VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP213/2017

CATCHWORDS

Dispute regarding terms of engagement of excavator; services provided by excavator; whether services provided with due care and skill; s 60 Australian Consumer Law; adequacy of evidence

APPLICANT	Primesite Pty Ltd ACN 135 952 135
FIRST RESPONDENT	James Mylonakis
SECOND RESPONDENT	Peter Mylonakis
THIRD RESPONDENT	Artemis Mylonakis
WHERE HELD	Melbourne
BEFORE	Member A Eastman
HEARING TYPE	Hearing
DATE OF HEARINGS	12 December, 2017:13 December, 2017 (including site inspection); 21 December, 2017; 21 March, 2018
DATE OF WRITTEN SUBMISSIONS	4 April, 2018
DATE OF ORDER AND WRITTEN REASONS	21 May, 2018
CITATION	Primesite Pty Ltd v Mylonakis (Building and Property) [2018] VCAT 727

ORDER

1. Having:
   (a) determined the applicant must pay the respondents the sum of $2,318.00;
   (b) determined the respondents must pay the applicant the sum of $13,182.25;
   (c) set off the sum of $2,318 against the sum of $13,182.25;

   the Tribunal orders that the respondents must pay the applicant the sum of $10,864.25.

2. Having regard to s 115B(1) of the *Victorian Civil and Administrative Tribunal Act 1998* and being satisfied the applicant has substantially succeeded in its claim, the Tribunal orders the respondents must reimburse the applicant the application fee of $292.70.
3. Costs reserved. By 4.00 p.m. on 4 June 2018 the parties must make any application for costs to the Tribunal.
4. Any application for costs is to be referred to Member Eastman who will make orders in chambers as to the conduct of any such costs application.

A Eastman
Member

APPEARANCES:

For Applicant	Mr J. Gray, solicitor.
For Respondents	Mr G. Konstantinidis, solicitor.

REASONS

1 The applicant, Primesite Pty Ltd (**Excavator**), is an earthmoving contractor. Mr Ayhan Askin is the company's sole director. He holds an excavator's license and is also a registered building practitioner.

2 The first respondent, James Mylonakis, lives in a house that is owned by his parents, Peter Mylonakis and Artemis Mylonakis, the second and third respondents (**parents**). Mr Mylonakis wanted to undertake some works to update the exterior of the home, including constructing a car port and a new driveway. There is no dispute that Mr Mylonakis was authorised by his parents to proceed to have the works undertaken.

3 In August 2016, the respondents engaged the Excavator to carry out the excavation work required for the car port and other works. The Excavator carried out the work over 14 days in August and September 2016 and then issued an invoice to Mr Mylonakis requesting payment.

4 The dispute in this proceeding concerns the terms of the verbal agreement entered into between the parties and the standard of the services provided by the Excavator. The Excavator claims the sum of $13,182.25 for the work undertaken by it. The respondents deny they owe that sum and say, but for the counterclaim, the amount owed to the Excavator would be in the order of $6,951.60.

5 By way of counterclaim, the respondents say that the Excavator was negligent in carrying out its work at the Site. They base their claim under the *Australian Consumer Law* (**ACL**) and say the Excavator breached the guarantee provided by the ACL that the services would be carried out with due care and skill. The respondents seek the sum of $22,320.00 which they say are the costs they have directly incurred as a result of the Excavator's negligence. The Excavator denies it failed to carry out the excavation work with due care and skill.

THE HEARING

6 Mr Gray, solicitor, appeared on behalf of the Excavator. The Excavator's evidence was given by Mr Askin, who had conducted the discussions with Mr Mylonakis and carried out the work on behalf of the Excavator.

7 Mr Mylonakis and his parents were represented by Mr Konstantinidis, solicitor. Evidence was given by Mr James Mylonakis and Mr Alex Tzelepis, registered building practitioner, (**Builder**).

8 At the conclusion of the third day of hearing on 22 December, 2017, I gave the parties leave to request further hearing time if they believed it was required. The next day Mr Gray requested an additional 2-hour hearing to further cross examine the Builder, which was ordered and the proceeding re listed for 21 March, 2018.The Builder refused to attend the further hearing.

9 Directions were then made for the filing and service of concise written submissions and they were received by the Tribunal on 4 April, 2018.

THE LAW

10 The *Australian Consumer Law and Fair Trading Act 2012* (Vic) (**ACLFTA)** provides that the Tribunal may hear and determine a 'consumer and trader dispute' which is defined to include a dispute which arises between a purchaser of goods or services and a supplier of goods and services.[1] The Tribunal is empowered to make orders for the payment of damages under s 184(2) of the ACLFTA, including damages in the nature of interest.[2]

11 The ACLFTA also confers jurisdiction on the Tribunal in respect of claims under the ACL.[3] The ACL provides certain statutory guarantees to consumers about the goods and services they are purchasing. In particular, there are guarantees that goods will be of an acceptable quality and that the product will be fit for the purpose for which it was intended.[4] There is a guarantee that services supplied will be provided with due care and skill.[5]

12 Under the ACL, where there is a breach of the guarantee in relation to services, a consumer may recover damages against a supplier for any loss suffered because of the failure of the supplier to comply with the guarantee, if it was reasonably foreseeable that the consumer would suffer loss as a result of such a failure'.[6]

THE ISSUES

13 The issues which arise for consideration in this dispute are:

a) What were the terms of the agreement entered into between the parties?;

b) Were the Excavator's works defective?;

c) If there were defects, were they as a result of the Excavator's failure to supply its services with due care and skill? and;

d) If yes to (c), what loss have the respondents suffered?

THE CLAIM

14 By invoice dated 21 September, 2016 (**invoice**) the Excavator claimed the sum of $13,844.75 from Mr Mylonakis for the 14 days worked at the Site, less an amount deducted for three items relating to fence post damage, balcony tile damage and 'extra concrete for excavation toward the driveway side that was away from the steps'. During the hearing the Excavator conceded that the amount sought in its invoice ought to be reduced by $662.50. The amount claimed by the Excavator was therefore $13,182.25(**Claim**). The Excavator seeks interest on the Claim.

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1 ss 182(1) & 184(1)of the ACLFTA.
2 s 184(2)(b)(ii) of the ACLFTA.
3 s 224 of the ACLFTA.
4 ss 54 & 55 of the ACL.
5 s 60 ACL.
6 ss 267(4) of the ACL.

15 It is not disputed that:

a) An oral agreement was entered into between Mr Mylonakis, for and on behalf of the respondents, with Mr Askin, for and on behalf of the Excavator;

b) the amount charged by the Excavator would be based on a rate of $85 per hour and a rate of $50 per km travelled;

c) etag charges and tip fees would be charged, where applicable.

