

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1453/2017

CATCHWORDS

Applicant carried out excavation work for the respondent owner – builder. Respondent refused to pay the applicant’s invoice, alleging the works were faulty/inadequate, and alleging also that the charge for the works, in particular the charge for rock removal, was excessive. Applicant issued claim for the sum invoiced. Respondent issued counterclaim for the cost of extra site works alleged to have become necessary by reason of the applicant’s faulty/inadequate excavation work. Claim partially successful - applicant unable to substantiate the full sum invoiced. Counterclaim dismissed.

APPLICANT	Warren’s Plumbing & Drainage Services Pty Ltd (ACN 100 319 195)
RESPONDENT	Ashwani Sharma t/as ‘Meridien Homes’
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	19 and 20 December 2018
DATE OF ORDER	31 January 2019
CITATION	Warren’s Plumbing & Drainage Services Pty Ltd v Sharma (Building and Property) [2019] VCAT 149

ORDERS

1. On the applicant’s claim, the respondent must pay the applicant \$25,531.
2. The respondent’s counterclaim is dismissed.
3. Costs reserved with liberty to apply. Any application for costs is to be listed before Senior Member M. Farrelly allowing two hours.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant: Mr N Phillpott of counsel

For Respondent: Mr V Ryan, solicitor

REASONS

- 1 The respondent, Mr Sharma, owns a block of land in Keilor East (**‘the site’**). He is in the process of constructing a home for he and his wife on the site.
- 2 Although Mr Sharma has acquired an Australian Business Number (ABN) and a trading name, ‘Meridien Homes’, he does not hold a builder’s licence. He hopes to become a registered builder in the future. The construction of the home is being carried out by Mr Sharma as an ‘owner-builder’. It is the first building construction project he has taken on.
- 3 The site had a considerable slope from its rear, west, boundary to its street-front, east, boundary. In around September 2016, significant excavation works on the site were carried out by ‘Lantrak Pty Ltd’ (‘Lantrak’). The excavation cut deeply, more than four metres, into the site adjacent to its west boundary. Mr Sharma says the excavation was carried out poorly, and not in accordance with plans provided. A dispute in respect of those excavation works is the subject of a separate proceeding in this Tribunal.
- 4 In August 2017, Mr Sharma engaged the applicant to carry out further excavation works on the land in accordance with a site plan provided by Mr Sharma. Pursuant to that engagement, the applicant carried out excavation works, and the removal of rock and soil, on 24 and 25 August 2017. By invoice dated 25 August 2017, the applicant claimed payment of \$31,317 for the works.
- 5 Mr Sharma has not paid the applicant. He says the sum invoiced, in particular the cost of rock removal, is excessive and not justified. Further, he says the excavation work was carried out incorrectly and not in accordance with the site plan. He says that, by reason of the incorrect excavation, he had to obtain an amended engineering plan for the construction of concrete piers and a concrete block wall to support the west boundary of the land where the site cut was deepest. He says also that he had to engage further contractors to carry out further remedial excavation works.
- 6 The applicant commenced this proceeding by application filed on about 8 November 2017. The applicant seeks payment of the sum invoiced, \$31,317, plus interest, plus costs.
- 7 Mr Sharma defends the applicant’s claim saying the works carried out were faulty and of no benefit to him, and he brings a counterclaim for damages totalling \$28,980.75 which he says is the cost of and associated with the extra works which became necessary as a result of the incorrect excavation work carried out by the applicant. The counterclaim sum is made up of the following alleged costs and expenses:

-	Engineer's amended plan	\$572.50
-	resurvey of the block of land	\$880
-	building permit variation	\$640
-	further excavations	\$11,888.25
-	further rock and soil removal	\$3,250
-	costs claimed for construction of concrete piers and concrete block wall, including waterproofing	\$11,750

8 The applicant also claims interest and costs.

THE HEARING

9 The hearing was conducted on 19 and 20 December 2018. At the commencement of the hearing I granted leave to each party to be represented by professional advocates. Mr Phillipott of Counsel represented the applicant and Mr Ryan, solicitor, represented the respondent.

