

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP344/2014

CATCHWORDS

BUILDING AND PROPERTY LIST—major domestic building contract for erection of dwelling—works currently suspended by the builder—slab laid and frame erected—both approved by relevant building surveyor—owner seeks performance remedies—builder counterclaims for frame stage payment.

Whether there is a contractual obligation on the builder to ensure the ground level at slab edge is at RL98.58 metres and if so, whether the breach by the builder should result in an order requiring the builder to rectify—section 53(2)(g) *Domestic Building Contracts Act 1995*—relevant considerations when ordering rectification—Part 3.1.2.3 *Building Code of Australia*—the availability of an *Alternative Design Solution* under the *Building Code of Australia*—rectification order made.

Clause 2.08 *Guide to Standards and Tolerances* Whether, in any event, the slab should be demolished because of an alleged failure by the builder to construct the slab such that the finished floor level does not deviate more than 20mm across the entire building footprint—claim dismissed.

Whether, in the absence of compaction and inspection records concerning the founding material laid by the builder, demolition of the slab and frame should occur so founding material may be re-laid and compacted with appropriate certifications provided—claim dismissed.

Whether, notwithstanding approval by relevant building surveyor, the frame fails to comply with provisions of AS1684.2 and should be demolished—claim dismissed.

Whether, at the express request of the owner, there ought to be a referral by the Tribunal to the Building Practitioners Board pursuant to Clause 12(1) of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998*, based on alleged breaches of the *Building Act 1993* and/or the *Building Regulations 2006*—Building Practitioners Board already seized of matter—request dismissed—order that a copy of the Orders and Reasons for Decision be provided to the Building Practitioners Board

APPLICANT	Shannon Draper
RESPONDENT	Simonds Homes Victoria Pty Ltd (ACN 050 197 610)
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Hearing
DATE OF HEARING	18-21 May 2015, 25-26 May 2015, 27 May 2015 (half day), 28-29 May 2015. 10 June 2015 (written submission of Applicant re alleged frame defects); 19 June 2015 (written submission of Respondent in reply). 10 July 2015 (written submissions of Respondent), 7 September 2015 (written submissions of the Applicant), 14 September 2015 (final oral submissions), 13 October 2015 (written Reply Submissions of Respondent).
DATE OF ORDER	29 April 2016

CITATION

Draper v Simonds Homes Victoria Pty Ltd
(Building and Property) [2016] VCAT 669

ORDERS

1. Pursuant to section 53(2)(g) *Domestic Building Contracts Act 1995*, the Respondent must rectify defective building works, by demolishing the existing slab, and laying a slab for the dwelling as enables the Finished Floor Level of the garage section of the slab to be 150 mm above a Finished Ground Level at the slab's western edge of RL98.58 metres, in accordance with Site Plan 1.1 signed by the Applicant on 5 June 2014.
2. All claims of the Applicant are otherwise dismissed, save for the Applicant's claim for damages for any alleged extra time taken by the Respondent to complete the works, which claim cannot be brought until the Building Works (as defined in the Contract) are completed.
3. The counterclaim is dismissed, without prejudice to the Respondent's right to submit a further progress claim for the frame stage under the provisions of the Contract upon its re-construction.
4. **The Principal Registrar is directed to provide a copy of this Order and Reasons to the Building Practitioners Board (attention: Mr Robert Dalton, Legal Counsel-Litigation).**
5. Costs reserved, with liberty to apply.
6. If an application for costs is made by either party, the Principal Registrar is directed to list the matter for hearing before Member Kincaid, with an estimated hearing time of half a day.

A T Kincaid
Member

APPEARANCES:

For Applicant

Mr S Draper in person.

For Respondent

Mr M Stirling of Counsel.

REASONS

INTRODUCTION

- 1 The Applicant (“**Mr Draper**”) is the owner of land at Alpine Drive, Wallan (the “**site**”). He has been the owner since August 2013.
- 2 Mr Draper engaged the respondent Simonds Homes Melbourne Pty Ltd (“**Simonds**”) to construct a dwelling on the site. It has remained uncompleted since September 2014. Simonds has performed no further works since then.
- 3 Neither party has terminated the building contract.
- 4 Mr Draper started the proceeding in September 2014.
- 5 It is commonplace within the building industry for consultants to produce updated “construction issue” drawings after a contract has been signed. A central issue in this case concerns the obligations of a builder to keep the owner informed of material design changes that may occur during this process.
- 6 I have upheld Mr Draper’s claim for an order that Simonds rectify the completed base works, in order to achieve compliance with its contractual obligations, which will require Simonds to demolish the existing slab, and to replace it.
- 7 I have dismissed the other claims of Mr Draper, save for his claim in relation to damages for delay, which has been brought by him prematurely.

BACKGROUND

- 8 Mr Draper is a qualified carpenter, but no longer carries on his trade due to disabilities from which, I understand, he now suffers.
- 9 By a domestic building contract dated 5 June 2014 (the “**Contract**”), Mr Draper engaged Simonds to construct a brick veneer dwelling on the site.
- 10 Schedule 3 to the Contract identified the total contract price as \$193,380 including GST (the “**Contract Sum**”). It required Mr Draper to pay 5% of the Contract Sum as a deposit (\$9,669), a further 20% upon the base stage being completed (\$38,676), and a further 25% upon completion of the frame stage (\$48,345).
- 11 Vallence Gary Simonds (“**Mr Simonds**”) is a director of Simonds, and a registered building practitioner.
- 12 Mr Giambattista (“**Mr Giambattista**”) was the Relevant Building Surveyor (the “**RBS**”), appointed to carry out statutory functions in respect of the works, but he no longer does so, for reasons that follow.
- 13 Mr Giambattista issued a Building Permit on 26 June 2014.
- 14 By tax invoice dated 17 July 2014, Simonds issued a progress claim for completion of the Stage 1 “base” stage in the amount of \$38,676 including GST. Under the Contract, this is the stage when the concrete slab is complete. It was for 20% of the Contract Sum.

- 15 As appears in these Reasons, Mr Draper subsequently emailed Simonds to the effect that, in his view, the slab was too low relative to the proposed driveway level. He was also concerned that drainage requirements had not been adequately addressed by Simonds. He instructed Simonds to stop work.
- 16 Negotiations arising from Mr Draper’s concerns followed. He considered that the base stage payment was not due in circumstances where, he believed, Simonds had given him no comfort concerning the nature and compaction of the founding material below the slab, and whilst the issue concerning the level of the slab remained unresolved.
- 17 On 5 September 2014, Simonds issued a Notice of Suspension pursuant to clause 35 of the Contract.
- 18 Mr Draper had already made arrangements on 4 September 2014 to pay the base stage progress claim. He gave evidence that he was not happy about doing so, but that he made the payment to comply with the Contract, and as a sign of goodwill in the circumstances.
- 19 Simonds received payment for the base stage progress claim on 8 September 2014.
- 20 Simonds invoiced the frame stage progress claim by tax invoice dated 5 September 2014. Mr Draper did not pay it.
- 21 Simonds suspended work on the dwelling after it completed the slab and frame stages, together with the roof truss, because of Mr Draper’s failure to pay the frame stage progress claim of \$48,345.
- 22 Although each party has, in correspondence since the various disputes arose, threatened to terminate the contract, neither has yet done so.
- 23 Simonds is required to construct the dwelling in accordance with the provisions of the *Building Act 1993* (the “**Building Act**”) and the *Building Regulations 2006* (the “**Building Regulations**”).
- 24 The Building Regulations “call up” the *Building Code of Australia* (2014 edition, adopted by Victoria on 1 May 2014) (the “**BCA**”), being Volumes 1 and 2 of the *National Construction Code Series*, as the standard to which building contracts entered into after 1 May 2014 must be constructed in Victoria.

MR DRAPER’S CLAIMS

- 25 By his application to the Tribunal filed on 9 September 2014, Mr Draper sought orders that Simonds remove the slab and frame because they had been designed and constructed “at the wrong level”.¹
- 26 Mr Draper subsequently filed Points of Claim on 30 January 2015.² They contained a “List of Claims”.³

¹ See TB1-10.

² See TB11-12.

³ See TB13-20.

- 27 Mr Draper filed a “List of Claims (With Clarifications)” on 15 May 2015. It contained a “List of Orders” sought by Mr Draper.
- 28 On the first day of the hearing, Mr Draper tendered an amended “List of Claims”,⁴ containing references to documents contained in his Tribunal Book, with an amended “List of Orders”⁵ that he sought.
- 29 By his Final Submissions dated 31 August 2015 (the “**Final Submissions**”), Mr Draper seeks, in effect, seeks the following orders from the Tribunal:
- (a) Simonds must demolish the slab, and re-lay it so that a Finished Ground Level (“**FGL**”) of RL98.58 metres is achieved at the western slab edge, and ensuring that the FFL of the slab is no lower than 150mm above it, in compliance with Part 3.1.2.3 of the BCA;⁶
 - (b) alternatively, given the evidence that there is a variation of the Finished Floor Level (“**FFL**”) across the surface of the slab greater than 20 mm, Simonds must demolish the slab, and re-lay it;⁷
 - (c) alternatively to (a) and (b), in the absence of compliance certificate, alleged by Mr Draper to be required to be produced under the Contract, the BCA and the Building Regulations, that demonstrates that the foundation material below the slab has been properly prepared and compacted, Simonds must demolish the slab, and re-lay it, with proper certifications;⁸
 - (d) in the event of the Tribunal not making an order for demolition of the slab, then to the extent that the “P2 proposal” proposed by Simonds for achieving an FGL of RL98.58 metres at the slab edge is an “Alternative Solution” within the meaning of the BCA (and therefore required to comply with the “Performance Requirements” by adoption of one of the “Assessment Methods” in the BCA), Simonds must comply with the relevant requirements such that they meet the approval of the Relevant Building Surveyor;⁹
 - (e) if the need for a new frame does not arise as a result of the Tribunal making an order for demolition of the slab, for any of the reasons described in sub-paragraphs (a)-(c) above, Simonds must provide a certificate of compliance in respect of the frame design;¹⁰
 - (f) in the absence of a certificate of compliance referred to in sub-paragraph (e) above, Simonds must demolish the frame and reconstruct it in accordance with relevant requirements;¹¹
 - (g) to the extent that the proposal put by Simonds for rectifying the design of the drainage is an “Alternative Solution” within the meaning of the BCA,

4 See TB100-115.

5 See TB116-118.

6 See bracketed section in part 16(2)(b) of the Final Submissions.

7 See part 16(3) of the Final Submissions.

8 See part 16(2)(a) of the Final Submissions.

9 See part 16(2)(b) of the Final Submissions.

10 See part 16(2)(d) of the Final Submissions

11 See paragraph starting “Failing to...” on page 211 of the Final Submissions.

(and therefore required to comply with the “Performance Requirements” by adoption of one of the “Assessment Methods” in the BCA), Simonds must comply with the relevant requirements such that they meet the approval of the Relevant Building Surveyor;¹²

- (h) a declaration that the commencement date of the contract is 31 May 2014, and that Simonds must pay damages of \$400 per week to Mr Draper from 7 January 2015 (being Mr Draper’s calculated date of completion of the works) and continuing;¹³
- (i) Simonds must pay Mr Draper \$70,000 in “restitution”;¹⁴
- (j) Simonds must pay Mr Draper \$50,000 for “distress and mental trauma” caused by “these events”;¹⁵ and
- (k) Simonds must pay Mr Draper \$200,000 exemplary damages as a result of Simonds’s alleged “vexatious handling of not only the proceeding, but the entire contract provision and build process”.¹⁶

30 I address each of these claims below.

MR DRAPER MAKES NO CLAIM FOR DAMAGES IN RELATION TO RECTIFYING THE ALLEGED DEFECTIVE WORKS

- 31 The gist of Mr Draper’s final submissions is that given that the Tribunal is granted express power to make a performance-based orders by sections 53(g) of the *Domestic Building Contracts Act 1995* (the “**DBC Act**”), and that the Tribunal should make such an order in this case.
- 32 In light of his claims for performance-based orders, Mr Draper has made no claims for damages for the cost of rectifying allegedly defective work.

