order, as amended from 1 July 2014 by Ministerial Order G22 dated 29 May 2014.

39 One Certificate had the following endorsement:

Works	NEW SINGLE DWELLING CONSTRUCTION CONTRACT
At	1/280 CAMP ROAD BROADMEADOWS VIC 3047
Carried Out By	BUILDER [The name of the **second respondent** is stated] ABN: 13 006 180 188
Declared Contract Price	$190,000
Building Contract Date	06/04/2011
Builder's registration No	DBU 10247 [the **second respondent's** registration]
Building owner/Beneficiary	[The applicant's name is stated]

40 The other Certificate was endorsed as follows:

Works	NEW SINGLE DWELLING CONSTRUCTION CONTRACT
At	2/280 CAMP ROAD BROADMEADOWS VIC 3047
Carried Out By	BUILDER [The name of the **second respondent** is stated] ABN: 13 006 180 188
Declared Contract Price	$150,000
Building Contract Date	06/04/2011
Builder's registration No	DBU 10247 [the **second respondent's** registration]
Building owner/Beneficiary	[The applicant's name is stated]

41 On 5 August 2011, Mr Coco issued a building permit. He also stated in the permit that the building practitioner to be engaged in the building work was the second respondent, and cited the second respondent's DBU registration number.

42 The building permit referred to the total consideration payable to the builder of $340,000 plus $11,500 being the value of the work required to complete the proposed refurbishment of the applicant's existing dwelling.

43 I find that the third respondent signed the contract, ostensibly on behalf of RCH.

44 The further amended defence of the first respondent alleged that the third respondent had no authority to enter into the contract on behalf of RCH, and that the third respondent fraudulently represented to the applicant that he had such authority.

PROGRESS OF THE WORKS

45 The third respondent subsequently billed the applicant for deposit monies and the first four progress payments in the name of "RYAN COOPER HOMES" of 45 Hawtin Street, Templestowe (the address of the first respondent). The third respondent's mobile telephone number was endorsed on each progress claim. Endorsed at the foot of each progress claim account were the bank account details of "RYAN COOPER HOMES". It will be recalled that the first respondent alleged in his further amended defence that he had granted to the third respondent joint signing rights in respect of this account.

46 Subsequent progress claims submitted by the third respondent from 30 December 2011 were in the same form as the preceding ones, save that they were in the name of "RYAN COOPER HOMES" of 18 Hemsley Drive, Deer Park which, I was informed, was the personal address of the third respondent.

47 By letter addressed to the first respondent dated 15 October 2012, solicitors for the applicant served on the first respondent a notice of intention to terminate the contract, citing a failure to proceed with the works diligently, and suspending the works. I was informed that the third respondent failed to attend the site from May 2012.

48 By letter dated 1 November 2012, the applicant terminated the engagement of RCH. He subsequently arranged for the completion of the works, and for the rectification of extensive defective works. These works started in late April 2013, when it had become apparent to the applicant that the third respondent was never going to return to the property.

ASSESSMENT OF RECTIFICATION AND COMPLETION COSTS

49 Following termination of the contract, the applicant obtained a report from Mr Tom Casamento, consulting structural engineer, which listed the respects in which Mr Casamento considered the works to be defective and/or incomplete at the date of termination. Defective works undertaken at each of the 3 units were costed by Mr Casamento at $95,165. Incomplete works were costed by Mr Casamento at $581,996.

50 The applicant was able to complete rectification and completion works for a lesser amount than estimated by Mr Casamento. I deal with these works later in my Reasons.

51 Mr Coco issued an Occupancy Permit on 21 November 2013.

MISLEADING AND DECEPTIVE CONDUCT CLAIM-LIABILITY AND CAUSATION

Did the second respondent engage in misleading and deceptive conduct?

52 The applicant claims damages against the second respondent pursuant to the *Australian Consumer Law (Vic)* ("**ACL**").

53 Section 18 of the ACL provides:

> **18 Misleading or deceptive conduct**
>
> (1) **[Misleading and deceptive conduct prohibited]** A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

54 The applicant alleges that in order to obtain the certificates of warranty insurance from the warranty insurer, the second respondent represented in trade or commerce that he was the builder engaged to carry out the works at the property, and that those representations were misleading and deceptive because he was not so engaged under the contract.

55 It becomes necessary for me to examine all the circumstances, including the second respondent's subsequent conduct, to determine whether, at the time of his applying for the certificates of insurance, he intended to carry out the works at the property.