10 Mr Smith, director of the applicant, gave evidence for the applicant.

11 For the respondent, Mr Sharma gave evidence and the following witnesses were called to give evidence:

- Mr Raven, an engineer engaged by Mr Sharma to provide structural drawings in respect of retaining walls at the site;
- Mr Mladicheck, a building consultant engaged by Mr Sharma to provide opinion evidence in respect of the excavation works carried out by the applicant, in particular the cost of such works. Mr Mladicheck also produced a written report dated 20 November 2018.
- Mr Gevergizyan of Edens Excavations Pty Ltd which carried out further excavation works at the site; and
- Mr Stanovic of Stanmark Holdings Pty Ltd which also carried out further excavation works at the site.

12 I note for the record that at the commencement of the hearing, I granted Mr Sharma leave to file and serve Amended Points of Counterclaim in the form of the document dated 19 December 2018 and produced at the hearing, and leave to file and serve the above-mentioned report of Mr Mladicheck dated 20 November 2018. Pursuant to previous interlocutory orders made during the course of the proceeding, Mr Sharma's counterclaim and any expert reports upon which he intended to rely were to have been filed and served well before the commencement of the hearing. I informed the parties that if, by reason of the late service of these documents, the applicant sought an adjournment of the hearing, an adjournment would be granted. The applicant elected to proceed with the hearing without any further delay.

THE QUOTATION

- 13 In around early August 2017, Mr Sharma telephoned the applicant (he spoke to Mr Smith) seeking a quotation for excavation works and subsequent drainage works at the site. Mr Smith asked Mr Sharma to provide a copy of the soil report, engineering plans for the proposed footings for the home to be constructed on the site and the construction plans. The documents would assist Mr Smith in estimating the depth of the excavation work, having regard to the nature of the proposed slab and the finished floor levels of the proposed construction works. The documents, including a site plan showing the footprint of the proposed construction works and the site slope, were provided.
- 14 The plans depicted a two-tier retaining wall construction along the western end of the site cut. There was to be a front retaining wall, core filled concrete blocks, of approximately 3 m in height. Approximately 610 mm behind the front wall, and commencing at the height of the top of the front wall, there was to be a further core filled concrete block wall of around 900 mm in height. The two walls between them, would constitute an overall retaining wall construction of around 3.9 m in height, with the first wall being approximately 3 m in height and the rear wall, setback around 610 mm, extending a further 900 mm (approximately) in height. The rear wall was to be located approximately 800 mm inside the west boundary of the site. (**‘the original retaining wall plan’**)
- 15 Several quotations were provided by the applicant as the parties negotiated a price for various works. The quotation ultimately accepted by Mr Sharma, dated 5 August 2017 (**‘the quotation’**), provides:
- Provide excavation required for site cut and fill > 2000mm as per plan
\$4,000
- Removal of excess soil from site including tip truck hire and tipping
fees @ \$25.00 p/mtr.
- Excavation of rock encountered on site will be charged at \$165.00
p/mtr
- *** These prices do not include any fees, excavation of rock, loading
out of excess material and also GST.
- After discussions with Ash [Mr Sharma] works will be broken into
two stages \$1250.00
- Stage 1 - cut house area down to FEL [finished excavation level] as
per plan including an additional \$400 re establishment fee.
- Stage 2 – Backfill retaining walls with scoria supplied plus an
additional costs of \$850
- 16 It is not disputed that the above terms provide for:
- a charge of \$4000 for the excavation; and

- an additional charge for soil removal, at a charge rate of \$25 per cubic metre of soil removed; and
- an additional charge for rock removal, at a charge rate of \$165 per cubic metre of rock removed.