REQUEST BY MR DRAPER THAT THE TRIBUNAL REFER MATTERS TO THE BUILDING PRACTITIONERS BOARD

- 33 Section 178(1) of the Building Act gives power to the Building Practitioners Board (the “**BPB**”) to conduct an inquiry about the conduct or ability to practise of a registered building practitioner.
- 34 Should the BPB do so, and it makes findings against a registered building practitioner of the type set out in section 179(1) of the Act, it is empowered to make certain “decisions” (in the nature of penalties) against the registered building practitioner, as set out in section 179(2) of the Building Act.
- 35 On the first day of the hearing, Mr Draper tendered material demonstrating that in early 2015, he made a complaint to the Victorian Building Authority (the “**VBA**”) about the works. By her email dated 28 April 2015, Ms Grayson of the VBA informed Mr Draper that his complaint was undergoing a “technical assessment”. A further letter dated 14 May 2015 from Mr Douglass, Manager, Inspections and

¹² See Part 16(2)(c) of the Final Submissions.

¹³ See Part 16(5)-(7) of the Final Submissions.

¹⁴ See Part 16(8) of the Final Submissions.

¹⁵ See Part 16(9) of the Final Submissions.

¹⁶ See Part 16(10)-(11) of the Final Submissions.

Complaints Services of the VBA informed Mr Draper that the assessment had not been completed. Mr Douglass also informed Mr Draper that, as the matters raised by him were to be the subject of this proceeding, and given that Mr Draper had summonsed VBA employees to give evidence at the hearing, the VBA would not be in a position to comment further until the proceeding had been determined.

- 36 Mr Draper also tendered a copy of a letter from the BPB to him dated 18 March 2015 stating that, in response to a request made by him, it had appointed a person pursuant to s 177(1) of the Building Act to report and make recommendations to it on whether or not it should hold an inquiry under section 178 of the Building Act about Mr Simonds’s conduct or ability to practise.
- 37 Clause 12(1) of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (the “**VCAT Act**”) gives the Tribunal a power of referral to the Director of Consumer Affairs, the Victorian Building Authority or the BPB to investigate any matter that arises in a proceeding under the DBC Act.
- 38 Clause 12(2) of Schedule 1 to the VCAT Act provides that on any such referral to the BPS, the BPS may investigate a matter and, if it does so, it must report on such investigation to the Tribunal.
- 39 Section 178(1)(ca) of the Building Act also provides (among other things) that on any such referral by the Tribunal, the BPB may conduct an inquiry about the conduct or ability to practise of a registered building practitioner.
- 40 In addition to the claims I have described above and, given that at the time of the hearing, Mr Draper had not been successful in obtaining a commitment by the BPB to conduct an inquiry about “the conduct or ability to practise of Mr Simonds”, Mr Draper also sought a referral by the Tribunal to the BPB¹⁷.
- 41 Pursuant to Clause 12(2) of Schedule 1 to the VCAT Act, such a referral would, in effect, require the BPB to investigate a matter and report on the investigation to the Tribunal. It would also be open to the Building Practitioners Board to conduct an inquiry under section 178(1) of the Building Act.
- 42 In his opening submissions, Mr Draper called for an immediate referral by the Tribunal to the BPB, and he renewed this request during the hearing, and afterwards. This was opposed by Simonds.
- 43 I was not prepared to make such a referral, until after I had heard the evidence and determined whether there was evidence of a sufficiently egregious breach of the Building Act, or the Building Regulations, or conduct otherwise referred to in section 179(1) of the Building Act, to warrant referral.
- 44 By a proceeding filed in the Tribunal on 15 October 2015, and pursuant to section 182A(3)(a) of the Building Act, Mr Draper sought a review of an alleged failure by the BPB to conduct an inquiry [pursuant to section 178 of the Building Act] within a reasonable time (the “**second VCAT proceeding**”).
- 45 By the Tribunal’s order dated 6 April 2016, the second VCAT proceeding was adjourned, pending receipt by the Tribunal of advice from the BPB on 12 May

¹⁷ See paragraph 34 on page 22 of the Final Submissions.

2016 as to whether or not an inquiry under section 178 of the Building Act will be conducted.

SIMONDS'S COUNTERCLAIM

46 Simonds seeks payment of the outstanding frame stage progress claim of \$48,345, plus interest of \$5,526 from 16 September 2014 to 10 July 2015, and continuing.

EVENTS SUBSEQUENT TO THE FILING OF FINAL SUBMISSIONS

47 I have outlined the above matters because, while the proceeding was adjourned for my reserved decision:

- (a) by paragraph 11 of an email from Mr Draper to the Tribunal dated 3 November 2015, he requested the Tribunal to stay its decision until “after the completion of the second VCAT proceeding;
- (b) by paragraph 12 of the same email, Mr Draper asked the Tribunal to request the Director of Consumer Affairs (the “**Director**”) pursuant to Clause 12(1) of Schedule 1 to the VCAT Act, to conduct an investigation pursuant to Clause 12(2) of Schedule 1 to the VCAT Act; and
- (c) by a further email dated 2 December 2015, Mr Draper requested the Tribunal immediately to refer the issues to the BPB pursuant Clause 12(1) of Schedule 1 to the VCAT Act, to for it to consider conducting an inquiry being, in Mr Draper’s view, “the more appropriate forum considering the changing nature of this case”. This was, of course, a reference to an inquiry able to be conducted by the BPB under section 178 of the Building Act, for which Mr Draper had previously often contended, and to which I have referred.

48 Following receipt of these emails, the Tribunal fixed the proceeding for further directions on 18 December 2015.

49 At the directions hearing, Mr Draper announced that he was seeking only three outcomes, as follows:

- (a) a request by the Tribunal of the Director pursuant to Clause 12(1) of Schedule 1 to the VCAT Act to conduct an investigation;
- (b) a summary order of the Tribunal that the slab be demolished; and
- (c) a request by the Tribunal of the VBA pursuant to Clause 12A(1) of Schedule 1 to the VCAT Act that the VBA provide the Tribunal with a copy of a report dated 24 June 2015, alleged to be in the possession of the VBA.

50 Mr Draper’s request for a summary order that the slab be demolished arose out of the following circumstances, described by Mr Draper at the directions hearing on 18 December 2015.

51 At the hearing, Mr Draper tendered a letter from the VBA to him dated 26 November 2015. It indicates that on 1 October 2015, the VBA consented to the termination of the appointment of Mr Giambattista as the RBS.

- 52 It appears that the view had been taken by the VBA that the relationship between Mr Draper and Mr Giambattista had so completely broken down (resulting in the obtaining by Mr Giambattista of an intervention order against Mr Draper) that Mr Giambattista could no longer sensibly continue to act as the RBS.
- 53 The letter from the VBA also records that, in the absence of Mr Draper appointing a replacement building surveyor, the municipal building surveyor “will be the [RBS] for the works”.
- 54 Mr Draper also tendered a letter to him from the Municipal Building Surveyor of Mitchell Shire Council dated 26 November 2015, which reads as follows:
- As previously [mentioned] Council policy is to not complete a private building surveyor’s function once work has commenced. This is for insurance and risk reasons.
- I have communicated with the previous building surveyor for this dwelling and read the reports you have provided and am satisfied that although the works on site may not be compliant they do not pose a risk in their current state.
- This leaves you with two options from this point on:
- Option (a) appoint a new private building surveyor to complete the function.
- Or
- Option (b) make an application to Council to demolish what has been erected and start afresh with a new building permit to construct a dwelling with your building surveyor of choice.
- I hope this gives you some clarity and direction for your next decision.
- 55 Mr Draper thus contended, at the hearing on 18 December 2015, that the Municipal Building Surveyor was not prepared to assume a role as the RBS in circumstances where it could not satisfy itself that the slab had been laid on adequate founding material that had been properly compacted in accordance with the requirements of AS 2870.
- 56 By his email to Simonds dated 27 November 2015, also tendered by him at the hearing on 18 December 2015, Mr Draper invited Simonds to submit an application for a demolition permit, and then also submit an application for a new permit based on a proper design including amended contract drawings setting out Mr Draper’s requirements. Simonds had declined to do so.
- 57 Mr Draper’s submission at the directions hearing was that there is evidence that the slab has been laid in breach of Clause 2.08 of the *Guide to Standards and Tolerances 2007* (the “GST”), because the overall deviation of the slab level to the entire building footprint is over 20mm. Mr Draper submitted that the work is therefore defective, and that he was therefore entitled to a summary order that the slab be demolished and replaced. I did not agree with this submission, for reasons that follow.
- 58 On 25 January 2016, I made the following orders (with Reasons):
1. The application by the Applicant to the Tribunal to make a request of the Director of Consumer Affairs pursuant to Clause 12(1) of Schedule 1 to the

Victorian Civil and Administrative Tribunal Act 1998 to conduct an investigation pursuant to Clause 12(2) of Schedule 1, is refused.

2. The application by the Applicant for an order requiring the Respondent to demolish the slab, is refused.
 3. The application by the Applicant to make a request of the Victorian Building Authority pursuant to Clause 12A(1) of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* to provide to the Tribunal with a copy of a report allegedly obtained by the Victorian Building Authority dated 24 June 2015, is refused.
- 59 By one of two emails dated 26 January 2016, Mr Draper attached a copy of letter he had received from the VBA dated 30 October 2015. That letter informed him that the VBA had completed its “investigation” into the conduct of Mr Simonds, and had referred [Mr Draper’s request for an inquiry] to the BPB.
- 60 By email dated 1 April 2016, Mr Draper attached a letter from legal counsel for the BPB dated 30 March 2016, stating that the BPB had resolved to undertake a non-statutory “Conduct Review” of Mr Simonds, in the exercise of one of its functions to “supervise and monitor the conduct and ability to practise of registered building practitioners”.¹⁸ The letter explained that a review of this sort can be a step in the BPB making a decision to exercise its power under section 178 of the Building Act to conduct an inquiry. The letter further explained that at the conclusion of the Conduct Review, a decision will then be made on whether or not the BPB will conduct an inquiry under section 178 of the Building Act.
- 61 By email dated 1 April 2016 Mr Draper requested a directions hearing to consider and if thought appropriate, order Simonds, in effect, to make further submissions on “how the acceptance [by Simonds] of changes to their business practices [arising out of compliance breaches by Simonds, then identified by the BPB] now affects Simonds’s position “regarding the claims and allegations made in the proceeding.
- 62 By his email dated 1 April 2016, Mr Draper also repeated his earlier request made in his email dated 3 November 2015 (although he chose not to pursue the request at the hearing on 18 December 2015) for the proceeding to be stayed until after the outcome of the second VCAT proceeding was known.
- 63 By Chambers order dated 11 April 2016, I refused Mr Draper’s two requests.
- 64 By his email dated 1 April 2016 and, given that the BPB has not yet resolved to conduct an inquiry about the conduct or ability to practise of Mr Simonds, Mr Draper confirmed that he still seeks a referral by the Tribunal to the BPB pursuant to Clause 12(1) of Schedule 1 to the VCAT Act.

THE HEARING

- 65 The dates of the hearing, and the subsequent written submissions by the parties, are set out in the heading.

¹⁸ See section 183(2) of the Building Act.