16 The dispute arises as a result of the parties' differing views as to:

a) when would the hourly rate and rate per kilometres travelled commence? Was it from the time Mr Askin left the depot until he returned to the depot, as maintained by the Excavator? Or was it, generally speaking, not to commence until Mr Askin arrived at the Site, as maintained by Mr Mylonakis. The answer to this question, in turn, has a bearing on the Excavator's entitlement to pass on a number of etag charges to Mr Mylonakis;

b) which tip was to be used for the excavated material? Was the Excavator only permitted to use the GB landfill tip which was 12.5 kilometres from the Site and which did not require etag charges, as maintained by Mr Mylonakis? Or was it agreed the Excavator would initially use a tip in Clayton, 25 km from Site, and then go to the GB Landfill tip, once Mr Askin considered it appropriate to do so?; and

c) how many hours were, in fact, worked at the Site? The Excavator and Mr Mylonakis have differing records of time spent at the Site.

ISSUE 1: WHAT WERE THE TERMS OF THE AGREEMENT?

A. When was time and kilometres travelled to commence?

Excavator's evidence

17 Mr Askin said that it was agreed he would be paid $85 per hour from the time he left the depot in Clayton, until he arrived at the Site, and from the time he left the Site until he returned to the depot. He said it was agreed he would be paid for time spent travelling to and from the tip, whether that occurred during the day whilst at the Site, or, if he went to the tip either first thing in the morning on the way to the Site or, at the end of the day on the way home. Further, Mr Askin said, in addition to time, he would be paid an amount for the kilometres travelled, based on $50 per 100km, again from the time he left the depot until his return. Mr Askin maintained that Mr Mylonakis knew that when the truck left the yard he was getting charged and that the charge only stopped when the truck gets back to the depot.

18 The Excavator relied upon the following documents:

a) a hand-written note Mr Askin prepared and handed to Mr Mylonakis after Mr Askin had completed two days of work at the Site.

Relevantly, the note details the number of hours worked on the first day, being 8 hours, refers to the rate of $85 per hour and records etag fees of '$40 x 2'. The note relating to the second day again includes the number of hours worked, being 9 hours, the rate of $85 per hour, and etag fees of $40. It notes 'fuel surcharge 300 km $50 per 100km' (**handwritten note**);

b) a text message sent by Mr Mylonakis to Mr Askin on 25 August 2016 (being, according to Mr Askin's records, the third day of work) which states 'next time you come can you please come earlier and with the big truck to make it worthwhile for me as I'm still paying an hour prior and from here as yesterday we didn't achieve much'(**Mr Mylonakis' text message**); and

c) etag charges incurred during the period work was carried out at the Site.

19 Mr Askin said an etag charge of $40 represented travel to and from the Site, being approximately $20 each way, and that a round trip from the depot to the Site and back was approximately 100 kilometres.

Mr Mylonakis' evidence

20 Mr Mylonakis said that he discussed with Mr Askin when the rate per kilometre would be charged and that it was agreed that he would not be charged until Mr Askin reached the Site, unless Mr Askin had a load to drop off at the tip either at the start of the day, or the end.

21 Mr Mylonakis said the first time he was aware of etag charges was when he received the handwritten note from Mr Askin. He said at that time he asked why he had been charged etag fees and queried which toll ways it related to. He said Mr Askin said it was due to attending the tip at Clayton. Mr Mylonakis said that he agreed with the etag charges for the first day of work as that was when Mr Askin brought the machinery to Site and that was 'fair enough'.

Respondents' written submissions

22 It was submitted, in the respondents' closing written submissions dated 4 April, 2018 (**respondents' closing submissions**), that there were two occasions when Mr Askin left the Site at the end of the day with a load for the tip and therefore 'only on those two occasions it was agreed that Mr Askin would charge for kilometres travelled and hours worked starting from the time Mr Askin left his yard in the morning'. Otherwise, it was submitted, kilometres travelled and hours worked commenced when Mr Askin arrived at the Site.

23 The respondents' closing submissions also stated that it was agreed 'kilometres travelled from the Applicant's yard to the Work Site will only be charged on the first and last days for the purposes of delivering equipment'. It went on to state:

> …the Respondents submit that it was never agreed upon **nor discussed** (emphasis added) that kilometres will be charged from the Applicant's Yard to the Work Site each day. Further the Applicant's (sic) submit that this is not to be implied in the agreement and that it is unfair and/or unreasonable and/or not in accordance with the industry standard to charge for kilometres travelled to and from the Work Site.

24 No evidence was led on the issue regarding industry standards.

Findings: when was time and kilometres travelled to commence

25 It was not disputed that all the discussions and interactions between the parties occurred between Mr Askin, as director for and on behalf of the Excavator and Mr Mylonakis. It was also not disputed that Mr Mylonakis acted with the authority of his parents and that all were parties to the agreement.

26 I find that the dispute between the Excavator and the respondents is a 'consumer and trader dispute' within the meaning of the ACLFTA.

27 I prefer Mr Askin's evidence of the terms of the agreement entered into between the parties and therefore find that it was agreed the Excavator would be paid both an hourly rate of $85.00 per hour and a rate of $50 per kilometre travelled from the time Mr Askin left the depot, until he returned to the depot, including any time and distance travelled to the tip. I make this finding for the following reasons:

a) The handwritten note prepared by Mr Askin after two days of work is consistent with being paid for both time and distance from the time he left the depot. Neither party's records of what occurred in the first two days on Site recorded travel time to a tip. Therefore, the etag references and kilometres travelled recorded on the handwritten note must have reflected time travelled to and from the Site and could only have been referring to charges for kilometres travelled to and from the Site. The entry for day 2 noted 300km. This is consistent with the Excavator making 3 round trips between the depot and the Site and with the etag charges.

b) Mr Mylonakis' text message referred to the fact he was paying for 'an hour prior to attending the Site'. That statement was not made in reference to an attendance at a tip prior to attending the Site, which is the only time Mr Mylonakis now says it was agreed that the Excavator could charge kilometres and time travelled after leaving or before coming to the Site. Further, I note the date the text was sent, being on 25 August, 2016, was not one of the two dates when Mr Mylonakis agreed he would pay for tip time, being 7 and 12 September, 2016. Accordingly, in my opinion, the text is consistent with the Mr Askin's account of the agreement and demonstrates Mr Mylonakis' understanding of it.

c) Further, the statements made in the respondents' closing written submissions were not consistent with:

(i) the evidence given by Mr Mylonakis at the hearing. During the hearing he said he had a discussion with Mr Askin in which Mr Askin said he would not charge Mr Mylonakis until Mr Askin reached the Site. However, the closing submissions state a charge for kilometres travelled was never discussed.