- 17 As I understand it, it is also not disputed that the quotation provides for an additional charge of \$1250, \$400 of which is a 're-establishment fee' and \$850 of which is the charge for backfilling the retaining walls with scoria. As I understand it, the 're-establishment fee' is a charge for the preparatory work, confirmation of survey levels in particular, to be carried out by the applicant before commencing the excavation. The backfilling of the retaining walls was intended to be done at a later stage, obviously after the retaining walls had been constructed.
- 18 The sentence in the middle of the quotation – **** These prices do not include any fees, excavation of rock, loading out of excess material and also GST* – is not entirely clear. The reference to GST is clear enough. It simply confirms that the charges provided in the quotation do not include GST. As to the rest of the sentence, Mr Smith says (as I understand it) that it was intended to confirm that the quoted prices included a charge rate for rock *removal*, but not rock *excavation*. That may well be seen, objectively, as a reasonable interpretation. But I do not accept that such interpretation extends to creating or confirming an entitlement to the applicant to charge an additional amount, over and above the prices specified in the quotation, for rock *excavation*. In my view the quotation sets a price for the excavation and a charge rate for rock and soil removal, and it does not create an entitlement to make some arbitrary additional charge characterised as *rock excavation*.
- 19 An estimate of the price for the works in total, including soil and rock removal, was not provided, and Mr Sharma did not request any such estimate. Mr Smith told Mr Sharma that he estimated the works might take 4 days. Mr Sharma says the estimate given was 4 to 5 days.

THE WORKS AND THE SUM INVOICED

- 20 The applicant carried out the works all day on 25 August 2017 and in the morning on 26 August 2017. For much of that time, Mr Sharma observed the works. He saw the applicant setting levels and using blue paint to mark the excavation area. He saw the applicant's trucks come and go as soil/rock was removed from the site. Mr Sharma did not keep a record of the number of truckloads.
- 21 Mr Smith says that, during the works, Mr Sharma approached him and expressed his concern at the large volume of rock being removed. Mr Smith says that Mr Sharma suggested that the design of the concrete slab for the intended home be changed from a waffle slab to a conventional raft slab. This would reduce the volume of excavated material because a conventional raft slab requires a shallower excavation than a waffle slab.

Mr Sharma says there was no such discussion. I prefer Mr Sharma's evidence. The construction drawings prescribed a conventional raft slab, not a waffle slab. There is simply no reason why Mr Sharma might suggest a change from a waffle slab to a conventional raft slab when the construction drawings already prescribed a conventional raft slab. Not much turns on this point, save that Mr Smith's credibility as a witness is compromised.

- 22 On the evening of 25 August 2018, Mr Smith emailed to Mr Sharma the applicant's invoice for the works. The invoice provides:

Stage 1 – cut house area down to FEL as per plan including an additional \$400 re-establishment fee. \$400

Provide excavation required for site cut and fill > 2000 mm as per plan \$2,000.00

Removal of 70 mtr's of excess soil from site including tip truck hire and tipping fees @ \$25.00 p/mtr \$1,750.00

Removal of 128 mtr's of excess rock from site including tip truck hire and tipping fees @ \$25.00 p/mtr \$3,200.00

Excavation of 128 mtr's of rock encountered on site will be charged at \$165.00 p/mtr \$21,120.00

- 23 The invoice then confirms the total of the above items as \$28,470, and with GST of \$2847 added, a total sum of \$31,317 is charged.

- 24 Mr Sharma was surprised and alarmed at the sum of the invoice. He says he expected a much lower sum having regard to the time the applicant spent on site, and having regard also to the charge for previous excavation works carried out by Lantrack. As noted above, Mr Sharma did not keep a record of the number of truckloads of soil/rocks taken from site. He is unable to say how many truckloads there were.