- 66 Mr Draper summonsed Mr Nick Kukulka, a Private Building Surveyor previously engaged by the VBA to inspect and report on the construction of the dwelling pursuant to the provisions of the DBC Act. He also summonsed Mr Daniel De Lacy, Manager of the VBA Inspections Department to give evidence at the hearing, and to produce documents. Documents were produced by both witnesses.¹⁹
- 67 In the event, Mr Kukulka was called by Simonds to give evidence.
- 68 In addition to Mr Kukulka, the following further witnesses were called by Simonds, in the following order:
- (d) Mr Kevin Wilson, the frame inspector, engaged by Mr Clem Giambattista;
 - (e) Mr Mark Benson, Major Account Sales Manager, Timbertruss, the truss supplier;
 - (f) Mr David Whitford, National Building Manager of Simonds.
 - (g) Mr Luke Vandouree, framing carpenter employed by Simonds;
 - (h) Mr Shannon Wall, Site Supervisor employed by Simonds (who reported to Mr Hus Saglam);
 - (i) Mr Michael Carlini, qualified draftsman, employed by Simonds; and
 - (j) Mr Hus Saglam, Construction Manager employed by Simonds.
- 69 On 7 May 2015, Mr Draper also served summonses on the following, requiring each to give evidence:
- (a) Mr Shannon Wall (called by Simonds), Mr Craig Harrington (called by Simonds), Mr Kane Kelly, Ms Jennifer Warren and Ms Lauren Marriage all of Simonds's Northern Region Office in Morang;
 - (b) Mr Simonds, Mr Graeme Mathers, Mr David Whitford (called by Simonds) Mr Trent Smith, General Manager Group Operations Ms Mary Pink, Accounts Receivable Officer and Tracey Leung, all of Simonds's head office in St Kilda Road, Melbourne;
 - (c) Mr Chao Guo (EC-37903), engineer, the building practitioner referred to in the relevant building permit as having been engaged by Simonds to prepare documents;
 - (d) Mr Louis Tantric, Department Manager Residential Volume Housing and Ms Jessica Borzillo, Account Manager, both of Intrax Consulting Engineers Pty Ltd ("**Intrax**"), the consulting engineering company engaged by Simonds to provide Simonds with a Site Classification report dated 9 April 2014;
 - (e) Mr Giambattista;
 - (f) Mr John Kitsoulis (IN-L40410) of Online Permit Solutions Pty Ltd, a Building Inspector engaged by Mr Giambattista, responsible for issuing to

¹⁹ Letter from the VBA to the tribunal dated 13 May 2015.

Mr Giambattista pursuant to section 238 of the Building Act, the “pre-slab” Certificate of Compliance dated 14 July 2014, and a “steel” Certificate of Compliance dated 16 July 2014; and

- (g) Mr Kevin Wilson (called by Simonds), another Building Inspector employed by Mr Giambattista, responsible for issuing to Mr Giambattista, pursuant to section 238 of the Building Act, the “frame” Certificate of Compliance dated 14 August 2014.

70 By order dated 1 May 2015, the Tribunal ordered that the Registrar must issue the above witness summonses, but that the witnesses were not obliged to attend the Tribunal until the relevance of those witnesses had been determined by the Member conducting the hearing, ideally on the first day of the hearing, and that Mr Draper was required to serve a copy of that order when serving the summonses.

71 I set aside the summonses addressed to

- (a) Mr De Lacy of the VBA;
- (b) Simonds employees Mr Graeme Mathers, Mr Trent Smith, Ms Mary Pink, Tracey Leung and Mr Guo;
- (c) Mr Louis Tantri and Ms Jessica Borzillo;
- (d) Mr Giambattista; and
- (e) Mr Kitsoulis

on the grounds that their evidence could not have been relevant to the issues in the proceeding.

72. In respect of Mr Giambattista, my reason for setting aside the summons served on him was that I was informed by Counsel for Simonds that at all material times, as he was entitled to do pursuant to section 238 of the Building Act, he relied on inspection certificates issued by registered building practitioners Mr Kitsoulis (in relation to the base and slab stage), and Mr Wilson (in relation to the frame stage).

73. I also set aside the subpoena served on Mr Simonds. He was named in the Building Permit both as the “Building Practitioner Engaged in the Building Work” and the “Building Practitioner Engaged to Prepare Documents”. I was informed by Counsel for Simonds that Mr Simonds had never visited the site, nor was he involved in any other way with the works. In that sense, I concluded that he was not “engaged in the building work”.

74. This did not appear to me to be extraordinary. It is doubtful in any event, in my view, having regard to section 24A(2) of the Building Act, that Mr Giambattista was required at law to certify that Mr Simonds was to be “engaged in the building work”. Notwithstanding that the prescribed Form of Building Permit prescribed by Form 2 of Schedule 2 to the Building Regulations requires details of the building practitioner to be “engaged in the building work”, that requirement applies only to building work that is “not domestic building work” (see section 24A(1) of the Building Act).

75. However, I find on Counsel’s concession, and on the evidence, that the representation in the Building Permit that Mr Simonds had been “engaged to prepare documents” was incorrect.

CLAIM 1

SHOULD THE SLAB BE DEMOLISHED AND RECONSTRUCTED?

Description of Terms

- 76 The Contract requires Mr Draper’s dwelling to be designed to be constructed on a waffle raft slab. A waffle raft is a stiffened raft slab, with closely spaced ribs constructed on the ground with slab panels suspended between ribs. It is constructed on a level site using polystyrene void forms to produce a close grid of reinforced concrete ribs, which support the slab panels.
- 77 The footing system is that part of a building’s construction that transfers the load from the building to the foundation. The footing system in Mr Draper’s dwelling comprises edge beams incorporated into the waffle raft slab, with a “rebate” (on which the external brick veneer is constructed), and internal stiffening ribs.
- 78 The exterior walls of Mr Draper’s dwelling are designed to be brick veneer.
- 79 The foundation of a building is the ground that supports the building,²⁰ or, more particularly, the “footing system”.
- 79 As the footing system of a waffle raft slab is cast on the surface using polystyrene void forms, rather than trenched into the foundation, site preparation is minimised, and reduced concrete and reinforcement is required.
- 80 The “reduced level” (“**RL**”) of a location on a building site is its elevation (or vertical distance) above or below a temporary bench mark which has a commonly assumed datum plane. In other words, all levels that may be nominated on a construction drawing are “reduced” to a nominated datum point.
- 81 A “Site Plan Sheet 1.1” (the “**Site Plan**”) is one of the plans referred to in the Contract. It nominates a temporary bench mark (“**TBM**”) at the top of the site’s electricity pit as RL100 metres. This TBM was therefore adopted as the commonly assumed reference point for all other levels shown in the Site Plan.

Mr Draper’s submissions

The garage section of the slab

- 82 It is not contested that the FFL of the “garage section” of the slab is RL 98.55 metres
- 83 Mr Draper says that Simonds is required under the Contract to provide an FGL of RL98.58 metres at the western edge of the garage section of the slab.
- 84 Mr Draper says, and I find, that Part 3.1.2.3 of the BCA requires the FFL of a slab-on-ground to be not less than 150 mm above the FGL. Mr Draper submits

²⁰ See definition in Part 1.1.1 of the BCA.

that Simonds is therefore required to construct the garage section of the slab with an FFL of RL98.73 metres, as would allow the FGL at the garage slab edge to be RL98.58 (being 150 mm below).

- 85 Mr Draper submits that the FFL of the as-built garage section of the slab means that the FGL at the slab edge can be no higher than RL98.40 metres (150 mm below RL98.55 metres), rather than RL98.58 metres required by the Contract.
- 86 The FGL at the garage slab edge has been measured by Simonds at RL98.33 metres, which is level to the horizontal section of the slab rebate.

The house section of the slab

- 87 The plans require a 135 mm step-up from the garage.
- 88 Mr Draper's submits that the FFL of the garage section of the slab should be RL 98.73 metres. It follows that the FFL of the connecting "house section" of the slab should be RL98.865 metres (being 135 mm above RL98.73 metres garage section of slab).
- 89 Mr Draper submits that if the FFL of the house section of slab is found to be RL98.685 metres, this means that the FGL at slab edge can be no higher than RL98.535 metres (150 mm below the FFL of the house section of the slab).
- 90 The FGL at the edge of the house section of slab has been measured by Simonds at RL98.43 metres. Assuming the FFL of the house section of the slab is RL98.685 metres, the FGL is therefore 35 mm below the horizontal section of the slab rebate.
- 91 Mr Draper contends that what Simonds should have done was to calculate the FFLs by "working up" from the nominated FGL of RL98.58 metres.
- 92 Mr Draper does not contend, and has never contended that the FGL at the slab edge is too high in relation to the FFL of the house and garage slabs. Rather, he says, the slab has been constructed too low, given Simonds's obligation to construct an FGL at the slab edge of RL98.58 metres.
- 93 For the reasons discussed below, Mr Draper wants the slab demolished and rebuilt in accordance with the Contract as construed by him.

Simonds's submissions

- 94 Simonds contends that the FFL of RL98.55 metres of the garage section of slab is in accordance with the Contract as properly construed. That is to say, it is not contractually required to achieve an FFL of the garage section of slab such that an FGL of RL98.58 metres at the slab western edge can be achieved.
- 95 It says that to the extent that an FGL is expressed in the Site Plan as RL98.58 metres, that was "indicative" only, and that that was superseded by "construction drawings" subsequently signed by Mr Draper.

96 Simonds contends that the FFL of the house section of the slab is in accordance with the contract viz. RL98.685 metres²¹, being 135 mm above the FFL of the garage section of the slab. Again, Simonds says that it was not contractually required to lay the house section of the slab such that a FGL at the slab edge of RL98.58 metres can be achieved.

Was Simonds required to achieve an FGL at slab edge of RL98.58 metres?

97 In order to answer this question, it is necessary for me to review the contractual arrangements between the parties.

Architectural drawings

98 The parties signed an HIA “New Homes Contract” on 5 June 2014.

99 The Contract included 9 sheets of plans, prepared by Simonds’s in-house architectural team (the “**architectural drawings**”). They were signed by Mr Draper and Simonds on 5 June 2014. They comprised the Site Plan, and Plans 2.1, 3.1, 3.2, 5.2, 5.3, 6.1, 8.1 and 8.2. They are all dated as having been drawn on 19 April 2014.

100 The Site Plan also provided:

SITE SOIL CLASSIFICATION CLASS ‘P’ TO AS 2870-1996

DWELLING & GARAGE: WAFFLE POD CONCRETE SLAB

SITE SCRAPE **RL 98.30**

FREEBOARD **385mm**

REBATE TO HOUSE **220mm**

STEP DOWN TO GARAGE **135mm**

STEP DOWN TO PORCH **220MM**

101 “Freeboard” is described in AS2870-2011 as the height of the slab surface above finished ground.²²

102 “Freeboard” is also described as the minimum height of the level of the lowest floor of a building above the defined flood level, regulated by the relevant planning scheme, or specified or otherwise determined by the relevant Council under Regulation 802 of the Building Regulations.²³

103 What is clear, in my view, is that when using the word FREEBOARD in the Site Plan, Simonds is referring to neither: rather, it is referring to the overall slab depth from the FFL to the bottom of the edge beam; it was always Simonds’s intention (as is common, for cosmetic reasons) to backfill the ground level at the slab edge to the horizontal section of the slab rebate, or just below it.

²¹ Mr Draper contends that the house section of the slab does not have a uniform FFL of RL 98.685.

²² See C5.2.2 of AS2870-2011

²³ See VBA *Practice Note 2014-65* Issued May 2014

104 In this circumstance, I find that Simonds’s obligation concerning the height of the FFL above the FGL (“freeboard” in the sense used in the BCA) was that set out in Part 3.1.2.3 of the BCA viz. it must be 150 mm above the FGL.