(ii) the statements in the respondents' closing submissions itself. On the one hand, it is said that a charge for kilometres travelled was never discussed yet, under the heading, 'How would hours be charged?' it stated that 'on two occasions it was agreed that the Excavator would charge for kilometres travelled from when he left his yard – and that was when he left to go to the tip on the way home'. A few paragraphs earlier in the respondents' closing submissions it is stated the Excavator would charge kilometres travelled on the first and last day 'for the purposes of delivering equipment'.

d) It appeared to me Mr Mylonakis' evidence and the respondents' closing submissions, in parts, sought to set out what Mr Mylonakis believed was a fair basis for an agreement - rather than what in fact was agreed. The evidence I must consider is not what Mr Mylonakis might now think is fair or what, looking back at the arrangement, he might think is reasonable.

B. Was the Excavator only permitted to use the GB Landfill tip?

Excavator's evidence

28 Mr Askin said that he discussed with Mr Mylonakis the differing requirements of the GB landfill tip with the Clayton tip. Mr Askin said he told Mr Mylonakis that GB Landfill were much stricter in their requirements and that if the excavated material was not sorted properly, he would be fined and that would then be a charge that Mr Mylonakis would need to pay. Mr Askin said that Mr Mylonakis agreed that, rather than run that risk, Mr Askin would initially go to the Clayton tip and he would use the GB landfill tip only after he was able to drop 'clean' suitable material at GB Landfill. The Excavator's invoice records the GB Landfill tip was used later on during the works.

Mr Mylonakis' evidence

29 Mr Mylonakis said that it was as a result of him querying the etag charges in Mr Askin's handwritten note that a discussion arose as to which tip would be used. He said Mr Askin had told him he intended to use the Clayton tip but had said it was Mr Mylonakis' choice. Mr Mylonakis said he then directed Mr Askin to use the tip closest to the Site, being the GB Landfill tip. During the hearing Mr Mylonakis posed the question to the

effect 'why would I agree to pay for a tip which was twice as far away and which required etag fees to be paid?'

30 When asked whether he ever queried the time away from the Site by Mr Askin when trips to the tip were made, Mr Mylonakis said he had not. When it was put that it would be expected that a trip to the Clayton tip would take much longer than a trip to the GB landfill tip and that this may have raised concerns with him with time spent away from the Site, he said it had not at the time.

31 Mr Mylonakis said he spoke to his Builder about the different tips and that the Builder had told him that the GB Landfill tip could accept all material.

32 Mr Mylonakis produced evidence to prove the GB Landfill tip was closer to the Site.

Findings: which tip was Excavator to use?

33 I prefer Mr Askin's version of the agreement that he would initially use the Clayton tip and then, later on, would use the GB Landfill tip. Mr Askin gave evidence of his experience with the two tips and his preference to use the Clayton tip initially where he considered the material would be readily accepted without any risk of the material being rejected or a fine being imposed if the material was deemed unsuitable. The dates in his invoice of later attendances at the GB landfill tip reflects his view of the agreement.

34 I am satisfied that the records produced by the Excavator verify Mr Askin's attendance at the Clayton tip and later the GB Landfill tip and that Mr Askin has charged according to the time spent attending those tips.

35 In my opinion, Mr Mylonakis' evidence reflected more what he thought should have been agreed, rather than what was actually agreed, and appeared to be based on information he subsequently obtained. Mr Mylonakis produced evidence to prove the GB Landfill tip was closer to the Site – I accept that it is. However, the issue I must determine is whether it was agreed the Excavator would only ever attend that tip. Mr Mylonakis said the issue of the tip was raised by him after he saw the etag charges on Mr Askin's handwritten note. As I have said, those etag charges relate to the Excavator's travel to and from the Site. Further, I note no evidence was led or given by the Builder about the alleged discussion Mr Mylonakis said he had with him regarding the different tips and that the Builder had told him that the GB Landfill tip could accept all material.

C. What were the number of hours worked?

Excavator's evidence

36 In terms of the hours worked each day, Mr Askin said he kept a record on his phone of the hours worked and he used that to form the basis of details included in his invoice. He said he had cross checked the dates and hours worked with his etag records which were produced during the hearing. He

also produced his phone which recorded time spent each day on-site in one entry dated 14 September, 2016.

37 Mr Askin submitted etag invoices for the duration of the project which he said supported the etag amounts claimed in the Excavator's invoice dated 21 September 2016.

Mr Mylonakis' evidence

38 Mr Mylonakis said he kept a record on his computer of the time spent at the site by Mr Askin. He agrees with the number of days worked by Mr Askin, being 14, but the dates he said Mr Askin attended differed from the dates given by Mr Askin. I note also that the print out of the text messages which passed between the men differs by one day in terms of the dates the messages were sent. During the hearing Mr Mylonakis conceded his print out was incorrect.

39 Further, the number of hours Mr Mylonakis has recorded for each day worked differs from that recorded by Mr Askins. Mr Mylonakis did not dispute that he was not always outside when works were being undertaken but said he could hear when machinery was being turned on and off.

40 Mr Mylonakis did not dispute that the etag records correlated with the amounts charged in the Excavator's final invoice and represented the trips made by Mr Askin from the depot to the Site and back again. The issue Mr Mylonakis had with the amounts charged was, with the exception of the etag charges and travel time charged for the first two attendances at the Site (being the ones recorded in the note) which he agreed to pay, Mr Mylonakis said it had been agreed that he would only be charged for time once Mr Askin reached the Site – unless Mr Askin was travelling to the tip on his way home from the Site or prior to coming to Site in the morning.

41 The amount which Mr Mylonakis says is owing to the Excavator is based on his record of hours which Mr Askin worked at the Site together with his calculation of distance and time which:

a) would have been saved had the Excavator used the GB Landfill tip as he maintains had been agreed; and

b) allows for a deduction in the time and kilometres charged for travelling to and from the Site (other than the first and last day or the two times Mr Mylonakis allows the Excavator for attending the tip).

Findings: hours worked

42 It seems to me the main difference in the number of hours each party says can be charged per day is accounted for in the differing views of whether travel time to and from the Site is to be allowed. I say this because the total hours charged by the Excavator is 129.5 hours. Mr Mylonakis says the Excavator is entitled to charge for 93 hours. Mr Mylonakis says he has been charged for 28 hours of travel time to and from the Site and that he has been overcharged by 22 hours (presumably because Mr Mylonakis concedes

travel time was allowed on two occasions Mr Askin attended the tip on the way home).

43 I am satisfied the Excavator has proven, on balance of probabilities, that the amounts claimed in its invoice are substantiated by not only Mr Askin's record of time spent at the Site, but by the etag records which confirm travel to and from the Site and the tips. In this regard, there was no dispute by Mr Mylonakis that the amounts claimed in the Excavator's invoice properly reflected the kilometres and hours travelled and etag fees charged if it was accepted the Excavator was entitled to charge on the basis alleged by him, namely, from the time he left the depot in the morning until he returned at night. I have found he was entitled to charge on that basis.