56 By his Points of Defence dated 25 June 2015, the second respondent stated:

> Back to May 2011 I have tried to remember as much as I could, it's seem (sic) to forget by time to me now. One Chinese man named **Jim**, came to see me and asked me to build the project including three units [for] his relative Mr and Mrs Lu. He had all the plans enough to start… He asked me to organise the certificate of 7 years warranty first, and then when the owners got the certificate of the warranty, they would contact…me to sign the contracts and [give] job to me to start building the project.
>
> [It] looked okay, good job to me… As the builder's role, I had done all the certificate of seven years warranty for him and waiting… waiting, had been waiting the answer from the owners to sign the contract and start the job. I didn't know what happened, or any reasons to the owners… or any finance problems… Really since then I had no contact, no contact no information from the owner, even I didn't know, didn't see or get any cents (sic) from the owners… Further I didn't know they have contract ready and had built by Ryan Cooper Homes and who is [the first respondent].
>
> I am the builder represent to [the warranty insurer] to carry out the building works only for the job to be carried out and completed by or under my name as shown in the contract documents under my name and my signature only. I have not made representations to other body or other contract not under my signature, and have not [warranted, nor am I] responsible for [another person's] contract works.

> [I deny paragraphs 30-41 of the Points of Claim dated 3 May 2015]. I had no contract under my name my signature how can I [have made] the representations to obtain the policy. I had no contact and no project from the owner… how can I [have] breached my duty of care to the owner… How can I breach the contract… How [can I have been] the builder for these works at the property? How can I [have caused] the damage on site? How can I [be responsible for] the owner [suffering] loss and damage [given] that I didn't see the owner and [did not receive] one cent or one dollar.
>
> All the same, misleading or deceive, [illegible word], all illegal, void [I repeat] unenforceable, and effective, invalidate no foundation.
>
> Thank you so much for your [illegible word] in reading and understanding what I have presented with my little knowledge in law and language problems. But at least I have shown the story with all my heart within the truth. I look forward to hearing from the help of VCAT [**emphasis added**].

57 I find from the evidence that the reference to a man called "Jim" is a reference to the third respondent.

58 By his further letter to the Tribunal dated 19 November 2015, the second respondent alleged:

> 1. The [applicant] had already signed a building contract with the first respondent before [the alleged misrepresentation by the second respondent].
> 2. I am not responsible and not as the Builder to sign the contract and have the permit to start the job at 280 Camp Road, Broadmeadows.
> 3. I did not completely know [the third respondent] treat me and used my certificate to due and start the project and caused the damages.
> 4. I am not responsible completely for all the contract documents paper work signed by the owner and his builder and all the damages caused by them and their lives

59 The gist of the second respondent's defence, therefore, is that he obtained the certificates of warranty insurance from the warranty insurer, in expectation of being contacted by the applicant to enter into a building contract for the carrying out of the works.

60 The second respondent also gave the following evidence:

> I was also cheated by the [third respondent]. I wanted to have the [applicant's] job. I trust people, but the Chinese people tricked me [the second respondent is Vietnamese]. I did not know anything about the contract. I did not give my DBU number to the [third respondent]. There are many ways in which he could have got it so he could put it in the contract. My business card has my DBU registration number on it. The [third respondent] gave me the drawings and specification that I needed to have in order to get the insurance certificates, but I never saw the contract.

61 When asked, in cross-examination why, if he did not have a copy of the contract, he knew the total contract price of $340,000 for the purposes of applying for the certificates of insurance. He replied:

> Because I can estimate from the plans and drawings [that were given to me].

62 When asked, in cross-examination why, if he had never seen the contract, he applied for insurance in respect of work to be performed pursuant to a contract dated 6 April 2011 (the date of the contract). He replied:

> That's why I'm a builder. I gave my trust.

63 When it was put to the second respondent that when he received the insurance certificates on about 11 May 2011, he was well aware that he had not signed a contract with the applicant, he responded:

> I never met [the applicant]. How could I have signed [a contract]?

64 I find from the contents of the certificates of insurance that the second respondent represented to the warranty insurer that he had entered into a building contract with the applicant. I also find that at the time of his representations, he was aware of the contents of the contract[4] and that he must therefore have then known that he was not a party to it. I find that his representations therefore amounted to conduct on his part that was misleading and deceptive within the meaning of section 18 of the ACL.