- 25 The applicant's method of recording and substantiating the volume of soil and rock removed from the site is unusual. The applicant, surprisingly, has no simple written ledger of the number of truckloads of material removed from the site or the nature of the material, rock or soil, removed. The applicant relies on photographs of each truckload as it departs the site, and satellite GPS tracking data which records the movement of the applicant's trucks. The photographs depict a truck as it departs the site and the time the photograph was taken. The GPS tracking data purportedly corroborates the photographic record in that it will identify the movement of trucks to and from tipping stations.

- 26 Mr Smith says the applicant has two trucks which were used on this job. He says each truck's tray has a capacity to carry 10 m³ of rock. One of the trucks has an attached trailer which a capacity to carry 12 m³ of rock. Mr Smith says that the applicant also engaged a contractor with one truck with load capacity of 10 m³. The applicant was unable to GPS track the contractor's truck. I accept this evidence as it is not challenged.

- 27 The photographs of the trucks leaving the site and the GPS tracking data were produced at the hearing.
- 28 The GPS tracking data is not particularly useful. In some instances, ‘geo-fence’ data is provided. ‘Geo-fence’ data tracks a truck’s movement in respect of a particular geographical location. For example, a ‘geo-fence’ may be set up surrounding a particular tipping station and the geo-fence data will show the date and time when a truck crossed the geo-fenced area, that is the tipping station. However, the data in this case is limited in that not all of the tipping stations where soil/rock was tipped could be ‘geo-fenced’. And, as noted above, the contractor’s truck was not GPS tracked at all. Accordingly, the tracking data does little more than corroborate the movement of some, but not all truckloads, to and from tipping stations. As such, the data is of no real use in substantiating the total number of truckloads of material removed from the site.
- 29 The photographs of trucks leaving the site are useful in that they depict the truckload of material, and the time the photograph was taken. Having examined the photos, and having heard evidence from Mr Smith, I am satisfied that the photos substantiate the following:
- the applicant’s truck and trailer with a capacity load of rock, 22 m³, leaving the site at 10:52 am on 24 August 2017;¹
 - the truck of the contractor engaged by the applicant, with a capacity load of rock, 10 m³, leaving the site at 11:09 am on 24 August 2017;²
 - the applicant’s truck and trailer leaving the site at 2:58 pm on 24 August 2017. The truck tray appears to have a capacity load of rock, 10 m³. The trailer has a load of rock, but it does not appear to be at full capacity. I think it fair to say the trailer is at 75% capacity, that is a load of approximately 9 m³ of rock, thus making the total load of the truck and trailer 19 m³; ³
 - the applicant’s truck, with a load of rock, leaving site at 8:02 am on 25 August 2017. The truck tray does not appear to be quite at full capacity. I think it fair to say the load is at around 90% capacity, that is a load of 9 m³ of rock;⁴
 - the applicant’s truck and trailer with a capacity load of rock, 22 m³, leaving the site at 8:58 am on 25 August 2017;⁵
 - the applicant’s truck with a capacity load of rock, 10 m³, leaving the site at 10:33 am on 25 August 2017;⁶

¹ photograph at page 199 of the applicant’s Tribunal book

² photograph at page 200 of the applicant’s Tribunal book

³ photograph at page 201 of the applicant’s Tribunal book

⁴ photograph at page 204 of the applicant’s Tribunal book

⁵ photograph at page 206 of the applicant’s Tribunal book

⁶ photograph at page 207 of the applicant’s Tribunal book

- the applicant's truck and trailer with a capacity load of rock, 22 m³, leaving the site at 1.39 am on 25 August 2017.

30 The total rock removed, as assessed above, is 114 m³.

31 Mr Smith says the photographic record is incomplete in that, in addition to the above truckloads, there was one further single truck load, 10 m³, of rock removal late in the day on 24 August 2017. He says that he remembers that truckload and, for reasons he is unable to explain, the photo he believes he took of that truckload was not recorded on his camera. As a substitute for this 'missing' photo, Mr Smith has included in the Tribunal book a duplicate of one of the above-mentioned photos, namely the single truck photo taken at 8:02 am on 25 August 2017. The duplicate photo, of course, substantiates nothing other than that it is a duplicate photo.