44 Mr Mylonakis challenges the accuracy of the number of hours recorded by Mr Askin whilst on Site. He said he kept a log on his computer of the time worked whist Mr Askin was on site. Mr Askin said he also kept a record of hours worked by recording them on his phone, which was shown to me at the hearing. Given Mr Mylonakis said he was not outside the entire time Mr Askin was on site and that he based some of his record of hours on when he heard the machine being turned on and off, I prefer the records kept by Mr Askin.

Amount owing on the Claim

45 Accordingly, noting the Excavator amended its Claim to $13,182.25, I find that the respondents owe the Excavator the sum of $13,182.25 for the work carried out at the Site.

46 The Excavator sought interest on the amount owed to it. The Excavator submitted it was entitled to interest 'since this compensates the Applicant for foregone funds in hand'.

47 Section 184(2)(b) of the ACLFTA provides that the Tribunal 'may' order damages in the nature of interest. Before making such an order the Tribunal must be satisfied it is appropriate to do so. I am not satisfied it is appropriate in this instance to award interest on the amount owing to the Excavator because:

a) There is no contractual entitlement to award interest;

b) There was no evidence given in support of the claim of loss suffered by the Excavator because it was deprived of the use of the money; and

c) In its invoice, the Excavator claimed the amount of $13,844.75. During the hearing, the Claim was amended to $13,182.25. I have found some works carried out by the Excavator were not carried out with due care and skill. I have therefore found that the respondents are entitled to damages in the sum of $2,318.00 on the Counterclaim and that this sum is to be set off against the amount otherwise owed to the Excavator.

THE COUNTERCLAIM

48 The respondents say that the Excavator was negligent in carrying out its work at the Site and that Mr Askin did not exercise due care and skill when providing the excavating services.

49 It is not disputed that:

a) a building permit dated 26 July 2016 was obtained and issued to the parents for works described as 'construction of carport, front fence and retaining wall';

b) Mr Askin was provided with engineering drawings and site plans which formed part of the building permit documentation. The retaining wall referred to in the building permit documentation related to the removal of the neighbour's side retaining wall and replacement with a new retaining wall to be constructed on the neighbour's boundary;

c) in their discussion about the proposed works, Mr Mylonakis told Mr Askin that, in addition to the works detailed on the engineering drawings and site plans, he also wanted additional works to be carried out, namely, a brick garden box constructed in the back garden and the removal and replacement of the existing retaining wall on the house side of the driveway. The construction of the garden box and the new retaining wall closer to the house required a trench for the footings to be excavated;

d) Mr Askin agreed to carry out the works requested by Mr Mylonakis; and

e) a building permit was required, but not obtained, for the removal of the existing house side retaining wall and the construction of the replacement house side retaining wall.

50 In the Reply to the Applicant's Claim and Counterclaim dated 21 April 2017 the respondents' described the Excavator's negligence in carrying out the works as:

a) Performed work on 13 September, 2016 during heavy rain causing major soil collapses and flooding; and

b) Did not adhere to the plans and removed excessive amounts of soil causing significant and major damage to property, soil collapse and flooding.

51 In the respondents' closing submissions, in addition to repeating the allegations of negligence described above, the respondents also submitted that the Excavator's acts of removing the house side retaining wall without the appropriate plans and permits; and/or the direct instructions/supervision/approval of the Builder and/or engineer meant that Mr Askin did not use an acceptable level of skill or technical knowledge when providing these services; and did not take all necessary care to avoid

loss or damage when providing these services. The respondents further said that it was unsafe and dangerous to excavate so close to the foundations of the house and beneath the stairs and a reasonable person in Mr Askin position would have refused the instructions.

52 My first task is to determine, based on the evidence before me, whether there were defects in the works carried out by the Excavator. In the respondents' closing submissions, it appears to be submitted that because the Excavator did not have a permit to do the excavation work, the Excavator is now liable for all costs which have been incurred by Mr Mylonakis and his parents, regardless of whether the works were defective or not. I reject this submission.

53 The statutory guarantees with respect to services provided to consumers under the ACL apply to the services provided by the Excavator to the Mr Mylonakis and his parents. In order to succeed in their claim under the ACL, the respondents must prove that the Excavator has failed to carry out the excavation works with due care and skill and that as a result they have suffered loss and damage.

54 Mr Mylonakis and his parents claim $22,320.00 which they say are the costs they have incurred as a direct result of the Excavator's failure to perform the excavation works with due care and skill.

55 The works performed by the Excavator which are alleged to have required rectification were described in the respondents' closing submissions as follows:

a) excavating too close to foundations of the house and removing excessive soil under the stair case when digging the trench for the house side retaining wall;

b) removing excessive amounts of soil when excavating the trench from the stairs to the front of the house on the house side of the driveway;

c) excavating the trench for the house side retaining wall during heavy rain on 13 September, 2016

d) removing excessive amounts of soil when excavating trenches along the neighbours side of the driveway;

e) removing excessive amounts of soil when excavating footings for the garden box in rear yard;

f) damaging driveway/crossover requiring additional concrete to repair;

g) damaging neighbours side fence, requiring it to be replaced;

h) failing to remove concrete and soil left on site and failure to complete excavation of front fence trench.

56 I note in addition to the above, the respondents also claim an amount of $385 for damage caused to a veranda tile broken by the Excavator.

57 I will now separately consider each of the areas of work alleged to be defective.

ISSUES 2 & 3: WERE THE EXCAVATOR'S WORKS DEFECTIVE? IF SO, WERE THEY AS A RESULT OF EXCAVATOR'S FAILURE TO SUPPLY SERVICES WITH DUE CARE AND SKILL?

House side retaining wall

58 The three areas of complaint with respect to the works associated with the house side retaining wall are described in paragraphs 55(a) to 55(c) above.

Excavator's evidence

59 Mr Askin said that Mr Mylonakis asked him to remove the existing house side retaining wall, including the bricks, the existing concrete foundations and the refuge from the garden bed which the retaining wall supported.

60 When asked whether he ever considered propping was required whilst the works were being undertaken Mr Askin said that, in his experience, as long as the next trades were ready to pour the concrete for the footings once the trench was dug, there was no requirement for propping. He said in his experience, the method used of excavating the trench without any propping was acceptable. He said if the works required protection, for example, by way of propping, then that was the builder's responsibility. He said it was not his responsibility to coordinate the works but that, in this case, it was up to Mr Mylonakis to arrange the trades.

61 Mr Askin said he dug the depth of the foundations under instructions from Mr Mylonakis, whom he believed was communicating with the engineer. He said he had not written down the dimensions but did what he was directed to do by Mr Mylonakis.

62 Mr Askin denied advising Mr Mylonakis that the dimensions for the footing should be the same as the front brick fence – he said the front fence was not a retaining wall and would not be appropriate.