Representation as to a future matter

65 When asked by the applicant's counsel why, when the insurer issued the certificates on 11 May 2011 with the date of the contract noted as 6 April 2011, he did not say to the insurer that he had not yet entered into a contract, the second respondent replied:

> Because that is the *proposed* date of the contract only. I don't need the exact signing date. I didn't need a contract then, just an insurance certificate. I expected to get a contract afterwards.

66 I find that to the extent that the second respondent represented that he *would* be the builder to be engaged to carry out the works (assuming that he had no knowledge of the contract), this was a representation as to a future matter for the making of which he had no reasonable grounds.

67 My first reason for coming to this conclusion is, as I have already found, he had knowledge of a building contract that had already been signed, and to which he was not a party. Secondly, there is nothing in the second respondent's subsequent conduct, which shows that he held any genuine expectation, at the time of applying for the insurance certificates, of being awarded the contract. In this respect, my notes of his evidence are as follows:

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[4] In particular, the reference to the correct date of the contract, and the references to the declared contract prices which amounted to the contract sum in fact stipulated in the contract.

Counsel for the applicant	Second respondent's response
You say that you obtained the certificates of insurance because you thought that it would be a good job [for you to undertake]. When did you realise that it wasn't going to be your job?	I don't pay attention. I'm not concerned whether it comes. If it comes, that's good, if not I have something else to do. No harm if I don't get the job.
You never contacted [the applicant] to find out when he was starting the job?	I didn't know Mr Lu. How do I know?
You didn't care about [Mr Lu's job]	No time, no thinking. I was concerned with other jobs
You never went to [the applicant's] site to see whether there was work going on?	Never.
You did nothing more about it?	No.
You didn't apply to cancel the insurances?	No. I forget this one.
Why did you not apply to cancel the insurances when you knew you weren't doing it?	I told you. No time.
How many jobs a year do you do?	I have not had any jobs for 2 years.
Back in May 2011, you say you had so much work, you really didn't care…	No, that's not correct. I was under pressure, so I had to prioritise.
So on this job, you took no steps to get ready to start work?	I had no right to start.
So, contrary to what the insurance certificate says, none of these things you had signed up to?	[unresponsive]
You obtained the insurance certificates so the [third respondent] could carry out work for the applicant. Correct?	I don't know anybody called Lu or Li. I never contacted these people.
But the insurance certificate had Mr Lu's contact details.	If I contacted them directly, my experience tells me that they don't give me the job.
Is this something you've done previously? That is, obtain insurance for a contract that you have not entered into?	Usually I sign a contract with people I trust. This is the first time it has happened to me.

68 If, as the second respondent seemed also to contend, his disclosures to the warranty insurer amounted to nothing more than the declaration of an intention on his part to enter into a domestic building contract with the applicant, being a representation as to a future matter, I find from his

evidence that he had no reasonable grounds for making it, and therefore his conduct is taken to have been misleading.[5]

Causation and Liability

69 There is no contract between the applicant and the second respondent.

70 The applicant's claim is therefore brought under the provisions of the ACL.

71 Section 236(1) of the ACL provides:

> **236 Actions for damages**
>
> (1) [**Recovery of loss or damage**] If:
>
> (a) A person (the claimant) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened [Section 18(1) of the ACL]
>
> the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

72 The applicant claims that had the second respondent not engaged in misleading and deceptive conduct, which I have found occurred, the second respondent would not have obtained the insurance certificates. He submits that Mr Coco would not then have subsequently issued the building permit, in presumed reliance upon the insurance certificates. This effectively resulted, he says, in the third respondent, not being a registered builder, carrying out the works purportedly as an employee of the first respondent.

73 Rather, the applicant says, he would have entered into a contract with a reputable, solvent and registered builder for a similar contract sum ($340,000) and, having done so, would have avoided the completion, rectification and delay costs that were incurred as a result of the third respondent carrying out the works.

74 The first question that arises is whether the circumstances were such that had the applicant not entered into a contract with the first respondent, he would have entered into a contract with a reputable builder for a similar contract sum. The second respondent, a registered builder, gave evidence that he looked at the proposed job, and believed that it would be "a good job to do" at $340,000. The applicant has also tendered a quotation submitted to the applicant by Le Homes Pty Ltd (DB-U 22306) for $210,000 for construction of unit 2 and $140,000 for construction of unit 3- a total of $350,000. I find from these pieces of evidence that had the applicant not entered into the contract, he would have entered into a contract for a contract sum in the order of the price in the contract ($340,000) with a reputable, solvent and registered builder.