32 In my view, where the applicant's charge for the job is largely dependent on the volume of soil and rock removed from the site, it was incumbent on the applicant to keep a satisfactory record to substantiate the charge made. The only reliable record in this instance is the photographs. Having regard to this, and having regard also to Mr Smith's compromised credibility as a witness as discussed above, I do not accept that there was one further single truck load of rock removal in addition to the truckloads substantiated by the photographs.

Method of measurement of volume rock removal

33 Mr Mladicheck says that the standard method of measurement for the volume of rock removed in excavation works is the volume of the rock in the ground rather than the volume of the rock after it has been excavated and broken up. He says that 10 m³ of rock on the ground will amount to around 20 m³ out of the ground.

34 I accept that the volume of rock, measured in cubic metres, in the ground will be significantly less than its volume measured after it has been excavated and broken up. I accept also that the 'in ground' method of measurement is a method used in the construction industry. But it is not the only method used.

35 In *J G King Pty Ltd v Patel*⁷, Justice Kyrou considered, amongst many matters, the appropriate measurement of rock excavated from the ground having regard to the contract between the builder and the owners in that case. He found that it was a matter of construction of the contract, and the usual principles of contract construction apply. It is not the subjective beliefs and understandings of the parties that governs the contractual relations. Rather it is what each party by their words and conduct would have led a reasonable person in the position of the other party to believe. Notably, Justice Kyrou stated⁸:

⁷ [2014] VSC 58

⁸ op. cit. at paragraph 137

Where the issue is the meaning of a contractual provision that uses non-technical language, experts should not be asked to express their views on that meaning. That is because the task is to ascertain the ordinary meaning of the words used, not some technical meaning.

- 36 In this case, the contract, in so far as it is in writing, is the quotation. There is nothing in the quotation itself to suggest any particular method of measurement in respect of the rock removal. There is no evidence of any surrounding circumstance, such as email or other communications between Mr Smith and Mr Sharma, to suggest the parties turned their mind to alternative methods of measurement or to any particular agreed method of measurement. There is no evidence to suggest that Mr Sharma had, at the time the contract was entered or indeed at any time prior to the commencement of this proceeding, any knowledge of the 'in ground' method of measurement.
- 37 In my view, a reasonable person in the position of Mr Sharma would reasonably expect the volume of rock excavated to be measured after it was excavated.
- 38 Mr Mladicheck also expresses doubt that 128 m³ of rock, as claimed by the applicant, could have been removed in a time span of one and half days, having regard to the time that he believes would ordinarily be required to excavate, breakup and load such volume of rock onto trucks. Mr Mladicheck's opinion in this regard is speculative at best. His knowledge of the works carried out is entirely dictated by the instructions he received from Mr Sharma. He simply does not know the volume of rock removed from the site by the applicant. Mr Mladicheck's opinion has very little probative value, and certainly is not reason enough for me to depart from my assessment of the volume of rock removed having regard to the photographic evidence as discussed above.
- 39 Accordingly, I am satisfied that the measurement of rock by reference to the truckloads of excavated rock, as I have assessed above, is appropriate in this case. I find that the applicant was entitled to charge for 114 m³ of rock removal.
- 40 There is no satisfactory record, photograph or otherwise, of the volume of soil removal from the site, if any. As such, I find the applicant had no entitlement to charge for any soil removal.
- 41 I am satisfied that the applicant carried out the preparatory survey works prior to the excavation, for which the applicant is entitled to the so-called 're-establishment fee' of \$400.
- 42 Based on my findings set out above, and before considering any entitlement of Mr Sharma to a set-off in respect of his counterclaim, I find that the applicant was entitled to charge Mr Sharma \$25,531, calculated as follows:

-	excavation	\$ 4,000
-	removal of 112 m ³ of rock at \$165 per cubic metre	\$18,810
-	re-establishment fee	<u>\$ 400</u>
-	Sub-total	\$23,210
-	plus GST	<u>\$ 2,321</u>
	Total	\$25,531

THE COUNTERCLAIM

43 Mr Sharma says that the excavation works carried out by the applicant were faulty and inadequate, with the result that Mr Sharma incurred considerable expense in attending to consequential remedial works.