63 Mr Askin denied over excavating the section under the staircase. He said the retaining wall ran parallel to the house for the most part but curved back behind the staircase towards the house so that the section adjoining the garage was angled towards the house.

64 He agreed he had gone 'off line' in relation to the new trench for the house side retaining wall in the section from the bottom of the stairs to the front of the house. However, he said he had made the trench too wide by excavating away from the house – not towards it. He had deducted $100 from his invoice for the extra concrete that he said would be required because the trench was wider than it should have been.

65 Mr Askin said that the rain which fell on the days he dug the trench for the house side retaining wall was 'light'. He said the works were completed on

13 September, 2016 and that he returned to the Site on the 14 September only to remove the excavated material from the Site.

66 Mr Askin said he had been asked by Mr Mylonakis the week before the 13 and 14 September, 2016 to complete the works as Mr Mylonakis had other trades arranged. He relied upon the text sent by Mr Mylonakis on 8 September, 2016 which said:

> Hi Ayhan, I really need this job done by next week. I have other tradies booked for mid next week. Can you please make it a full day on Monday to knock it out of the way?

It was in response to the Mr Askin's reply text in which he stated he could come on Monday and also the next day, 9 September, 2016 that Mr Mylonakis said:

> I will not be there tomorrow, its best if I'm here as there's a few pointers I need to show you when digging.

67 Mr Askin said that it was acceptable to excavate whilst raining, as he had done, as long as the next trades were 'lined up' to carry out the next steps required. He agreed that given the nature of the works he had done, being the removal of a retaining wall and digging a trench on the house side, meant that it was important the next trades worked quickly to pour the concrete footings.

68 Mr Askin denied leaving the Site when the trench started to collapse because he 'panicked'. He said he was being paid for his time and had no reason to leave the Site other than he had finished his work and had other work to go to. Mr Askin said that when he left the Site the trenches were fine.

69 Mr Askin said that the first he knew of concerns with the work carried out (apart from the issue with the fence post and the trench being too wide) was when he received a text from Mr Mylonakis on 19 September, 2016, in response to a request for payment, in which Mr Mylonakis said:

> Come pick up your stuff, payment cannot be sorted yet as I have major issues with collapsed soil, a temporary barrier has been installed which cost me $2K in order to save the front of house from falling and looks like there will be underpinning required. I asked for the trenching to be done when dry and not in the rain but you said you had to leave and nothing would happen. Now I have major expenses which is not my fault.

70 Mr Askin said the trenches collapsed because Mr Mylonakis did not keep the trenches dry by using a pump and he did not have the trades ready to go to pour the concrete footings.

71 In relation to the costs claimed for installing the temporary fence and cleaning out the trenches Mr Askin said it would require no more than two hours' work. He estimated the cost of carrying out such work to be $800.

Mr Mylonakis' evidence

72 Mr Mylonakis said he knew the removal of the retaining wall was not on the plans. He also acknowledged that the Builder had told him that there was no building permit to cover the removal of the wall and that Mr Mylonakis should not be doing the work.

73 Mr Mylonakis said the Builder would regularly attend Site to check on the progress of the works. He said the Builder took measurements and looked over the Site.

74 Mr Mylonakis says that he was not in touch with the engineer at all during this time and that he relied on Mr Askin for the dimensions for the footings. He said Mr Askin said he would build the trench in the same way as the trench for the front fence. Mr Mylonakis agreed he had discussed with Mr Askin the shape of the new house side retaining wall and where it was to go, but he had not directed him regarding the dimensions.

75 Mr Mylonakis said the problems with the retaining wall trenches came after the rain. He said there had been 4 days straight of rain and that he had asked Mr Askin if it was okay to proceed. He said Mr Askin said it was okay, that the machine might be slower, but it could still be done. Mr Mylonakis relied upon a text message he sent to Mr Askin on 13 September, 2016 (although I note the date is disputed by Mr Askin who says it was sent on 14 September, 2016) stating, 'It's been raining all night long, maybe we leave it for another day?' In response, Mr Askin said 'I would love to but I have other worked banked up. Terrible day though'.

76 Mr Mylonakis said the last day Mr Askin worked on Site was 13 September, 2016 but that the excavation work was not completed on that day. He said Mr Askin had excavated the trench and when Mr Mylonakis saw what had been done, the trench was completely crooked and was too wide. He said it was not at all like he had discussed with Mr Askin.

77 Mr Mylonakis said not long after Mr Askin finished 'everything started to collapse'. He said the bottom of the staircase was 'mid-air' with nothing propping it up. He called his Builder who attended the Site at about 3pm and told Mr Mylonakis to get a pump to pump the water which was running into the trenches. Mr Mylonakis initially borrowed a cousin's electric pump but within 24 hours realised it could not perform the task. Mr Mylonakis then hired a fuel pump. The invoice produced in support of the claim for the cost of the hire of the pump records the pump being hired on 15 September, 2016. The cost to hire the pump as evidenced by the invoice from the hire company was $148.00.

78 Mr Mylonakis said Mr Askin panicked as he knew he had done the wrong thing and that he abandoned the works when he saw the trenches starting to collapse.

79 Mr Mylonakis said that Mr Askin should not have proceeded with work during the rain and it was because he did that the trenches collapsed and

that it caused other soil collapse under the stair case such that it exposed the foundations to the house.

80 When asked whether he had trades lined up for the week as he had stated in his text to Mr Askin, Mr Mylonakis said the Builder had trades lined up. When pushed he said he could not remember whether it was him or his builder. He said words to the effect that 'My builder said we have excavators on the scene but we didn't expect a storm'. When asked when did he start looking at the weather, Mr Mylonakis said words to the effect that he didn't have to look at the weather, and that he would ask Mr Askin every time he was digging in the last week if it was okay and Mr Askin had said it was.

81 Mr Mylonakis produced a rainfall chart detailing the amount of rain which fell in the neighbouring suburb of Viewbank during the month of September 2016. It recorded 8 ml for 13 September and 16 ml for 14 September, 2016.

82 Mr Mylonakis also relied upon a photograph taken on 6 October, 2016 of the area under the stairs to support his claim that the section had been over excavated and had caused the foundations of the house to crack. He agreed work on this area involving the pouring of concrete was not done until 23 November, 2016.

83 Mr Mylonakis agreed that the Builder took charge of the 'rectification works' required for the retaining wall.

Builder's evidence

84 The Builder said he told Mr Mylonakis the removal of the house side retaining wall had nothing to do with him. He said Mr Mylonakis said that he and Mr Askin were going to do the same footings as the front fence. The Builder said he told Mr Mylonakis the footings needed to be deep enough to hold the existing load of soil and that an engineer should be engaged. He said Mr Mylonakis was happy because Mr Askin had said it was okay.