75 The question though, is whether the applicant's entry into the contract was, as section 236 of the ACL requires, "because" of the misleading conduct of the second respondent.

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55 Section 4 ACL.

76 In relation to section 18 of the ACL, it is clear that there must be a relevant nexus between the conduct complained of (in this case, the misinforming of the warranty insurer by the second respondent that he was or was to be engaged in the carrying out of domestic building works for the applicant) and the loss or damage suffered. This does not mean, however, that it is always necessary for a claimant (in this case, the applicant) to prove reliance on that conduct.[6]

77 As to how close the connection between the conduct and the loss or damage there must be in order to sustain a claim, "the law looks at what influences the actions of the parties rather than considering cause and effect in mathematical or philosophical terms…the law attributes causality to one or more [of the several considerations], provided it has some substantial rather than negligible effect".[7]

78 The required connection between the relevant misleading conduct and the claimed loss or damage was considered by DP Macnamara (as he then was) in *Neill and Arliel-Isa Hill v Bastecky*.[8] Mr Bastecky, the holder of a DBU builder's registration, signed a building contract, found by the Tribunal to have been intended to assist a sham transaction. He provided the sham contract to a company ("**WPI**"), which intended to undertake building works for the Hills at Lancefield, Victoria. The Tribunal found that WPI fraudulently applied the Hills's signatures to the sham contract. Mr Bastecky subsequently supplied the sham contract to his warranty insurer, and was granted builder's warranty insurance in respect of the proposed building works. The certificate of warranty insurance was subsequently used by WPI to obtain a building permit. WPI subsequently failed during the course of the works.

79 Although the Hills gave evidence that they were introduced to Mr Bastecky as 'their builder", no finding in this respect was made by the Tribunal. The Tribunal found that the works were in fact undertaken by WPI pursuant to another building contract signed by the owners some months previously, and that Mr Bastecky was not the builder. No claim on the warranty insurance could therefore be made by the Hills.

80 The Tribunal also considered the liability of Mr Bastecky under the provisions of the *Fair Trading Act 1999* (now repealed). Section 11 of the *Fair Trading Act 1999* provided:

> 11. **Misleading conduct in relation to services**
>
> A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

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6 See *Miller's Australian and Consumer Law Annotated* 38th edition (2016), paragraph 1.S2.236.15 and cases there referred to

7 Again, see *Miller's Australian and Consumer Law Annotated* (supra) paragraph 1.S2.236.15 and cases there referred to.

8 *Hill v Bastecky* [2006] VCAT 2663.

81 Having found that it was not necessary for the Hills themselves to have been misled or deceived by Mr Bastecky in any particular way,[9] the learned Deputy President found that Mr Bastecky's warranty insurer was misled, by Mr Bastecky's submission of the sham contract, into believing that there was a genuine contract for the carrying out of major domestic building work between the Hills and Mr Bastecky.[10] With regard to causation, he observed:

> [Noting the use of section 11 as a "quasi passing off" remedy, where the applicant is not the person misled and deceived, but the members of the public]
>
> In the present case, it is clear that the [warranty] insurer was misled by Mr Bastecky's submission of the four pages constituting the August 2003 document into believing that there was a genuine contract for the carrying out of major domestic building work between the Hills and Mr Bastecky.
>
> …All that is necessary [for a claim under the precursor provision to Section 236(1) of the *Australian Consumer Law (Vic)*] to be proven is that there is a causal link between the contravention and the damage sustained. Here, the necessary causal connection exists. It was only because Mr Bastecky obtained the apparent indemnity insurance cover by the use of the "sham" August document that WPI was able to obtain the building permit to commence work at Lancefield. Without that [it] could not have done work with a colour of legality. Obviously WPI was concerned to have that colour of legality. Without Mr Bastecky's assistance by way of misleading and deceptive conduct, the arrangement between the Hills and WPI would simply have fallen through.
>
> …The Hills deal with WPI would not have proceeded but for the misleading and deceptive conduct of Mr Bastecky. He could be regarded as responsible for the Hills dealing with a company which became insolvent for performing its obligation in the same way as the negligent valuer was responsible for the consequences of the collapse of the property market in *Kenny and Good Pty Ltd* (1999) 199 CLR 413 because but for the valuation the loan transaction which MGICA insured would not have been entered into.

Findings and Analysis

82 Given that on 5 August 2011, Mr Coco issued the building permit in the name of the second respondent, I find that the third respondent, having received the insurance certificates from the second respondent, provided them to the third respondent.