Ground level shown in the Site Plan

- 105 The Site Plan shows that the land falls away from Alpine Drive, located north, towards the south. The level of the land at the southern boundary is at RL96.2 metres relative to the TBM at RL100 metres.
- 106 The proposed garage of the dwelling is shown as hatched, to indicate to Simonds that an additional site scrape of 135mm below the prescribed RL 98.30 metres “bench level” would be required to achieve the required 135mm step down from the house section of the slab to the garage section of the slab.
- 107 Significantly for Mr Draper, the Site Plan, in two locations along the western side of the proposed dwelling, stipulates the FGL at the slab edge as RL98.58 metres. Mr Draper contends that these measurements represent the height of the FGL required to be achieved by Simonds at the slab edge.
- 108 Mr Draper contends that this was a little lower than the level of the land to the immediate west of the proposed slab edge of RL 98.60 metres, left by his own site works, which I will describe later. He contends that this was because of natural settlement since he undertook his works. However, he contends that the level of RL 98.58 metres was sufficient for his proposed purpose of using that land to the immediate west of the dwelling as a driveway.
- 109 Also, significantly, the Site Plan makes no reference to the FFL for the garage section of the slab, nor for the house section of the slab.

Engineering drawings

- 110 There are 5 sheets of engineering drawings S1-S5 prepared by Intrax Consulting Engineers Pty Ltd for Simonds (the “**engineering drawings**”). Drawing S1 is marked “CLIENT’S COPY” dated “APR 2014”.
- 111 Unlike the architectural drawings, there is no evidence that the engineering drawings were signed by Mr Draper. For this reason, Mr Draper contends that the engineering drawings were “non-contractual”.
- 112 In Section A INTERPRETATION section:

‘**Contract Documents**’ is defined to mean:

...this signed Contract and these Conditions, signed **Specifications**, signed Plans and an Engineer’s Design.

‘**Engineer’s Design**’ is defined to mean;

a Footing Design or other structural design that has been prepared by a qualified Engineer for the concrete footings, piers or slab construction, or for a particular part of the **Building Works** that requires a structural design, drainage design where appropriate and computations accompanying the foregoing.

‘**Plans**’ is defined to mean:

the drawings showing the layout and design details of the proposed buildings with dimensions and elevations, including the **Engineer's Design**

113 Clause 7.0 of the Contract provides:

On the signing of this Contract, the **Builder** must give the Owner identical copies of documents that form the **Contract Documents** at the time of signing or no later than 5 clear **Business Days** after the date of signing, including:

- signed contract;
- signed detailed Specifications;
- signed detailed Plans; and
- Soil Test Report and **Engineer's Design**.

114 There is no requirement, on a construction of Clause 7.0 of the Contract, that the Engineer's Design (being the engineering drawings) was required to be signed by the parties.

115 Simonds submits that given the stamp "Client's Copy" appearing on the engineering drawings, the inference can be drawn that the 5 engineering drawings were given to Mr Draper prior to or at the time of his signing of the contract on 5 June 2014, and that they therefore represent its contractual obligations to Mr Draper.

116 Page 1 of the pages entitled "Particulars of Contract" state as follows:

There are 5 sheets in the ENGINEER'S DESIGNS and it/they was/were prepared by Intrax for [Simonds].

117 I find that the Engineers Design was likely to have been provided to Mr Draper in about June 2014, and that even if this were not so, the engineering drawings S1-S5 dated "APRIL 2014" have been sufficiently referred to in the Particulars of Contract as to have been incorporated, by reference, in the Contract. I therefore reject Mr Draper's submission that the engineering drawings were not part of the Contract.

118 Engineering drawing S2 confirms the overall slab depth at 385 mm (which I have found find is a reference to the FREEBOARD depth referred to in the Site Plan)

119 Engineering drawing S3 contains the following notes:

WAFFLE CONSTRUCTION NOTES

SITE SCRAPE A MIMIMUM OF 100MM OF TOP SOIL REMOVE ALL ORGANIC MATERIAL FROM THE BUILDING SITE

PERFORM THE SITE CUT TO REQUIRED BENCH LEVEL [of RL 98.30-see engineering drawing S2]

FOLLOWING THE SITE CUT [to RL 98.30], WHERE THE DEPTH OF THE REMAINING FILL IS GREATER THAN 150MM:

REMOVE ALL FILL DOWN TO 150MM

COMPACT THE REMAINING 150MM LAYER OF FILL IN ACCORDANCE WITH AS2870-2011 SECTION 6.4

ANY ADDITIONAL REQUIRED FILL IS TO BE COMPACTED IN ACCORDANCE WITH 5 (BELOW)...

WHERE FILL IS ADDED TO FORM THE BENCH LEVEL, A LAYER OF QUARRY MATERIAL (CLASS 3 20 MM) IS TO BE PLACED OVER THE BUILDING AREA (EXTENDING 1000 mm OUTSIDE THE BUILDING EDGE LINE

- 120 The drawing called TYPICAL EXTERNAL RIB DETAIL on engineering drawing S3 refers to the quarry material as “minimum 50 mm”.
- 121 In subsequent correspondence between the parties, which I will come to, Mr Draper relies on this drawing detail when incorporating a 50 mm assumed depth of the quarry material, when making his calculations of the required FFL of the slab. Mr Draper submits that the drawings are unclear as to whether the quarry material was required to be placed upon or below the bench level of RL 98.30 metres. I find that, to the extent that any quarry material was required to be placed by Simonds, the material was to be placed on top of the controlled fill such that the upper surface of the quarry material was at the required bench level of RL 98.30 metres.²⁴
- 122 In summary, the waffle pod concrete slab was to be constructed above the ground on a level surface (or bench level) at RL98.30 metres. Polystyrene pods, about 1 metre by 1 metre in dimension, were required to be placed in a grid formation, separated by 110mm wide internal steel reinforced concrete stiffening beams to support an 85mm steel reinforced concrete slab.

Contract entered into on 5 June 2014

- 123 I find that the Contract was entered into on 5 June 2014.

Further drawings signed by Mr Draper on 16 June 2014 and 17 June 2014

- 124 On 16 June 2014, Mr Draper re-signed architectural drawings 2.1, 3.1, 3.2, 5.3, 6.1, 8.1 and 8.2.
- 125 He also signed drawing 5.1 and drawings 9.1-9.5 (none of which were signed by him on 5 June 2014).
- 126 It appears that Mr Draper was not requested by Simonds to re-sign either the Site Plan, or drawing 5.2 (although a note on the Simonds tax invoice dated 16 June 2014 confirms that drawing 5.2 was “included as part of the contract as at 16/6/14”).
- 127 On 17 June 2014, Mr Draper signed some amended electrical plans.

Mitchell Shire Council Approves Site Plan

- 128 On 17 June 2014, Mitchell Shire Council endorsed its consent to the Site Plan.

²⁴ See detailed drawings on Engineering drawing S3.

Approval of Drawings by Building Surveyor on 26 June 2014

- 129 On 26 June 2014, Mr Giambattista issued the Building Permit, with attached stamped approved architectural drawings, including those signed by Mr Draper on 16 June 2014.
- 130 The stamped Site Plan was identical to the Site Plan comprising one of the architectural drawings signed by Mr Draper on 5 June 2014.
- 131 The stamped Site Plan contained no reference to FFLs.
- 132 I accept Mr Draper's submission that the Site Plan constituted an "allotment plan" within the meaning of Regulation 302 of the Building Regulations, that Regulation 302(2)(d) required it to show the FFLs of "the floors of the building", and that the Site Plan failed to do so.

Signing of "Final Construction drawings" on 4 July 2014.

- 133 Simonds booked the site scrape for 7 July 2014.
- 134 By email dated 1 July 2014, Simonds informed Mr Draper as follows:
- ...Please find attached your final construction drawings which have now been completed. Can you please check over these plans thoroughly and ensure everything is correct as these are the plans [Simonds] will be referring to during the construction of your home. If you have any concerns please let [Simonds] know as soon as possible.
- 135 On 4 July 2014 Mr Draper signed a document described as a "Site Start Introduction Checklist". Relevant parts are as follows:
- Have you sighted and signed your 'Final' construction drawings-(if no, your Customer relations Coordinator to arrange promptly) Yes
- Have all building variations raised now been signed and returned-(Supervisor to review & ensure he has all applicable variations in his building file). Yes
- SPECIAL NOTE**-Please understand that there are to be no further changes to the plans or specifications for your home. Future variation requests will not be permitted.
- 136 Mr Draper signed the architectural drawings, described as FINAL CONSTRUCTION DRAWINGS on 4 July 2014. They comprised an Amended Site Plan dated 30 June 2014 (the "**Amended Site Plan**"), and drawings 2.1, 3.1, 3.2, 5.1, 5.2, 5.3, 6.1, 8.1, 8.2, 9.1, 9.2, 9.3 and 9.4.
- 137 Relevantly, the Amended Site Plan showed FFLs for the first time.
- 138 These are the FFLs relied on by Simonds as the source of its obligations to Mr Draper concerning FFLs.
- 139 An FFL of RL98.685 metres was shown for the house section of the dwelling. I find that this was calculated by Simonds's designer simply by adding the "freeboard" distance of the waffle raft slab of 385 mm to the required bench level (or site cut) of RL 98.30 metres.

- 140 An FFL of RL 98.55 metres was shown for the garage (being 135 mm below the house section of slab, as required by the design).
- 141 Significantly, the FGL of RL98.58 metres, shown in the Site Plan at the western edge of the garage section of the slab, had been deleted by Simonds. Mr Draper did not realise this, nor did Simonds point it out to him. Significantly, he says, the FGL of RL 98.58 metres appearing next to the house section of the slab in the Site Plan, appeared unchanged in the Amended Site Plan. I accept his submission that such an FGL could not be achieved with an FFL for the house section of the slab of RL 98.685 metres, if there was also to be compliance with Part 3.1.2.3 of the BCA.
- 142 I accept Mr Draper's evidence that Simonds provided him with no information concerning the nominated FFLs, appearing for the first time in the Amended Site Plan.
- 143 In particular, I find that Simonds did not inform Mr Draper that if the garage section of the slab was completed in accordance with the nominated FFL of RL98.55 metres, the top of the garage slab would be 30mm below the FGL of RL98.58 metres nominated in the Site Plan and forming part of the Contract.
- 144 Further, I find that Simonds did not inform Mr Draper that if the house section of the slab was completed in accordance with the nominated FFL of RL98.685, the FFL of the main floor area would only be 105mm above the FGL of RL98.58 nominated in the Site Plan.
- 145 Also, I find that Simonds failed to inform Mr Draper that if the FFLs in the Amended Site Plan were adopted, the effect of Part 3.1.2.3 of the BCA would be that it would not be possible for the FGL at slab edge to be at RL 98.58 metres. This is because that Part prescribes, in effect, that the distance between the FFL of a slab and the FGL at slab edge must be no less than 150 mm.
- 146 These matters, occurring in early July 2014, lie at the heart of Mr Draper's complaints about Simonds's conduct in relation to the construction of his dwelling. They are matters that I have concluded, on the evidence, have caused Mr Draper no small degree of indignation concerning the way Simonds conducted itself during the contract and final design phases.
- 147 Clause 7.0 of the Contract provides:
- On the signing of this Contract, the **Builder** must give the Owner identical copies of documents that form the **Contract Documents** at the time of signing or no later than 5 clear **Business Days** after the date of signing, including:
- signed contract;
 - signed detailed **Specifications**;
 - signed detailed **Plans**; and
 - Soil Test Report and **Engineer's Design**.
- 148 Clause 23.0 of the Contract provides:

Requested Variations

Either the **Owner** or the **Builder** may ask for the **Building Works** to be varied. The request must be in writing, must be signed and must set out the reason for and details of the variations sought.