85 The Builder said he was not aware of any discussions Mr Mylonakis had had with Mr Askin or whether Mr Mylonakis had asked Mr Askin to finish the job. Nor was the Builder aware that Mr Mylonakis had earlier told Mr Askin that trades were lined up to commence mid-week. The Builder said he did not have trades lined up for the middle of that week because those works were not part of what he was doing.

86 The Builder could not recall the date he attended Site but said when he arrived it was raining heavily and 'heaps of water' at the front yard was running down into the trenches. He told Mr Mylonakis to get a pump because if footings hold water, they collapse.

87 The Builder returned to Site the next day to find the electric pump had not done the job required and he told Mr Mylonakis to hire a 'big pump', which Mr Mylonakis did. The Builder said he then proceeded to erect a temporary

retaining wall in the footings along the house from the bottom of the stairs towards the front in order to stop and prevent soil from breaking away. He, with the help of others, then cleaned out the trench, packed the soil down and spread bags of rapid set concrete on top of it. He repeated that process to ensure the footings were stable and then installed a temporary wall of yellow tongue using star pickets. He said it took a couple of days to do these works and he invoiced the sum of $2,170 for carrying them out.

88 The Builder said in his opinion the footings for the house side retaining wall were deeper and wider than they needed to be and they had not been dug straight. He said in his opinion the footing should have been 1 metre deep but they were 1.8 metre deep.

89 In relation to the section behind the staircase and towards the house the Builder said he arranged for steel rods to be inserted and mass concrete to be poured. He agreed this had not be done until months later in November 2016 and that he had not been worried enough to do immediate work on that section of the Site.

90 The Builder said his main concern was with the corner section of the house where the stair case came down to the path. That was where the temporary fence was installed and where quickset concrete was mixed and placed on top of the compacted mud to prevent further collapse.

91 The Builder agreed that in carrying out the rectification work he did not seek engineering for the work. He said that the way the rectification works had been done was three to four times stronger than the other retaining walls at the Site because of the extra concrete. He again said those works were not part of his works.

92 The Builder issued an invoice to Mr Mylonakis dated 11 December, 2016 for the works said to have been done in order to rectify Mr Askin's work. The invoice was for $20,405.00 and described the works carried out as follows:

> 2 days labour
>
> Clean out mud from trenchhold
>
> Secure 3 metre props to support temporary wall(18m at 1.8m)
>
> Supply and install brace board
>
> Secure mud with rapid set concrete to avoid collapse of house footings - $2,170
>
> Mark out site with correct footing location
>
> Management fee for other services including repair to storm water pipe in rear yard - $1,900
>
> Remove and repair broken tiling on front veranda - $385
>
> Corrective concrete due to excessive amount of soil removed - $8,800

> Excavation works and removal of soil to rectify trenching in accordance with plans - $7,150

93 The Builder said the works relating to the pouring of 'corrective concrete' (which totalled $8,800) and 'excavation works and removal of soil to rectify trenching in accordance with plans' (which totalled $7,150) were carried out by two subcontractors, MIMMO Paving and Northside Excavations respectively. He said the subcontractor's costs had been included in the Builder's invoice. Other than by way of a general description of the work, he was unable to say what work had been carried out, nor provide a breakdown of the way in which the sums of $8,800 or $7,150 had been incurred. The amounts included in the Builder's invoice for the subcontractors' works were based on a global quotation which had been provided by each of MIMMO Paving and Northeast Excavations to Mr Mylonakis.

Subcontractors' invoices

94 When giving evidence at the hearing in December, 2018, Mr Mylonakis said that he had not yet paid the Builder's invoice of $20,405.00. He said he believed the Builder had paid MIMMO Paving and Northeast Excavations, whose invoices formed part of the Builder's invoice. The Builder said he had not paid the subcontractors.

95 In any event, subsequently, on the last hearing day on 22 March, 2018, Mr Mylonakis' solicitor produced two tax invoices which he submitted verified that a cash payment had been made on 22 January, 2018 by Mr Mylonakis to the subcontractors, MIMMO Paving and Northside Paving, for their works carried out at the Site. Both invoices were on MIMMO Paving letterhead. One was for the amount of $8,800.00, the other for $7,150.00.

96 The tax invoices were not provided to the Excavator's solicitors prior to the hearing. Hand written notes were made on the back of the tax invoices. No one was called to give evidence regarding the tax invoices. Mr Gray objected to the invoices being tendered, noting that he had no opportunity to cross examine or test the truth of the statements made in the documents.

97 Although the tax invoices were received into evidence, the fact that no witness had been called to attest to their content, nor made available for cross examination, affects the weight which can be given to the information contained in them.

98 Upon a closer inspection, the invoices appear have been prepared by one person, who has written his name and placed his signature on the back of each invoice, underneath the hand written notes. The notes seek to detail the work undertaken and to provide a breakdown of the global amount claimed. The description of work included work related to completion of the front fence retaining wall and removing left over soil not taken from the Site by the Excavator. They also reference dimensions of what the footings

alongside the house side and in the rear yard were 'meant to be' without any reference to how those dimensions had been ascertained.

Respondents' closing submissions

99 The respondents' closing submissions stated, in relation to the trench required for the house side, '...Had Mr Askin excavated the trench to similar specifications engineer approved plans for the front fence trench, the respondents would not have been required to pour additional concrete.'

Findings: House side retaining wall

100 I will deal with the three areas of complaint with respect to the works associated with the house side retaining wall and described in paragraphs 55(a) to 55(c) above separately.

Findings: Over excavations area under the stairs

101 No expert evidence was led on behalf of the respondents regarding the construction of the new house side retaining wall, including the required depth and width of the excavated trench for the proposed footings and the method of construction required for the area under the stairs. No expert evidence has been led to support the statement made in the respondents closing submissions to the effect that had the trench been excavated to similar specifications to that engineered for the front fence trench, than 'the respondents would not have been required to pour additional concrete'.

102 Likewise, there was no expert evidence regarding the process which should have been adopted for the removal of the existing retaining wall and, in particular, whether temporary propping, particularly underneath and surrounding the stairs, should have been erected whilst the works were being undertaken.

103 Further, no engineering has since been obtained for the constructed works, nor is there any evidence of the works having since been approved by the appointed building surveyor. As such, there is no evidence that the 'rectification' works which have been carried out are, in fact, adequate and appropriate. No records of inspections carried out by the relevant building surveyor were provided during the hearing, nor was a Certificate of Final Inspection for the works carried out at the Site produced.

104 Accordingly, there is no evidence before me upon which I can find the area was over excavated such that the amount of concrete used under the stairs is other than what would have been required to achieve Mr Mylonakis' desire to remove the wall and widen the carport, had an engineer been engaged to design the works. Further, there is no evidence before me upon which I can find that the use of steel rods to tie the concrete to the house is other than the process which would have been required had an engineer been engaged to design the footings and works required to move the retaining wall nearer to the house.