83 I find that were it not for the second respondent's providing to the third respondent the two insurance certificates, obtained by his own misleading conduct, who in turn provided them to Mr Coco, Mr Coco would not have issued the building permit. Like *Bastecky*, the arrangement between the applicant and the third respondent would simply have "fallen through".

84 It was in consequence of Mr Coco issuing the building permit, in reliance on the insurance certificates, that the third respondent, an unregistered builder, was able to put himself in a position to carry out the building works for the applicant, and cause the applicant to incur the completion, rectification and delay costs that are now claimed by him.

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9 supra at [38]-[40]
10 supra at [41]

85 I therefore find that there is the necessary causal link between the second respondent's engaging in misleading conduct in his representations to the insurer, the subsequent provision of the insurance certificates to Mr Coco, and the damage suffered by the applicant.

86 I therefore find that the loss and damage suffered by the applicant was incurred because of the conduct of the second respondent, such that the second respondent is liable for such damage.

87 I was also referred by counsel for the applicant to the decision of *Theodor v Noonan*[11] in which the question also arose whether a registered building practitioner holding a DBU licence, Mr Noonan, who took no part in the relevant works, but who obtained builder's warranty insurance that, in effect, allowed the works to proceed, should subsequently be liable to the owners. In *Theodor*, the Tribunal was able to find that at the time the building contract was signed by a Mr Prendergast, expressly on behalf of Mr Noonan, a joint venture existed between Mr Prendergast and Mr Noonan. The Tribunal was able to find that Mr Noonan was liable as "the builder" by reference to the law of agency. *Theodor* can therefore be distinguished from the case for me, in which no claim is made that the second respondent was "the builder"— simply that as a registered building practitioner, the second respondent was responsible for starting a chain of events which resulted in a permit being issued, and the domestic building works being carried out by a person who was unqualified to do so.

Further Basis of Liability-Breach of duty of care?

88 In the alternative, the applicant claims damages for breach by the second respondent of his duty of care owed at common law to the applicant.

89 Having found that the second respondent is liable to the applicant for the loss and damage incurred by the applicant, as a result of his misleading and deceptive conduct, it is unnecessary for me to consider this further alleged basis of liability.

Damages

90 The applicant alleges that the works undertaken by the third respondent, purportedly on behalf of the first respondent, were defective. He also alleges that the works were left incomplete at the date of termination on 1 November 2012.

91 The applicant claims the following amounts:

Ref to line item in Tribunal Book 77.	**Description**	**Amount**
1.	Amounts paid to Yarra Water TB 78-82	$2,405.07

[11] [2015] VCAT 1390.

2.	Amount paid to Yarra Water for water tapping TB 83.	$3,749.19
Pt 4	P & L Heating and Cooling TB 84	$1,000.00
3.	Donnaz Undergrounds Pty Ltd Installing water service, connecting to Yarra Valley tapping. TB 85	$3,850.00
Pt 4	P & L Cooling and Heating TB 86	$1,200.00
Pt 4	Real Brite Electrics TB 87	$1,100.00
Pt 5	King Kong Fencing TB 91.	$1,665.00
Pt 5	King Kong Fencing TB 92.	$580.00
Pt 5	As built survey (fence)	$110.00
6.	Amendment to name of building practitioner TB 95.	$2,475.00
7.	Report of Mr Casamento TB 96.	$5,775.00
8.	National Infrastructure Solutions Installing telecommunication infrastructure TB 97.	$1,760.00
9.	Red Energy Pty Ltd Truck appointment TB 98.	$429.00
10.	Bunnings Cooktop TB 99.	$974.00
Pt 21	Bunnings Warehouse Box Hill TB 100-101.	$636.71
11.	GTV Nominees Pty Ltd Driveway construction TB 102.	$15,159.10.
12.	Cleaning TB 103.	$400.00
13.	Fence hire TB 104.	$649.00
14.	Lawn Mowing TB 105.	$200.00
15.	Antenna TB 106.	$330.00
16.	Pest control TB 107.	$660.00
16.	Pest control TB 108.	$408.00
17.	Locksmith TB 109	$660.00
18.	Timetrex Builders (Mario Mazza) Management fee to complete non-structural work	$25,300.00
19.	TZ Electrical, light and power	$14,500.00
TB 77	Painting ($18,000 claimed in “black section”) TB 112	$13,200.00