149 Clause 23.2 of the Contract provides:

If the **Builder** requires the variation, the notice given by the must state the following further particulars:

- what effect the variation will have on the contract works;
- if the variation will result in any delays, the builder's estimate of such delays; and
- the cost of the variation and the effect it will have on the amount payable by the Owner under this Contract.

150 Clause 23.4 of the Contract provides:

Subject to Sub-Clause 23.1, the **Builder** must not give effect to any variation unless the **Owner** gives the **Builder** a signed consent to or request for the variation attached to a copy of the notice referred to in Sub-Clauses 23.2 and 23.3.

151 Having found that the Contract was entered into on 5 June 2014, and that the Site Plan with nominated FGLs comprised part of the Contract, I have concluded that the Amended Site Plan presented to Mr Draper on 1 July 2014 amounted to a request by Simonds for the works to be varied within the meaning of Clause 23.0 of the Contract.

152 This is because, by nominating the particular FFLs in the Amended Site Plan, it became impossible, having regard to Part 3.1.2.3 of the BCA, and for reasons I have described, to provide an FGL at the western slab edge of RL 98.58 metres referred to in the Site Plan.

153 In this circumstance, in my view Simonds was required to give Mr Draper a notice pursuant to clause 23.0 of the Contract, setting out those matters described in clause 23.2 of the Contract, including the effect the proposed variation will have on the contract works. I find that Simonds failed to do so.

154 It follows from clause 23.4 of the Contract that, in the absence of a signed consent from Mr Draper to a request for a variation, attaching a notice required by Clause 23.2 of the Contract, Simonds was not entitled to construct the slab to the FFLs stipulated in the Amended Site Plan, since it meant that Simonds would be in breach of its contractual obligation to provide an FGL at slab edge of RL 98.58 metres.

155 Because of the existence of the terms of the Contract that set out Simonds's express obligations to Mr Draper, in the case of what I have found to be a variation to the Contract,²⁵ I do not accept Simonds's submission that by his signing the Final Construction Drawings on 4 July 2014, Mr Draper assented to those drawings forming part of the Contract.²⁶

²⁵ The terms mirror Simonds's obligations under the DBC Act.

²⁶ Simonds relies on the authority of *Toll v Alphapharm Pty Ltd* (2004) 219 CLR 165

- 156 It follows that Simonds was in breach of contract in laying a slab that prevents Mr Draper from having an FGL at slab edge of RL98.58 metres.
- 157 Mr Draper does not claim damages arising from this breach, and therefore he led no evidence as to damages.

Should the Tribunal make an order requiring Simonds to replace the defectively laid slab?

- 158 Mr Draper wants the Tribunal to make an order that requires Simonds to demolish and relay the slab.
- 159 Section 53 of the DBC Act states as follows:
- (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
 - (2) Without limiting this power, the tribunal may do one or more of the following-
 - ...
 - (g) order rectification of defective building work;
 - (h) order completion of incomplete building work.

- 160 I respectfully adopt the statement of Sifris J in *Christchurch Grammar School v Frank Bosnich and Melinda Sehr*²⁷ when describing the approach to be taken by the Tribunal in relation to section 109 *Fair Trading Act 1999* (now section 185 *Australian Consumer Law and Fair Trading Act 2012*). That provision, like section 53 of the DBC Act, confers a power on the Tribunal, in connection with certain disputes under that Act, to “make any order it considers fair”. His Honour, for the reasons he set out, stated:

In my opinion, although the matter is not free from difficulty, the Tribunal is required, when deciding the merits of a case, to apply the law and not merely be guided by it. Any flexibility relates only to the form of the order and of course, to procedural and evidential matters.

- 161 Mr Draper’s seeks an order requiring Simonds to rectify the slab (necessarily by demolition of the existing slab), for which section 53(2)(g) of the DBC Act provides an express power. Having regard to the approach advocated in *Christchurch Grammar School*, I therefore consider that, in a case such as this, I should not make such an order without also being satisfied that Mr Draper would be entitled to such an order at law.
- 162 This is not a case where, for instance, the Tribunal might order a builder to carry out minor works, such as the fixing of a cornice, to ensure compliance with a building contract.
- 163 Given the extent of the rectification works sought by Mr Draper, in my view it is necessary for me to consider whether the exercise of the express statutory power in this case, to order Simonds to rectify the slab, would be supported by the law of specific performance. This is where a court or tribunal makes an order requiring a

²⁷ [2010] VSC 476

party to perform a contractual obligation, where there is a subsisting contract between the parties, rather than leave that party to a remedy in damages.²⁸

- 164 Specific performance is granted in the court's equitable jurisdiction. The basis for it has been the inadequacy of legal remedies, and particularly damages, in the particular circumstances. *Spry* puts it as follows:

The precise question that has been asked is whether the relegation of the plaintiff [Mr Draper, in this case] to such remedies as he has in damages or other legal remedies would leave him in as favourable position in all material respects as would exist if the obligation in question were performed *in specie*. So it was said by Lord Redesdale, 'Unquestionably the original foundation for [decrees of specific performance] was simply this, that damages at law would not give the party compensation to which he was entitled: that is would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground, the court in a variety of cases, has refused to interfere, where from the nature of the case, the damages must necessarily be commensurate to the injury sustained'.²⁹

Does Mr Draper have a substantial interest in having the slab works performed in accordance with the Contract, for which damages are not an adequate remedy?

- 165 In the case of building works, and following from the above statement of principle, the authorities support there being three requirements before an order for specific performance of building works will be granted. There are also discretionary considerations.

- 166 I shall now consider the first requirement. That is, an owner must show that he:

has a substantial interest in having the building works performed, which is of such a nature that he cannot adequately be compensated for breach of contract by damages³⁰.

Does Mr Draper have a substantial interest in having the works performed?

- 167 Importantly, Mr Draper gave evidence that he has acquired certain physical disabilities, which has meant that he has been unable to continue to work as a carpenter. He gave evidence that he was therefore very particular to Simonds concerning his need for a drive of an appropriate level down the western side of the dwelling, in order that he could readily access a proposed shed to be located towards the south of the site. He wishes to use the shed to carry on workshop and other pursuits.
- 168 A proposed shed is shown in a draft site layout dated 14 September 2013, prepared for Mr Draper.
- 169 Mr Draper's desire for the works by Simonds to meet his driveway access needs is, I consider, supported by the fact that he meticulously prepared the ground on the western side of the site for the works by Simonds.

²⁸ See the general discussion in *Equitable Remedies* by Spry 7th edition, Chapter 3.

²⁹ See Spry (supra) at pp58-59.

³⁰ See *Wolverhampton Corporation v Emmons* [1901] 1 KB 515 per Romer LJ. Discussed by Spry (supra) at pp 114-118.

- 170 The site slopes downwards from Alpine Road in the north, towards the southern boundary.
- 171 In October 2013, Mr Draper undertook site preparation works himself, with the assistance of a local contractor.
- 172 First, he created a level building block by a “cut and fill” excavation. This process reduces the need for importing fill from another source. In effect, this meant that existing fill was cut from the north west of the site, and moved by him to the south east corner. Mr Draper tendered photographs 1-4, showing this.
- 173 Mr Draper placed the fill by spreading it in horizontal layers, and compacting it in successive layers, using a sheep’s-foot compactor. Mr Draper gave evidence, which I accept, that he intended his excavation to provide a “bench level” of RL98.4 for the building works.
- 174 Mr Draper anticipated that the footings for the house and garage would be “built up” from this surface without the need for further excavation.
- 175 Mr Draper tendered photographs 3, 4 and 5 in later October 2013. They are consistent with his evidence, and I so find, that he purposely left a raised area to the west of the site, for a drive, at a level of about RL98.6 metres, being 200 mm above his site cut of RL98.4. Photo 5, tendered by Mr Draper, taken some months later on 17 June 2014, shows a raised area to the west of the site, slightly eroded since October the previous year, but still consistent with Mr Draper’s evidence.
- 176 Mr Draper subsequently obtained a survey of the site, from a Mr T Cooper of T Cooper & Associates dated 28 February 2014.
- 177 Mr Draper also obtained a “Level 1 Supervision and Inspection Report” from Cardno Bowler Pty Ltd, Geotechnical Engineers, dated 3 March 2014. The report confirmed:
- (a) that Mr Draper’s placement of the fill had been carried out in accordance with AS3798-2007 *Guidelines on Earthworks for Commercial and Residential Developments*; and
 - (b) that the fill had been compacted to a density ratio of not less than 95% standard compaction as determined by AS1289 *Methods of testing Soils for Engineering Purposes*.
- 178 Simonds subsequently prepared an undated Site Plan “V9”, relying on the ground levels indicated in the Cooper survey.
- 179 Because of his physical disabilities, and his intention to use the proposed shed at the south of the Site for his own pursuits, Mr Draper at all times wished to avoid an over-steep driveway. He says that his current property has a steep driveway, and he is “sick of the pain” caused by walking up and down it, as his physical condition worsens. I accept his evidence that the extra pitch of the driveway, if it is not built up to the RL 98.58 metres required by the Contract, will be about 13% steeper than what the Contract requires. He considers that the extra pitch will create a more significant peak at the top of the driveway, where it meets the cross-

over, and that he believes that this will cause problems with low vehicles, particularly when towing trailers as they cross the peak at the cross-over.

- 180 Mr Draper considers that as a result of the lower level, retaining walls will be required where they were not required before. The extra retaining walls will require maintenance and replacement during the design life of the dwelling at his expense.
- 181 He also submits that the driveway to the garage is steeper as a result, and that there will be “more of a dip” when entering the garage. He considers that increasing the pitch of the driveway will also mean an increased risk of water bypassing the grated drain in front of the garage, increasing the risk of flooding there.
- 182 He considers that the lower slab level will increase the potential for overshadowing, and affect the amount of sunshine that enters the habitable rooms on the western side of the dwelling.
- 183 He submits that lowering the FGLs will mean that an area at the rear of the Site, marked for an underground water tank, may need to be excavated a further 20%, increasing the chance of encountering rock, leading to him incurring consequential costs.

Is there a reasonable alternative solution to ordering Simonds to rectify?

- 184 In considering whether Mr Draper has a sufficiently substantial interest in having the works performed in accordance with the Contract, I must also consider whether an alternative solution to ordering specific performance is reasonably available.
- 185 The BCA imposes on builders the obligation to construct a building or structure such that it achieves stipulated “Performance Requirements”. In particular, the BCA specifies that a “Building Solution” will comply with the BCA if it satisfies the “Performance Requirements”.³¹
- 186 Clause 1.0.5 of the BCA provides:
- Compliance with the *Performance Requirements* can only be achieved by-
 - (a) complying with the *Deemed-to Satisfy Provisions* ; or
 - (b) formulating an *Alternative Solution* which
 - (i) complies with the *Performance Requirements*; or
 - (ii) is shown to be at least equivalent to the *Deemed to Satisfy Provisions*; or
 - (c) a combination of (a) and (b).
- 187 Without prejudice to its contentions that the FFLs of both sections of slab have FFLs that are in accordance with the Contract (and I have found against Simonds on this issue), Simonds has proposed a design dated 21 October 2014, that, subject to the RBS approving the proposal as an Alternative Solution, will allow the FGL

³¹ See Part 1.0.4 of the BCA.

adjacent to the slab to be raised from its present level to RL98.58 metres (the “**P2 proposal**”).