105 I note the Builder says that the area under the staircase has been constructed so that it is 3 or 4 times stronger than it needs to be. However the Builder is not an engineer. Further, his view that it is stronger than it needs to be does not assist me in determining whether what was done by Mr Askin was anything other than what would have been required had the works been engineered.

106 Further, I am not satisfied that Mr Mylonakis has proven that the Excavator caused the foundations of the house to crack. The only evidence relied upon to support that allegation was a photograph taken on 6 October, 2016, over 3 weeks after the Excavator left the Site. No expert opinion was sought as to whether the photograph relied upon in fact demonstrated a crack in the foundations.

107 In relation to the assertion that the house would have collapsed but for the 'rectification' works, I reiterate that there is no evidence before me to demonstrate the works involving the drilling of steel rods and the pouring of concrete would not have been required in any event in order to achieve the desired outcome, namely, a retaining wall constructed closer to the house. I note also these works were not carried out until 23 November, 2016, over 2 months after the Excavator completed his work.

108 Accordingly, based upon the evidence before me, I am not satisfied that Mr Mylonakis has proven that there are defects in the trench excavated under the stairs by the Excavator.

109 Further, even if I had found there were defects in the trench excavated under the stairs, I am not satisfied on the evidence before me that Mr Mylonakis has incurred the costs he claims in rectifying that part of the works, namely, the sum of $8,800.00 which was said to have been paid to MIMMO Paving for 'corrective concrete'.

110 I place no weight on the invoices provided to the Tribunal on the last day of hearing. No witness had been called to attest to their content, nor made available for cross examination. Further, I make the following observations in relation to the invoices:

a) unlike the quotations provided by the subcontractors, both tax invoices have been issued on MIMMO Paving letterhead;

b) one person has hand written both invoices and notwithstanding the invoices are said to relate to works carried out by different companies, namely, MIMMO Paving and Northeast excavation, the invoices were both issued on MIMMO Paving letterhead;

c) hand written notes on the back of the invoice seek to detail the work undertaken and to provide a breakdown of the global amount claimed. The description of work included work related to completion of the front fence retaining wall and removing left over soil not taken from the Site by the Excavator. These works were not associated with the

retaining wall and related to works for which there would be no entitlement to payment;

d) the invoices reference what the author says the width of the footing ought to have been, without any reference to their qualifications, nor to plans or to any other evidence to support the assertion;

111 Accordingly, there is no other evidence before me upon which Mr Mylonakis could rely to verify the cost he claims he has incurred in rectifying these works.

Trench from stairs to front of house

112 The Excavator conceded that there was a section of the footings in this area that was too wide and I therefore find there was a defect in that section of the works.

113 I repeat, no expert evidence has been led upon which I can rely to determine what the width of the footing and the trench ought to have been..

114 The Excavator allowed $170 for the extra concrete he said was required because of his error in excavating the trench too wide.

115 Other than the invoices from MIMMO and Northgate Paving, there was no other break down of costs provided by Mr Mylonakis for the cost of the extra concrete required for the trench from the section of the stairs to the front of the property. For the reasons stated above, I place no weight on the subcontractors' invoices and I therefore find the respondents have not provided evidence to support their claim for damages for this part of the work.

116 Accordingly, the amount allowed by the Excavator for this defect will be allowed.

Excavating in rain

117 Mr Askin gave evidence that, in his opinion, there was no need for a temporary retaining wall to be constructed whilst the existing retaining wall was demolished and prior to the construction of the new retaining wall. He said it was not unusual to proceed in that way. This evidence was not challenged by Mr Mylonakis or any expert evidence.

118 Further, Mr Askin did not challenge the fact that a temporary wall was required to be installed after the trench had been dug, in order to protect further collapse of the soil due to the rain. He said only that it was required because Mr Mylonakis failed to have the trades lined up to work after the excavation was completed.

119 Whilst I accept Mr Mylonakis was responsible for organising the next trades required to continue work on the retaining wall and had, the previous week, asked the Excavator to complete the job by the middle of the following week, I find it was Mr Askin who was responsible for

determining when the excavation works would be carried out and for overseeing the manner in which the excavation works were carried out.

120 It is unclear on the evidence whether the works relating to the trench were completed on 13 September, 2016 as maintained by Mr Askin, or the last day on Site, being 14 September. In any event, I note that the rain chart tendered during the hearing showed rain fell from 10 to 14 September, 2016 inclusive. Mr Mylonakis asked Mr Askin whether the works should be postponed because of the rain. Mr Askin said he could not postpone completion as he had other works to do. It was therefore Mr Askin's decision to continue with the works during the rain.

121 There was no evidence from Mr Askin that he had any discussion with Mr Mylonakis at the time concerning the need to move quickly because of the rain or that there was risk of a soil collapse because of the rain. In fact, the only evidence was that of Mr Mylonakis asking if it was okay to proceed. Further, there was no evidence of Mr Askin discussing the risks with Mr Mylonakis and allowing him to decide whether he wished Mr Askin to proceed then and incur further costs, or wait until the weather had cleared.

122 I am satisfied based on the evidence that the need for the temporary retaining wall, quick set concrete and water pump was because of Mr Askin's decision to excavate the trench whilst it was raining, rather than because of Mr Mylonakis' failure to have the next trades lined up for the works. I further find that the Excavator failed to exercise due care and skill in deciding to excavate whilst it was raining.

123 I accept the evidence of the Builder of the work which was required to be undertaken to erect the temporary fence, clean out the trench and install rapid set concrete to prevent further collapse of that part. I am satisfied the reasonable costs for these works is $ 2,318.00, being the Builder's costs together with the cost to hire the pump.

Neighbours side trench

Excavator's evidence

124 Mr Askin said he dug the trenches in accordance with the plans. He said he had not received a complaint about the width of this trench prior to the proceedings.

Mr Mylonakis' evidence

125 Mr Mylonakis said the trench on the neighbour's side was a little wider and deeper than the dimensions in the engineering drawings. He said as a result he has had to pay for additional concrete.

Builder's evidence

126 The Builder said that he attended Site throughout the works at various times to inspect the work being carried out. He said he had attended when the footings on the neighbour's side had been dug to make sure they were the

right length and depth. The Builder said the trench was wider than the dimensions on the plans. He did not give specific dimensions of how much wider the trenches were alleged to have been.

Findings: Neighbour's side trench

127 I am not satisfied based on the evidence before me that the neighbour's side fence trench was over excavated. The Builder said he attended the Site whilst the excavation works were being carried out and that he would check measurements and review levels whilst he was there, yet at no time did he raise any concerns with the measurements during the times he attended the Site. Further, no clear evidence was provided of measurements taken of the footings which were said to demonstrate the trench was too wide, including who took the measurements or how.