Pt 21	Cabinetry TB 113	$11,000.00
TB 77	Plumbing including rectification ($18,920 claimed in "black section") TB 115	$18,920.00
TB 77	Plaster, bricks and brick cleaning, ($9,900 claimed in "black section") and carpet (Item 20) All included in TB 117	$12,980.00
Item 22	Rubbish removal. TB 118	$15,070.00
	TOTAL CLAIMED RECTIFICATION AND COMPLETION COSTS SUPPORTED BY INVOICES	**$157,145.07**

92 I disallow the amounts referred to in items 14 and 16 above, amounting to $1,268. I am not satisfied, from the evidence, that the claimed works fell within the contractual obligations of the builder under the contract, or were necessary rectification costs.

93 Other than these amounts, I find from the evidence that the sum of $157,145.07 represents the costs incurred by the applicant in rectifying defective work and completing the works required to be performed under the contract.

94 The applicant also claimed carpentry costs of $15,000 (TB 77 black section) for which, he gave evidence, he paid cash to a carpenter engaged by the rectifying builder. He could not tender any receipts for these payments. For this reason, I disallow this claim.

95 The applicant also claimed $12,163.29 for the estimated cost of appliances other than those referred to in Item 21 above for which, again, he has no receipts.[12] For this reason, I also disallow this further claim.

96 The applicant also sought delay damages under the contract of $3,600. This amount is double the contractual rate of $200 per week set out in Schedule 1, item 19 of the contract, for the 9 week period between 30 August 2012, the date for completion and 1 November 2012, the date of termination. The contractual rate is doubled because the claimed period of delay is said to affect the completion of two units, not just one. I am not satisfied on the balance of probabilities that the applicant would not have incurred such delay damages had the applicant entered into a contract with a reputable, registered and solvent contractor. The proposition that he would not have done so is, I consider, too speculative.

97 I find that had the second respondent not engaged in misleading and deceptive conduct, the applicant would have entered into a contract with a reputable builder for a sum approximately the same as the contract sum, and that he would not have incurred total damages, as calculated below, in the sum of **$104,877.07**.

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[12] The total of $12,163.29, $636.71 (Item 21) and $11,000 (pt Item 21 above) is $23,800. (see TB 77).

CLAIMED RECTIFICATION AND COMPLETION COSTS	**$157,145.07**
ASSESSED RECTIFICATION AND COMPLETION COSTS	**$155,877.07**
AMOUNT PAID TO THIRD RESPONDENT	**$289,000.00**
TOTAL COST	**$444,877.07**
LESS CONTRACT SUM	**$340,000.00**
TOTAL	**$104,877.07.**

APPORTIONMENT

98 Sections 24AF, 24AH and 24AI of Part IVAA of the WA (the "**apportionment legislation**") provide as follows:

> **Application of Part**
>
> **24AF**
>
> (1) This Part applies to—
>
> (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and
>
> (b) **a claim for damages for a contravention of section 18 of the Australian Consumer Law (Victoria).**
>
> (2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.
>
> (3) A provision of this Part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law [**emphasis added**].
>
> **Who is a concurrent wrongdoer?**
>
> **24AH**
>
> (1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
>
> (2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.
>
> **Proportionate liability for apportionable claims**
>
> **24AI**
>
> (1) In any proceeding involving an apportionable claim-
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of *the loss or damage claimed*[13] that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and

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13 But see observations of Byrne J in *Gunston v Lawley* [2008] VSC 97 at [58] where his Honour chooses to construe these words as a shorthand version of "the proved loss and damage which is the subject of the claim", which construction is respectfully adopted in these Reasons.

(b) judgment must not be given against the defendant for more than that amount in relation to that claim.

(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim-

(a) liability for the apportionable claim is to be determined in accordance with this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

Is the second respondent entitled to have his liability to the applicant limited?

99 The claim of the applicant against the second respondent, being one for misleading and deceptive conduct in contravention of the *Australian Consumer Law (Victoria),* which I have found has been proved, is an apportionable claim within the meaning of section 24AF(1)(b) of the WA.

100 It became clear to me, during argument, that he says that he cannot be the only one to blame for causing the applicant's loss and damage. The second respondent is unrepresented. Understandably, he has not sought to submit, by way of defence, that either of the first or third respondents is a concurrent wrongdoer in relation to the applicant, and that his own liability should therefore be limited to an amount reflecting that proportion of the loss or damage claimed that the Tribunal considers just having regard to the extent of his responsibility for the loss or damage claimed by the applicant.[14]

101 Section 24AI(b) of the WA requires the Tribunal in the case of an apportionable claim, not to give judgment for more than such amount. I therefore consider that the second respondent's failure to plead by way of defence that the claim must be apportioned among the remaining respondents does not mean that the Tribunal should not undertake this task, especially in circumstances where he attributes some of the blame to others.