- 188 Simonds had also considered what works may be required to allow for the existing FGLs. Two drawings dated 11 September 2014, proposed a specially designed retaining wall, alternatively a stabilised batter to cater for the as-built FGLs. Mr Draper gave evidence that he did not see either of these proposals until they were included in Simonds’s Tribunal Book for the hearing, but he gave evidence that they would be unsuitable for him.
- 189 In respect of the P2 proposal, the FGL of the garage section of the slab would be raised from its present level of RL98.33 metres (level to the horizontal section of the slab rebate) to RL98.60 metres (2mm above the FGL required by the Contract), which would result in 3 courses of bricks along the length of the garage being below the FGL. The FFL of the garage section of the slab would be about half a brick width below the FGL.
- 190 In respect of the P2 proposal, the FGL of the house section of the slab would be raised from its present level of RL98.43 metres (just below the horizontal section of the slab rebate) to RL98.60 metres, which would result in 1½ courses of bricks along the length of the house being below the FGL.
- 191 Mr Draper holds great apprehension about the aesthetic and practical consequences of the P2 proposal. I consider that a reasonable person in his position would feel the same.
- 192 In respect of both proposals, there is a system of extra membranes specified for both areas, with surface water flowing further west to drainage pits.
- 193 Mr Draper is concerned that the P2 proposal relies on an engineered solution to protect the dwelling from flooding which could, and probably would in the future, fail.
- 194 There is also no evidence that that the P2 proposal would find favour with any alternative RBS who succeeds Mr Giambattista.
- 195 Having considered Mr Draper’s reasons for requiring an FGL at RL98.58 metres, and the consequences of the breach by Simonds in failing to provide such an FGL, together with the limitations of the P2 proposal, I have concluded that Mr Draper has a substantial interest in having the slab works re-performed by Simonds, in such a way that enables Mr Draper to have an FGL of RL98.58 metres at slab edge, and with 150 mm between the FGL and the FFL of the garage section of the slab.

Should Mr Draper be left to a remedy in damages?

- 196 Should, then, Mr Draper nevertheless be left to the remedy of damages? It is suggested by Spry that where building works may be as well performed by one builder as by another, damages may be regarded as adequate compensation.³² However, the learned author also suggests that where the builder alone has access

³² See Spry (supra) at p.16

to the land on which the building work is to be performed, damages may be inappropriate.³³ This, I find, is such a case.

- 197 Putting this aspect to one side, would Mr Draper be in as favourable a situation if he is left to damages, than if the Tribunal were to require Simonds to rectify the level of the slab, before continuing with the works under the Contract? If the former, Simonds would be entitled to continue with the works under the Contract, leaving Mr Draper to claim damages. In a case such as this, it will be unlikely, in my view, that Mr Draper will, after completion by Simonds, be able to prove damages by reference to the cost of relaying the slab at the required level. This is because the dwelling will have been completed. There would be a reasonable prospect, in my view, that the Tribunal will then be persuaded that the cost of relaying the slab, post completion, is not reasonable in the circumstances within the meaning of the well-known Australian authority.³⁴ A lesser award of damages for any proved loss of value, or loss of amenity, or physical inconvenience and discomfort will not, in my view provide adequate compensation to Mr Draper, such is the importance he attached to the FGL of the driveway, which he prepared so assiduously.

Are the works of which rectification is sought definitely ascertained?

- 198 I shall now consider the second requirement for specific performance of building works to be ordered. That is, that

...the building work, of which the owner seeks to enforce the performance, is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance.³⁵

- 199 It was often said that the ordering of specific performance of works, such as complex building works, will not be made because the court cannot superintend performance. That is to say, the court is unable to see that the work is carried out.³⁶

- 200 *Spry* argues that the courts have gradually resiled from this unduly inflexible position, and have ordered specific performance, where justice so requires.³⁷

- 201 The learned author summarises the position, supported by authorities, as follows:

The better view is that the following principles apply in this context. In ordering specific performance the court bears in mind that applications may later be made to it for the enforcement of its order or for the further definition of the obligations of the parties; in very exceptional cases obligations under a contract may be so complex or unclear that they lead the court to conclude either that it would burden itself excessively if it ordered specific performance, in view of the prospect that subsequently it would be required from time to time to define the obligations of the

³³ See *Spry* (supra) at p 16, and decisions he refers to in his fn 17.

³⁴ *Bellgrove v Eldridge* (1954) 90 CLR 613.

³⁵ See *Wolverhampton Corporation* (supra), referred to in *Spry* at p 114.

³⁶ See *Spry* (supra) at p 103 and cases referred to.

³⁷ See *Spry* (supra) at p 104.

parties or else would be required to determine from time to time whether complex or imprecisely defined obligations have been performed, or else that it would involve undue hardship on the defendant to require him to perform terms that are complex or burdensome or are not clearly defined and in breach of which he might find himself liable to the process of the court on the ground of contempt. Questions of degree are involved, and the preparedness of the court to order specific performance in cases involving difficulties of these kinds depends on such considerations as hardship and prejudice to the parties and especially the extent to which the plaintiff will be prejudiced if he is confined to damages. Not unnaturally, in borderline cases it may be difficult to determine in which way the discretion of the court should be exercised. The court may, where appropriate, require further information to be provided in order to enable difficulties of performance or enforcement to be assessed.

As a minimal requirement the court requires that it should be able to decide with reasonable certainty on any subsequent application whether or not performance has taken place.³⁸

- 202 Having regard to these principles, I have found that Simonds is obliged under the Contract, and the requirements of Part 3.1.2.3 of the BCA to construct the garage section of the slab such that its FFL is 150 mm above an FGL at slab edge of RL 98.58 metres (and having a 135 mm step up to the house section of the slab, as designed).
- 203 I consider that this obligation is sufficiently clearly defined and ascertained that the Tribunal will subsequently be able to determine, by evidence of measurement, whether performance has been met by Simonds.

Has the defendant possession of the land on which the work is to be done?

- 204 The third requirement before a court will order specific performance of building works is that:

...the defendant has by the contract obtained possession of the land on which the work is contracted to be done³⁹

- 205 Simonds still has possession of the Site. This requirement is also satisfied.

Discretionary Considerations

- 206 It remains for me to consider discretionary factors that may support or militate against an order for specific performance. *Spry* states:

The decision whether or not to enforce specific performance *in specie* depends on a balancing of the hardship that might be caused if relief were refused against such matters as hardship to the defendant and the difficulties and burdens that might fall upon the court if it were required to enforce an order of specific relief.⁴⁰

- 207 And also:

³⁸ See *Spry* (supra) at pp 104-105.

³⁹ *Wolverhampton Corporation* (supra), referred to in *Spry* at p 114.

⁴⁰ See *Spry* (supra) at p 118.

However it must be stressed that it does not follow, merely because damages are not considered adequate, that an order of specific performance will necessarily be made; relief may nonetheless be refused on discretionary grounds such as hardship or unfairness if it appears to be more just in the circumstances that the applicant should be confined to legal or equitable damages or refused relief altogether.⁴¹

- 208 In the context of his having a substantial interest in having the works performed by Simonds, I have discussed the hardship to Mr Draper of refusing an order for specific performance, leaving him to claim such damages as may be awarded to him once the works have been completed by Simonds.
- 209 Notwithstanding these considerations, should specific performance be refused, on the grounds of hardship to Simonds in having to demolish the existing slab and re-erect a new slab, with appropriate groundworks also being carried out to achieve an FGL at slab edge of RL 98.58 metres?
- 210 I have carefully weighed the hardship to Simonds, if an order for rectification were made, against the hardship that would be caused to Mr Draper if an order for rectification was not made.
- 211 Mr Draper has already paid Simonds \$38,676 for the base stage. This will need to be demolished, and a new slab erected by Simonds. It follows that Simonds must therefore replace the slab at its cost.
- 212 I consider that the hardship to Simonds of incurring the cost of demolishing and reconstructing the base works is of a lesser order, in all the circumstances, than the hardship to Mr Draper if he is confined to an action for damages of a speculative amount in respect of works that that he had a substantial interest in having performed for reasons I have found, but were not.
- 213 It also follows that the frame that has been erected by Simonds on the slab, the subject of Simonds's \$48,345 counterclaim, will also be demolished with the demolition of the existing slab.
- 214 I regard that Simonds incurring this loss is a hardship, but that it is not one that will be brought upon Simonds by reason of any rectification order, but by reason of its continuing with the framing works when a reasonable builder in the position of Simonds would not have started framing works in the light of the particular complaints made by Mr Draper. I have come to this conclusion for the following reasons.
- 215 Clause 11 of the Contract provides:
- 11.0 The **Builder** must carry out and complete the **Building Works** within the **Building Period**.
 - 11.1 The **Builder** warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the **Plans** and the **Specifications** set out in the Contract.
 - 11.2 The **Builder** warrants that all materials to be supplied by the **Builder** for use in the work will be good and suitable for the purpose for which

⁴¹ See Spry (supra) at p 73.

they are used and that, unless otherwise stated in the Contract, those materials will be new.

11.3 The **Builder** warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the [Act] and the [Building Regulations] made under that Act.

11.4 The **Builder** warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the Contract;

...

11.6 If the Contract states the particular purpose for which the work is required, or the result which the **Owner** wishes the work to achieve, so as to show that the building owner relies on the **Builder's** skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.⁴²

216 Simonds started work on the site in about July 2014.

217 Between 10 and 12 July 2014, 21mm of rain was recorded as having fallen at Wallan. Mr Draper tendered a photograph he took on 12 July 2014, showing vertical plumbing pipes in place. The site was otherwise covered with fill which, the evidence establishes, had been brought in and placed by Simonds over the compacted ground left by Mr Draper's site preparation works.

Email from Mr Draper to Simonds dated 14 July 2014

218 At about midday on Monday 14 July 2014, Mr Draper sent an email to Mr Wall, Simonds's site supervisor:

I am writing after a brief discussion with Jennifer [*an employee of Simonds*] and yourself on Monday 14 July 2014. The purpose of this letter is to formally advise you of a number of issues that need to be addressed.

As discussed on the phone, I have worked in countries with worse weather than Australia and made things happen so to hear bad weather as an excuse for sloppy work is never going to be good enough. We either worked on other things or we had delays, which we then had to make up for when the sun was out. It is pretty obvious to me that the site was too wet to have machines on right now and probably needed a day or two to drain a bit. There are bad weather days in the contract for a reason and it doesn't actually have to be raining for something to be too wet!

I am still puzzled how Simonds is not going to include any drainage for the site other than silt pits I demanded.

Can you please explain what you were saying on the phone about removing soil and why you were doing it. I am sure you said something about it being too wet which to me indicates a need for better drainage. Can you please confirm what this was all about. I have included a picture to show you how water IS affecting the site. [*the photo Mr Draper took on 12 July 2014*]

⁴² These warranties reflect those that are implied at law by section 8 *Domestic Building Contracts Act 1995*.

I also thought I heard something about bringing soil in? I have a huge problem with Simonds importing soil onto my property without consulting me first. There is no reason for you to be doing this and nothing in the contract that allows for you to do this without contacting me! **DO NOT BRING FOREIGN SOIL ONTO MY PROPERTY WITHOUT SPEAKING TO ME.** Where did this soil come from? Why not just let my soil sit open for a few weeks to dry?

I also discussed with you about not destroying or digging things up in areas that have been prepared [by me] earlier or labelled for other purposes. It seems these messages have not been passed on to the trades involved and they have just carved it up as they please. Please pass things like this on in future.

I specifically asked you to keep the site scrape to a minimum required as I have pre-rolled proposed driveway areas on the property. This information obviously failed to reach the contractor and we now have major overcutting. This overcutting has occurred in an area that will now require re-certification at the expense of Simonds Homes prior to completion else damages will be sought. This is why I made it clear in the meeting!

...

The third and major concern is the excavation that was done along the stabilised batter side of the site. I brought this up with you in our meeting and you replied ‘that was how the engineers designed it’ but I am still concerned about it, especially seeing how it is currently being completed. I have contacted the company who were overseeing the compaction work to get a second opinion which I am currently waiting to hear back about.