Retaining wall amendment

44 Mr Sharma says that the excavation carried out by the applicant made it impossible to construct the retaining wall/s at the west end of the site cut in accordance with the original retaining wall plan. He says the excavation carried out by the applicant went closer to the west site boundary than required, and did not allow for the two-tier retaining wall construction. He says that, as a result, he had to obtain an amended engineering plan for a new retaining wall construction for the west end of the site cut.

45 The new plan was provided by the engineer Mr Raven. The new plan retained a front and rear retaining wall. The difference, however, is that the rear retaining wall was no longer a wall of only 900 mm in height commencing at the level of the top of the front retaining wall. The new rear retaining wall commences at the footing level of the front retaining wall, and continues 900 mm higher than the front retaining wall. The new, larger rear retaining wall required substantial footings and concrete piers.

46 Mr Raven gave evidence. He confirmed that he prepared the original retaining wall plan and the amended plan. He did not say that the amended plan became necessary because of the excavation works carried out by the applicant or anyone else. He simply confirmed that the amended plan was required to provide adequate retaining wall support at the west end of the site cut.

47 There is no evidence as to the correctness or otherwise of the applicant's excavation work from an independent expert consultant, or from any engineer or the relevant building surveyor involved in the construction project. There is only the opinion of Mr Sharma himself. And he is no expert.

48 Having regard to the amended plan prepared by Mr Raven, I am not satisfied that the excavation carried out by the applicant was, as Mr Sharma

alleges, too close to the west boundary of the site. The distance of the rear retaining wall from the west site boundary has not changed from the original retaining wall plan. The location of the front retaining wall has also not changed. What has changed is, as mentioned above, the size of the rear retaining wall.

- 49 In my view, the amended retaining wall plan became necessary, not because of the excavation works of the applicant, but because the original retaining wall plan was unworkable. The original retaining wall plan provided for a concrete footing 'heel' for the front retaining wall. This heel was to extend approximately 600 mm towards the rear of the cut, that is towards the west boundary. I accept the applicant's submission that construction of the heel necessarily meant that a two-step excavation, seemingly prescribed in the original retaining wall plan, was not possible. The excavation would, at the very least, have to extend at least 600 mm behind the location of the front retaining wall to allow for construction of the 600 mm heel. In my view a two-tiered excavation as indicated in the original retaining wall plan was plainly unworkable, and the engineer was called to provide a workable amended plan.
- 50 Accordingly, I reject Mr Sharma's counterclaim in so far as it claims costs of and associated with the amended engineering plan for the retaining wall construction, and the construction of the amended rear retaining wall.

Further excavations

- 51 The balance of Mr Sharma's counterclaim relates to the cost of further excavation works to the site carried out by two further contractors engaged by Mr Sharma. Mr Sharma says the further excavation works were required because of errors or inadequacies in the excavation works carried out by the applicant.
- 52 The first contractor was 'Edens Excavations Pty Ltd' ('**Edens**'). It carried out excavation works at the site on 8, 9 and 10 January 2018, and invoiced Mr Sharma a total of \$9,358.25 for the works.
- 53 Mr Sharma says the excavation carried out by the applicant was shallow on the northern and southern boundaries, and Edens was required to rectify this.
- 54 Mr Eden Gevergizyan of Edens gave evidence. He says that Mr Sharma provided instructions as to the works to be carried out. He says that most of the excavation work carried out by Edens was in the area of the intended garage for the new home, and that some excavation work was also carried out on the western face of the site cut. He says he cannot recall carrying out any excavation works to the southern and northern boundaries of the site.
- 55 Again, the only evidence as to alleged faults in the applicant's excavation work is the evidence of Mr Sharma, and his evidence that Edens was required to rectify inadequate excavation to the northern and southern boundaries is not supported by Mr Gevergizyan.