102 It follows that if I find that the second respondent is a concurrent wrongdoer, together with the first and/or third respondent, it will therefore be necessary for me under section 24AI(a) of the WA to determine, the extent to which his liability should be limited to an amount reflecting that proportion of the loss or damage claimed that I consider just, having regard to the extent of his responsibility for the loss or damage claimed by the applicant.

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[14] See section 24AI *WA.*

Submissions on apportionment

103 Counsel for the applicant contends that damages should be apportioned principally between the second respondent and the third respondent. In closing submissions, he submitted that their respective apportioned liabilities to the applicant be in the region of 80%.

104 Counsel for the applicant submitted that the first respondent's extent of responsibility for the loss or damage should be for the balance. It should, be fixed at this lower end, he contended, because the first respondent was the victim of the third respondent who had "gone on a frolic" without the first respondent's authority. This appears from the first respondent's defence.

105 The second respondent submitted that the liability of the respondents should be apportioned between the first respondent as to 70%, the third respondent as to 20% and Mr Coco as to 10%.

106 Mr Coco is no longer a party to the proceeding, and so I am unable to consider his comparative responsibility for the loss and damage incurred by the applicant.[15]

107 I was assisted by these submissions. The respective apportionments are of course, a matter for determination by the Tribunal.

To what extent should the liability of the second respondent be limited?

108 I have found that the second respondent is liable to the applicant for the loss and damage incurred by the applicant because of the second respondent's misleading and deceptive conduct.

109 I have found that there are other wrongdoers whose acts or omissions caused the loss or damage the subject of the applicant's claim (see below).

110 The second respondent is therefore a concurrent wrongdoer within the meaning of section 24AH(1) of the WA, and his liability should be limited to an amount reflecting that proportion of the loss or damage proved that I consider just having regard to the extent of his responsibility for the loss or damage.

111 There is no neat formula that can be applied to apportioning the extent of a respondent's responsibility for loss or damage. I am guided by the observations of Kaye J that, in determining apportionment under Part IVAA of the WA, his Honour stated that it is proper to take into account both a comparison of the culpability of the parties, and also the relative importance of their acts in causing the injury which was the subject of the claim.[16]

112 I am satisfied that without the misleading and deceptive conduct on the part of the second respondent, the arrangement between the applicant and the

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15 See section 24AI(3) WA.

16 *Spiteri v Roccissano* [2009] 22 VR 596

third respondent would have fallen through. That is why I allocate the greatest share of the liability to the applicant against the second respondent.

113 The second respondent, by virtue of having a DBU registration, obtained certificates of insurance in the name of an owner who, on the second respondent's own evidence, he had never met. He was also in a position to specifically state the name of a project at a property (the owner's) that again, on his own evidence, he had never visited or intended to visit.

114 He was in a position to provide the certificates he obtained to the third respondent, and did so. As an experienced builder, he must be taken to have provided the insurance certificates to the third respondent, knowing that he may well use them for the purpose of obtaining a building permit naming the second respondent as the builder, but that the works may well be subsequently undertaken by someone who is not a registered builder. This in fact occurred.

115 I also accept the applicant's submission that the second respondent's standard of care is informed by Regulation 1502 of the *Building Regulations 2006*, which states:

> A registered building practitioner must-
>
> (a) perform his or her work as a building practitioner in a competent manner and to a professional standard; and…

116 I consider that the expression "work as a building practitioner" in this Regulation extends to all matters necessarily ancillary to the carrying out of the building works, such as the obtaining of warranty insurance certificates necessary for a building permit to be issued. I find that, at the very least, by obtaining the insurance certificates in circumstances where he was not assured of carrying out the works for the applicant, the second respondent fell short of the degree of competence and professionalism required of him by Regulation 1502.

117 The exercising by a registered builder of his or her rights in a proper manner, lies at the heart of building control in Victoria. A registered builder is conferred with a right to apply for a warranty insurance certificate for works proposed to be carried out by him which, when abused, results in uninsured loss and damage of the type incurred by the applicant.