I think it is important to meet on-site with the relevant engineers to discuss the above issues. We have engineers on paper saying we don’t need drains and yet we have issues with wet soil and after spending thousands of dollars on compaction work it is being destabilised at its most vulnerable point. I think the engineer needs to review the work that has been completed and inspect the site properly.

Please organise a meeting on-site between myself, you (Shannon Wall) and an engineer from Intrax. This way we can address everything at once, ensure everybody is fully aware of what is happening up there and who is actually accountable for the correct function of each system. Then we should be able to move forward with much more confidence.

I can do any day [this week] except Wednesday. I won’t have a vehicle then [emphasis added].

- 219 I have set out a large portion of the contents of this email. Not only does it raise Mr Draper’s concern about the extent of the site scrape undertaken by Simonds: it also raises questions about the provenance of the fill that Mr Draper believed Simonds had brought on to the site, and alleged drainage shortcomings.
- 220 Importantly, Mr Draper submitted that this email was a “first warning” to Simonds to stop work so that the multiple issues raised in the email could be addressed.

Simonds Continues with Works By Laying Slab

- 221 On Monday 14 July 2014, the same day that Mr Draper sent his email to Mr Wall of Simonds, Mr Kitsoulis, Building Inspector, undertook what he described as a PRE-SLAB Inspection, and issued to Mr Giambattista a PRE-SLAB approval dated 14 July 2014. This was the first mandatory inspection required by the Building Permit.⁴³
- 222 On Wednesday 16 July 2014, Mr Kitsoulis subsequently undertook what he described as a “STEEL” inspection, and issued to Mr Gianbattista a STEEL approval bearing that date. This was the second mandatory inspection required by the Building Permit, which I find was undertaken prior to the pouring of the slab.⁴⁴
- 223 It will be recalled that Wednesday 16 July 2014 was the day that Mr Draper was unable to be on site for a meeting that he had proposed in his email dated 14 July 2014, because, according to that email, he would not have a car that day.
- 224 These events indicate that Simonds ignored the email from Mr Draper dated 14 July 2014, requesting a meeting and, in effect, for works only to “move forward” once all issues of concern to Mr Draper had been addressed.
- 225 By tax invoice dated Thursday 17 July 2014, Simonds submitted a progress claim for completion of the base stage in the amount of \$38,676 including GST. Under the Contract, this is the stage when the slab is complete.
- 226 I find from this, that the slab was poured on Thursday 17 July 2014.

Email from Mr Draper to Simonds dated 21 July 2014

- 227 On Monday 21 July 2014 Mr Draper emailed Mr Wall of Simonds:

My mum actually drove past and took a photo on Sunday [20 July 2014] which was the first I had seen of the slab. Even after seeing the photo of the slab, the ‘driveway’ soil levels didn’t seem to be what I expected. After all the talk of weepholes and drive way height today I figured I should check the actual finish heights of everything to get a better understanding of what was going on. Initially the point you made about garage weephole height made sense and would need addressing but I forgot that the garage doesn’t actually need weep-holes because there is no wall cavity to vent.

I am still having trouble finding anything on the drawings that gives me a calculated FL or FFL of any type though. The numbers that I have produced are based on the Site plan elevations and the slab engineering dimensions and using the electricity pit as 100.00m as per plan.

Expectations:

RL-98.30 [the “bench level” referred to in Simonds’s engineering drawings]

Base MIN 50mm [this was a reference to the 50mm depth of quarry material (Class 3 20mm) referred to in the engineering drawings, placed at bench level]

⁴³ The Building Permit referred to this inspection as the one required “Prior to placing of footing”.

⁴⁴ The Building Permit referred to this inspection as the one required “Prior to pouring of insitu concrete”.

Freeboard (SLAB) .385mm [this was a reference to the height of the waffle raft slab prescribed by the engineering drawings]

This leaves me with an expected [FFL for the house section of the slab] of MIN [RL] 98.735.(I actually expected a little higher as 100mm base usually allows for variation in site work but 50mm IS the MIN.)

(weep-holes start 50mm? below this). Approximately 98.685

My ‘proposed driveway level’ as per [the Site Plan] was/is to be [RL] 98.60 [emphasis added]

This was designed to leave me approximately 85mm before encroaching on weep holes. Minimum excavation heights on the western boundary has ALWAYS been a major priority in this design.

Actual Site measurements as taken with Laser on Monday July 21:

Top of Pit-839mm

Top of slab-2160mm (Slab varied from 2157mm-2166mm)

Change in elevation-1321mm

ACTUAL [FFL of the house section of the slab]:

100.00-1.321 = [RL] **98.679**

So MINIMUM FLOOR LEVEL AS PER PLAN IS 98.735

CURRENT [FFL] 98.679 (Approximately 56mm below the MIN level if specs are to be met)

SO the feeling was right with things not looking quite right by eye...but I now have concerns that the slab is too low rather than my levels being too high.

I guess I will hear from you soon to discuss.

228 In other words, Mr Draper was telling Simonds that, in his view, the FFL of the poured slab was too low relative to the FGL of RL98.58 metres (but which he rounded up in his email to an FGL of RL98.60 metres) set out in the Site Plan, that he then believed, and which I have now found, forms part of the Contract.

229 Mr Draper contends that the email constitutes a “second warning” to Simonds to stop work, so that the multiple issues raised in this email, and his previous email dated 14 July 2014, might be addressed.

Email from Mr Draper to Mr Giambattista dated 22 July 2014

230 At 7:45 am on Tuesday 22 July 2014, Mr Draper emailed Mr Giambattista, Ms Marriage of Simonds, Mr Kelly of Simonds and Mr Wall of Simonds:

Hello [Mr Giambattista]

I have raised a number of concerns with Simonds staff and I am currently awaiting a response from them. In the meantime I contacted the Building Authority and they instructed me to contact you for direct comment.

1. Did someone actually review these plans or were they slid through as a generic plan without proper review?

2. Did you review the engineering drawings that are to be read with the Simonds drawings as I do not have a stamped copy to indicate you viewed them.
3. Does SITE SCRAPE RL mean the level at which construction is to begin i.e. RL [98.30] + BASE [quarry material of .050 mm] + FREEBOARD [of .385 mm] = Finished Slab Level. OR is RL [98.30] the level that the freeboard [of .385mm] is to be calculated from?

The contracted, current and future [FGL] is 98.60 [being Mr Draper's rounded up reference to RL98.58].

4. Do you think these heights meet the requirements of BCA 3.1.2.3(b)(i)?
[here Mr Draper set out those provisions of the BCA relating to Drainage, that require the FFL of a slab on ground to be 150mm above the FGL]
5. Knowing the [FGL] is 98.60 [being Mr Draper's rounded up reference to RL98.58]. Do you agree that [Simonds] should have finished the slab height at RL98.75 MINIMUM (including a drainage set up to pits...not just risers) so that [the drainage requirements of the BCA] are met?

I personally think that the 80mm level difference [between the RL98.68 FFL of the house section of the slab top and the FGL of RL98.60 [being Mr Draper's rounded up reference to RL98.58] does not meet the requirements of the [BCA drainage provisions].⁴⁵

6. Do you also agree that a drainage system also needs inlets at specific heights for it to function correctly?
7. Do you think it is within Building Regulations for [Simonds] to leave their clients with pooling issues caused by the allowance of 'risers' instead of ensuring they install complete and functioning drainage systems? (The engineers and I both agree that the system you have authorised would not be effective unless I was to do further work to it)

Can you please answer the above questions and make comments as to why these plans made it to the construction phase without these issues being picked up and addressed. I also expect some level of support when it comes to confirming the proper [FFL of the slab] and that [Simonds] is informed of your position as soon as possible so that this can be sorted out as soon as possible.

231 There is no evidence of any written response by Mr Giambattista to this email.

Email from Mr Draper to Simonds dated 22 July 2014

232 At about 3:00 pm⁴⁶ on Tuesday 22 July 2014, Mr Draper also emailed Mr Wall, Mr Kelly and Ms Marriage of Simonds:

I WOULD HOLD OFF ON THE FRAME UNTIL WE ARE SURE.

I am writing this email after our brief discussion on the phone. I do realise that it is hard to discuss this stuff without the documents in front of you **but**

⁴⁵ This paragraph in fact appears out of sequence later in the email, but has been moved to this position for ease of comprehension.

⁴⁶ This is the time shown on Simonds's copy of the email. Mr Draper also tendered a copy of his email to Simonds dated 22 July 2014. It is recorded as having been sent at 5:12:17 am on 22 July 2014.

I think allowing work to continue before getting an answer with such a critical concern would be pretty silly.

It seems from information given to you by your contractors, that we agree the slab height or [FFL] is currently set at 98.68 (80mm above the [FGL] on the western side).

The slab at current height does not meet my expectations.

The site plans clearly state in the top left corner that the SITE SCRAPE RL (reduced level...no need to dig further) is to be [RL] 98.30.

98.3 + 0.05 Minimum base + 0.385 FREEBOARD = 98.735 (MINIMUM)
and this is not how it is up there and you already have confirmation of this.

If you are in support of what your concretors told you, things still need to be urgently addressed. You will find that the lowered design that your concretors have produced does not meet BCA 3.1.2.3 which is shown below. Their current slab level will only be 80mm above the 98.60 ground level on the western side which is in clear breach of the Building Regulations. If this is the case, then it becomes a design error by Simonds...which suits me better. Before this change, we were looking to be 130mm above the 'well drained' newly designed drainage system. All of this stuff has been pre-calculated by me and Simonds was employed to make it happen. It was not a plod along and slap it up job like the usual ones. It might be more apparent now why I was asking about the other systems.

I do not believe what your concretor was saying to be correct anyway. The RL is the reduced height from which construction begins from. There is no point in having a RRL. I would be interested to see any evidence that supports digging below the RL to commence construction. This is why the industry usually has FFL on plans and why I asked about it Monday.

As per waffle construction notes in the engineering, the site scrape was to leave the RL at 98.30. Any excavation below this should have been re-layered as per instruction to RL 98.30 and then the slab construction process could occur.

I again repeat:

98.3 + 0.05 Minimum base + 0.385 FREEBOARD = 98.735 (MINIMUM)
and this is not how it is up there and you already have confirmation of this.

At his stage the slab is 50mm below what I expected. Due to this the slab will now be in breach of BCA 3.1.2.3 unless it is raised or some compromise is reached regarding levels so that the current design can fit in with BCA Building Regulations and meet the contract specifications.

I have added [Simonds's Northern Region Office] into this one as I am guessing you won't want to touch this. Once we start talking BCA stuff its time [Simonds's Northern Region Office] came into play anyway.

Email from Simonds to Mr Draper

233 On 22 July, Zonta Group which, I was informed, was the concreting company engaged by Simonds to lay the slab, undertook a survey of the slab. Simonds had instructed Zonta to do so, in response to Mr Draper's concerns.

234 At 10:45 pm on 22 July 2014, Mr Saglam, Construction Manager of Simonds, to whom Mr Wall reported, emailed Mr Draper, with copies sent to Mr Kelly, Ms Marriage, Mr Harrington and Mr Wall of Simonds, as follows:

As per your request to your site supervisor Shannon Wall we have had the relevant experts Zonta Group conduct a site visit to check the FFL of the slab. We have forwarded to you their report and analysis of the slab and FFL. Hence we hope this answers your queries regarding the slab FFL and I look forward to meeting up with you and [Mr Wall] on site at the completion of our next stage claim being that of frame stage as agreed to yesterday.