128 However, even if I am wrong and the neighbour's side trench was wider than required, there is no evidence before me upon which I could determine the extra cost incurred by Mr Mylonakis in rectifying these works. The only evidence relating to the cost to rectify the alleged over excavation is a reference in the invoice from MIMMO Paving and Sons, which is said in the respondents' closing submissions to have been prepared on behalf of Northside Excavations. However, for the reasons given above, I place no weight on that invoice.

Fence / cross over damage

Excavator's evidence

129 The Excavator denies the fence needed to be replaced. Mr Askin said he damaged one post and deducted $100 from his invoice in compensation for it.

130 In relation to the crossover, Mr Askin said it was already cracked before commencement of the works and that he had told Mr Mylonakis it could be damaged given the machinery which would be driving over it. He said Mr Mylonakis had told him not to worry about it as he would get it replaced when pouring the new driveway. No complaint had been made to Mr Askin about the crossover when he was carrying out the works.

Mr Mylonakis' evidence

131 Mr Mylonakis disputes Mr Askin's evidence about damaging the crossover. He seeks the cost of pouring a new cross over.

132 Mr Mylonakis says the entire fence needed to be replaced as a result of damage caused to it by over excavation and he seeks the cost of replacement of the fence of $1,915. He produced photos of the fence taken on 20 and 21 September, 2016.

Findings: Fence/cross over damage

133 I am not satisfied based on the photos relied upon by Mr Mylonakis that the fence was so damaged as to require it to be completely replaced. Whilst the bottom of some fence posts are exposed, given the excavation required on the neighbour's side of the driveway for the new retaining wall, there is no evidence before me to prove that the exposed posts were anything other than what was to be expected.

134 The Excavator allowed the sum of $100 in his invoice for what was described as damage to one of the posts. Other than seeking the cost of a new fence, no evidence was led to suggest that was not an appropriate amount.

135 Further, I am not satisfied that the respondents are entitled to the cost of a new cross over. I prefer Mr Askin's evidence that he had been told that Mr Mylonakis intended to replace that section at the time the new driveway was poured. Given Mr Mylonakis' involvement and knowledge of the works, I find it implausible that he would not have said something at the time if Mr Askin was proceeding with the works and driving on the cross over, other than that had been agreed. The first time this complaint was made was after the issue of proceedings.

Rear yard garden boxes

Excavator's evidence

136 Mr Askin said that in relation to the works carried out in the rear yard that Mr Mylonakis had directed him where to excavate the trenches for the garden box retaining wall and that Mr Mylonakis would sit on his balcony and watch him work. Mr Askin said that the works in the back garden were one of the first areas of works he undertook. He said that when these works were completed, the trenches for the rectangular garden bed were 'perfect' and Mr Mylonakis was happy with the work.

Mr Mylonakis' evidence

137 Mr Mylonakis says that the trenches dug for the garden box were too wide. He relied upon a photo taken on 23 November 2016 which showed a collapsed trench in a triangular shape.

138 Mr Mylonakis said that a storm water pipe in the back garden had been broken during excavation and that had caused waste water to run into the trench which had been dug. He said Mr Askin could not help hitting the pipe as it was not known it was there but that when the Excavator's plumber came to repair the pipe, the plumber had damaged the trench.

Builder's evidence

139 The Builder said even though works in the rear yard were not part of his works he said he had inspected them as he looks at everything.

140 He said he thought the machine which excavated the footings in the rear yard had not been set up properly and that the footings were deeper and wider than needed to be. He said the footing should be 300 ml wide but was 450 ml wide.

Findings: Rear garden box

141 The photos of the trench of rear garden box taken in November 2016 show a collapsed trench. However, I am not satisfied based upon the evidence before me that the collapse of the trench was caused by the Excavator's failure to carry out the work with due care and skill.

142 It is not disputed these works were one of the first to be undertaken at the Site. According to Mr Askin, the trench was 'perfect' when the works were completed.

143 The photo upon which Mr Mylonakis relies as evidencing the collapsed trench was taken on 23 November, 2016, some 2 months after the Excavator left the Site. Given Mr Mylonakis supervised these works and given the Builder said he attended Site often and would review all the works, including the rear yard works, I find it implausible that either one of them would not have raised concerns with these works at the relevant time had they considered them not to have been carried out correctly. The first time a complaint regarding these works was raised was after the issue of proceedings.

144 I am not satisfied based on the evidence before me that the state of the trenches as at 9 November, 2016 was as a result of Mr Askin's conduct.

Failure to remove concrete/ excavated soil

Excavator's evidence

145 Mr Askin agreed he did not complete the works associated with the front fence. He said this was because the Council had attended the Site and told him to stop work because an asset protection permit had not been obtained.

146 Mr Askin denied leaving the Site when the trench started to collapse because he 'panicked'. He said he was being paid for his time and had no reason to leave the Site other than he had finished his work and had other work to go to. Mr Askin said that when he left the Site the trenches were fine.

Mr Mylonakis evidence

147 Mr Mylonakis said that the works were not complete when Mr Askin left the Site. He said the front fence works had not been carried out and excavated soil was left in the driveway.

Builder's evidence

148 The Builder said the driveway was not dug out correctly and that there was a 'hump' of soil left on the Site.

Findings: failure to remove concrete and excavated soil

149 The agreement entered into between the parties was not a fixed price contract but rather such that the Excavator would be paid for the work undertaken based on a schedule of rates. Accordingly, the respondents are not entitled to the cost of completing work not carried out by the Excavator.

Broken tile

150 The respondents also seek the cost of $358 for labour required to replace a broken tile on the veranda. This amount was claimed in the Builder's invoice. The Builder said the amount of $358 was labour only for replacing the broken tile.

151 The Excavator allowed the sum of $100 for replacing the tile in his invoice.

Findings: Broken tile

152 I am satisfied the sum of $100 is a fair and appropriate amount to allow for the labour cost of the replacement of the tile and I therefore reject the claim of $358 for that item.

ISSUE 4: WHAT LOSS HAVETHE RESPONDENTS SUFFERED?

153 This issues has been addressed in the paragraphs above.

CONCLUSION

154 Accordingly, I find the Excavator must pay the respondents the sum of $2,318.00 being the costs incurred as a result of the Excavator's failure to carry out the works with due care and skill, namely, when Mr Askin carried out the excavation work in the rain.

155 Having determined the Excavator must pay the respondents damages in the sum of $2,318.00 on the Counterclaim, I will order that there will be a set off of that amount to the sum otherwise payable on the Claim, so that effect of my findings is that the respondents must pay the Excavator the sum of $10,864.25.

COSTS

156 The Excavator stated in its Application that it sought legal costs. Any application for costs will need to be determined based on the factors set out under s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

157 I will give the parties until **4.00 p.m. on 4 June, 2018** to make an application to the Tribunal for an order for costs.

158 In the event that no application for costs is made, each party will bear their own costs of the proceeding.

A Eastman
Member