118 By the second respondent's obtaining of the insurance certificates, through his own misleading and deceptive conduct, and by his own wilful failure to follow up with the applicant or the third respondent on the status of the subsequent works, the entire sequence of events leading to the applicant's loss and damage was, I find, set in motion. Put another way, in the absence of the second respondent obtaining the insurance certificates, it is unlikely that the applicant would ever have been put in a position where he had domestic building works carried out by someone who was not a registered builder.

119 I have therefore found that of the three respondents, the second respondent bears greatest responsibility for the loss and damage proved, and that his liability should be limited to 60% of the applicant's loss and damage.

To what extent should the liability of the first and third respondents be limited?

Are the first and third respondents concurrent wrongdoers?

120 In order to find that the first and third respondents are concurrent wrongdoers, and therefore apportion some responsibility for the applicant's loss and damage to them, I must firstly be satisfied that each would be *liable to the applicant* for such proportion.[17]

121 I am not convinced that the submission on behalf of the applicant that the first respondent was a victim of the third respondent's dishonest conduct, was supported by the account of the applicant. The applicant gave evidence of the contract having been signed by him following meetings jointly with both the first respondent and the third respondent

122 I am satisfied from the evidence that the applicant was introduced to the first respondent through a mutual acquaintance, a Mr Michael Po. The first respondent informed the applicant that he was a builder, and provided the applicant with a quotation for the works. The applicant gave evidence that the first respondent told the applicant that the third respondent was one of his "employees" and that the third respondent would "look after the job" in coordination with the first respondent. The first respondent was present when the applicant met the third respondent on site.

123 This evidence is at odds with the allegations in the first respondent's Points of Defence in which the first respondent states that the third respondent:

(a) did not have the authority to contract on behalf of RCH;

(b) was not authorised to use the RCH account to receive payment of progress claims.

124 The fact that neither the first respondent nor the third respondent gave evidence at the hearing makes it difficult to reach any firm conclusions in regard to these matters.

125 I find however that, as a consequence of the discussions between the applicant on the one hand, and the first and third respondents on the other, the applicant was of the view that the works would be undertaken by "one of the first respondent's employees", said to have been the third respondent. The applicant also gave evidence that at a later stage, after he received the insurance certificates, the first respondent informed the applicant that he was in a "partnership" with the third respondent. The applicant was also under the impression, from the representations made during these

[17]. See *Williams Civil Procedure–Victoria*, Commentary to Section 24AH *WA*.

discussions, that the second respondent would "look after the project" and "coordinate with [the first respondent]".

126 Further, the applicant gave evidence that upon receiving the insurance certificates, he noticed that the named builder was not the first or the third respondent, and he asked the third respondent about the identity of the named builder. The third respondent replied that the named builder nominated in the insurance certificate, the second respondent, was "one of the people involved in Ryan Cooper Homes". The applicant gave evidence that he subsequently received a copy of the building permit. He said that he made no further enquiry about the status of the second respondent, also nominated in the building permit, because he had been previously reassured by the first and third respondents about his status, when he raised the same question after receipt of the insurance certificates.

127 The second respondent was never an employee of or in partnership with the first respondent, contrary to what the first and third respondent represented. I find that the representations made by the first and third respondents were untrue.

128 I find from all the evidence that both the first and third respondents engaged in misleading and deceptive conduct towards the applicant, and are liable to the applicant for having done so. As such, they are concurrent wrongdoers within the meaning of section 24AH(1) of the WA, and their respective liabilities should be limited to an amount reflecting the extent of their respective responsibilities for the loss and damage sustained by the applicant.

Apportionment Against the First and Third Respondents

129 For the reasons I have given, I have found that the second respondent is therefore liable for meeting the bulk of the proved loss and damage incurred by the applicant, which I have assessed at 60%.

130 I also find that, in reliance upon the representations made by the first and third respondents, the applicant was persuaded not to advance his enquiries about the apparent involvement of the second respondent in the works, as may have led the works being brought to an end before they had even started. The first and third respondents therefore bear some responsibility for the applicant's loss and damage.

131 I limit the first respondent's liability, having regard to his responsibility for the loss or damage at 15%.

132 I limit the third respondent's liability, having regard to his responsibility for the loss or damage at 25%. I consider that his liability should be greater that the first respondent's, because not only was he a party to the misleading and deceptive conduct to which I have referred, but he also carried out the works defectively and failed to complete the works.

Orders

133 It will be necessary for me to fix quantum, and so I make the orders in the form attached.

134 I will reserve on the question of costs.

A Kincaid
Member