- 56 The fact that further excavation works were carried out does not, of itself, prove fault or inadequacy in the works carried out by the applicant.
- 57 On the evidence, I am not satisfied that the excavation works carried out by Edens were required because of any failing on the part of the applicant.
- 58 The second contractor was ‘Stanmark Holdings Pty Ltd trading as Elite Excavations’ (**‘Stanmark’**). It carried out work at the site on 13 and 14 February 2018, and invoiced Mr Sharma \$2,530 for the work.
- 59 Mr Stanovic of Stanmark gave evidence. He says Mr Sharma instructed the works to be carried out, and those works consisted entirely of hammering out edge rock to meet the required depth for the footings for the retaining walls to be constructed on the site boundaries.
- 60 There is no evidence from Mr Stanovic that the works were required by reason of any faults or inadequacies in excavation works previously carried out.
- 61 Again, the only evidence as to alleged failings on the part of the applicant is the evidence of Mr Sharma. I do not accept his evidence. He provides no satisfactory explanation as to why seemingly routine preparatory work for retaining wall footings became necessary because of faults in the work carried out by the applicant. And I do not accept that the work carried out by Stanmark was included within the scope of works to be carried out by the applicant pursuant to the quotation.

CONCLUSION

- 62 For the reasons set out above, Mr Sharma’s counterclaim wholly fails. I have, above, assessed the applicant’s entitlement to payment in the sum of \$25,531. There is no set-off to this sum.

Interest

- 63 The applicant claims interest at the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983. It relies on section 53(2)(b)(ii) of the *Domestic Building Contracts Act* 1995 (**‘the Act’**) which provides that the Tribunal may make an order for damages in the nature of interest. Section 53(3) of the Act provides also that, in awarding damages in the nature of interest, the Tribunal may base the amount awarded on the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983, or on any lesser rate it thinks appropriate.
- 64 It is important to note that the Tribunal’s power under section 53(2)(b)(ii) of the Act is subject to the overarching provision in section 53(1) of the Act which provides that the Tribunal may make *any order it considers fair* to resolve a domestic building dispute.
- 65 The applicant claims interest for the period commencing on 8 September 2017, that being the due date for payment of its invoice dated 25 August 2017.

- 66 Although the applicant has been out-of-pocket for some time, I am not satisfied that it is fair to award interest.
- 67 After receiving the applicant's invoice on 25 August 2017, Mr Sharma requested from the applicant, quite justifiably in my view, substantiation of the sum being charged. In response to Mr Sharma's request, the applicant sent to Mr Sharma copies of the photographs and GPS data records discussed earlier in these reasons.
- 68 It is not surprising that Mr Sharma was not satisfied with the documentation sent to him as purported substantiation of the invoiced sum. It is only after careful examination of the photographs and the GPS data, coupled with explanatory evidence from Mr Smith, that I have determined the sum the applicant is entitled to be paid. And the sum I have determined is less than the sum invoiced on 25 August 2017.
- 69 In my view, the applicant's invoice of 25 August 2017 raises uncertainty. Why, for example, does the invoice include one charge for removal of rock and a second charge for excavation of rock, in addition to an overall excavation charge? As discussed earlier in these reasons, the quotation did not include an additional entitlement to charge for rock *excavation* as distinct from rock *removal*. The uncertainty is exacerbated by the less than satisfactory record-keeping of the applicant as to substantiation of the sum charged.
- 70 In all circumstances, I am not satisfied that it is fair that interest be awarded.

Orders

- 71 For the reasons set out above I will order Mr Sharma to pay the applicant \$25,531. Mr Sharma's counterclaim is dismissed. Costs will be reserved with liberty to apply.

SENIOR MEMBER M. FARRELLY