235 The “report and analysis” forwarded by Mr Saglam’s was in the form of an email that Mr Wall had received earlier in the day from a Mr Marr of Zonta Group. The email read:

...as discussed, [the owner] was concerned with the FFL of this job so I went out and checked the levels on site, levels are **within 15mm of [the] TBM** which comply with Standards and Tolerances Victoria, examples of measurements, photos and S&T Victoria attached

TBM 100.000

FFL 98.685

DIFFERENCE 1.315

Laser set at 400mm above TBM, FFL changed to 1.715, included adding .400 to 1.315 = 1.715

(SLAB LEVELS WITHIN 15 MM OF TBM)

236 Mr Marr’s email referenced Clause 2.07 of the *Guide to Standards and Tolerances* (the “GST”) which states:

[FFLs] or [RLs] are defective where:

...

- They depart from the documented RL or FFL by more than 40mm;or

...

237 I am not satisfied that the contents of the email from Zonta Group comprise an “answer [Mr Draper’s] queries”, as alleged by Mr Saglam in his email. The subject of Mr Draper’s express complaints, as early as his email to Simonds dated was that the FFL of the house section of the slab was too low as to allow for an FGL at slab edge to be RL98.58 metres, the contracted FGL.

238 The Zonta Group report dated 22 July 2014 simply purports to confirm that the “slab levels are within 15mm of the TBM”.

Simonds Continued with Works By Erecting Frame

239 I find that the photos attached to the Zonta Group email report dated 22 July 2014 demonstrate that, on that day, pre-fabricated frame members had been delivered to the site, and that the frame was being erected on the slab, starting on the eastern side.

240 Mr Draper gave evidence that he was distressed to discover that, notwithstanding his instructions not to erect the frame, Simonds had proceeded with the

construction of the frame. Mr Draper says that this became clear to him when, in July 2015, he received a copy of a photograph taken by Zonta Group, the concreting firm engaged by Simonds to provide a check survey of the levels of the slab.

241 Mr Draper considers that Simonds should not have proceeded to construct the frame, given the concerns he had raised about the base stage.

242 By reason of Mr Draper's emails to Simonds between 14 July 2014 and 21 July 2014, I make the following findings:

- (a) that on 14 July 2014 (the email Mr Draper described as "Warning 1"), Mr Draper complained in writing that there had been a "major excavation" by Simonds along the western edge of the site, which had previously comprised of stabilised earth prepared by Mr Draper;
- (b) that by the email dated 14 July 2014, Mr Draper sought a meeting with Simonds at the site to discuss issues before "moving forward";
- (c) that there is no evidence that any meeting took place at site before the slab was poured;
- (d) that on 16 July 2014 or 17 July 2014 Simonds poured the slab;
- (e) that on 21 July 2014 (the email Mr Draper described as "warning 2"), Mr Draper expressly informed Simonds that the Contract required Simonds to achieve an FGL of "RL98.60" on the western side of the dwelling;
- (f) that when he referred in his email dated 21 July 2014 to an FGL of "RL98.60", Mr Draper was rounding up the FGL of RL98.58 that appears in the Site Plan;
- (g) that on 21 July 2014, Mr Draper calculated the FFL of the house section of the slab at RL98.679 which, by his further email dated 22 July 2014, he rounded up to RL98.68;
- (h) that on 22 July 2014, Mr Draper contended in writing that an FFL of the house section of the slab of RL98.68 is only 80mm above the required FGL of "RL98.60" on the western side of the site; and
- (i) that on 22 July 2014, Mr Draper contended that with a prescribed site cut to bench level of RL98.30, plus the prescribed.050 mm minimum quarry material base, plus 0.385 mm freeboard, the FFL of the house section of the slab should have been no less RL98.735.

243 I also find that Mr Draper had sufficiently raised his concerns with respect to the level of the slab prior to 22 July 2014. I have found that the raising of those concerns was justified on his part. I have concluded that Simonds, acting in a proper and workmanlike manner in accordance with clause 11.1 of the Contract, should have halted the frame works.

244 I therefore find that in all the circumstances, there are no considerations of hardship to Simonds, beyond what it will incur in demolishing the existing slab, and constructing a new one (with associated ground an drainage works), that

would cause me to exercise my discretion against making an order for specific performance of the Contract. This being the case, and being satisfied that the general principles that applicable to the court's ordering of specific performance of a contract are satisfied, I have made an order requiring Simonds to rectify the works pursuant to section 53(2)(g) of the DBC Act.

CLAIM 2

GIVEN THAT THERE IS A VARIATION OF THE SURFACE LEVEL OF THE SLAB GREATER THAN 20 MM, SHOULD THE SLAB BE DEMOLISHED.

- 245 In case I am wrong in my conclusion that Simonds must rectify the slab, I consider this claim.
- 246 Clause 2.08 of the *Guide to Standard and Tolerances* (the "GST") provides:
...The overall deviation of floor level to entire building footprint shall not exceed 20 mm.
- 247 Mr Draper relies on evidence of a survey on 14 August 2014, commissioned by Intrax, that the FFL at certain points of the house section of the slab is RL98.67 metres and and RL98.70 metres. That is to say, there is a 30 mm overall deviation of floor level to the entire footprint of the house section of the slab.
- 248 The GST is a non-prescriptive guide to building practitioners and building owners as a convenient reference for acceptable standards of workmanship in domestic building construction. Whether any material failure to comply with its provisions gives rise to a need to demolish a structure depends upon a consideration of the nature of the defect, and whether any and if so what damage has been caused or is likely to be caused by the defect. A further overriding consideration is whether demolition and reconstruction is reasonable in all the circumstances.
- 249 Mr Draper has not led any expert evidence concerning the effect of the departure from Clause 2.08 of the GST. The claim is dismissed.

CLAIM 3

SHOULD THE SLAB BE DEMOLISHED AND RELAID, WITH PROPER CERTIFICATIONS OF FOUNDING MATERIAL?

- 250 Mr Draper considers that the slab must be considered defective until such time as Simonds can demonstrate that it is laid on properly compacted and certified founding material.
- 251 For the sake of completeness, I shall also consider this claim.

Background

Intrax Report dated 9 April 2014

- 252 Intrax is a firm of consulting engineers. Intrax was engaged by Simonds to conduct an investigation of the surface and sub-surface conditions of the site to

report on the appropriate Site Classification for a “single/double storey articulated brick veneer dwelling.

253 Intrax’s report relevantly read:

2.3 Site Classification AS2870-2011

In accordance with AS 2870-2011 *Residential Slabs and Footings-Construction* a site classification of Class “P” is applicable to this site DUE TO AN ABNORMAL MOISTURE CONDITION-TREES ON ADJACENT SITES.

This site is subjected to abnormal moisture conditions which must be alleviated or allowed for in the design of the footing system. In the absence of these abnormal moisture conditions, the designing engineer should recognise that a “H2” site classification would apply to this site...

4.1 General

...6. Proper site drainage is very important in reactive sites such as this site. It is therefore recommended that the ground surface immediately next to the perimeter footings be graded away or site drainage issues be addressed. Should you the client require detailed design for specific site drainage plans please do not hesitate to contact Intrax Consulting Engineers.

7. Any filling placed across the site to assist in levelling prior to slab construction should conform with requirement for either Controlled Fill (clause 2.5.3 of AS 2870) or Rolled Fill (clause 6.4.2 of AS 2870). These clauses are as follows. If it cannot be confirmed that the fill is Controlled Fill all Rolled Fill then the reader should refer to item (c).

(a) *[the paragraph purportedly sets out Clause 2.5.3 of AS 2870]...*

Intrax has the express right to deem FILL uncontrolled where it cannot be clearly demonstrated that fill has been placed under the above conditions. That it is to say that (sic) it is a requirement of the developer/builder to demonstrate full placement has been placed in the appropriate layer thicknesses.

(a) *[the paragraph purportedly sets out Clause 6.4.2(b) of AS 2870]...*

(b) Where the nature of the fill cannot be confirmed, this office must undertake an assessment of the fill all be supplied with a suitable compaction report or geotechnical assessment of the fill to undertake an appropriate design for the site if the fill is to be utilised as a foundation (emphasis added).

4.2 Site Specific

- [...]
- The soils encountered on-site could develop a localised perched groundwater during periods of high rainfall which may lead to construction difficulties associated with excavations on site
- [...]

- An engineer designed footing system in accordance with AS 2870 2011 is recommended for this site taking into the effect of trees

Engineering Drawing S3

254 Drawing S3 contains the following notes:

WAFFLE CONSTRUCTION NOTES

1. SITE SCRAPE A MIMIMUM OF 100MM OF TOP SOIL
REMOVE ALL ORGANIC MATERIAL FROM THE BUILDING SITE
2. PERFORM THE SITE CUT TO REQUIRED BENCH LEVEL
[OF RL 98.30-see Drawing S2]
3. FOLLOWING THE SITE CUT [TO RL 98.30], WHERE THE DEPTH OF THE
REMAINING FILL IS GREATER THAN 150MM:
 - 3.1 REMOVE ALL FILL DOWN TO 150MM
 - 3.2 COMPACT THE REMAINING 150MM LAYER OF FILL IN
ACCORDANCE WITH AS2870-2011 SECTION 6.4
 - 3.3 ANY ADDITIONAL REQUIRED FILL IS TO BE COMPACTED IN
ACCORDANCE WITH 5 (BELOW)
4. WHERE THE DEPTH OF FILL FORMING PART OF THE CUT/FILL
OPERATIONS IS
4. WHERE FILL IS LESS THAN 150MM, THEN THE FILL IS TO BE
COMPACTED IN ACCORDANCE WITH 5 (BELOW).
5. ANY ADDED FILL FORMING PART OF THE CUT/FILL OPERATIONS
SHALL BE COMPACTED IN ONE 50 MM MAXIMUM LAYERS AT
OPTIMUM MOISTURE CONTENT. THE LAYERS ARE TO BE ROLLED
WITH AN EXCAVATOR IN ORTHOGONAL DIRECTIONS REPEATEDLY
AND EXTEND 1000 MM PAST THE WAFFLE EDGE (REFER TO AS 2870-
2011 SECTION 6.4).
6. IF THE FILL ON THE SITE IS NOT COMPACTED AS PER THE ABOVE
SPECIFICATIONS, THEN CONTACT SHOULD BE MADE TO THIS OFFICE
FOR FURTHER ADVICE...
8. WHERE FILL IS ADDED TO FORM THE BENCH LEVEL [of RL98.3-SEE
DRAWING S2], A LAYER OF QUARRY MATERIAL (CLASS 3 20MM) IS TO
BE PLACED OVER THE BUILDING AREA (EXTENDING 1000mm OUTSIDE
THE BUILDING EDGE LINE)...

Architectural Drawing 5.3

255 Drawing 5.3 is a “TYPICAL CLAY PLUG DETAIL”, showing the requirements of compaction of backfill over plumbing works. Mr Draper submits that Simonds conceded that the compaction requirements were not completed.

Events Subsequent to Intrax report

- 256 A photograph was taken on 17 June 2014, about 2 months after the Intrax report. It showed a raised section to the west of the site at about RL98.60, purposely left by Mr Draper for a drive, following his cut and fill, and compaction works in October 2013.
- 257 The Wallan weather station rainfall records demonstrate that substantial rainfall occurred between 9th and 19th July 2014.
- 258 A photograph taken by Mr Draper on 12 July 2014 shows that Simmonds had imported a significant amount of fill on to the site, with obvious water pooling evident.
- 259 Following his inspection on 14 July 2014, the first mandatory inspection pursuant to the building permit, building inspector Mr John Kitsoulis of Checkpoint provided a Certificate of Compliance dated 14 July 2014 pursuant to Regulation 1507 of the Building Regulations, in relation to what was described as the “pre-slab” works.
- 260 Mr Draper emailed Mr Shannon Wall of Simonds on 14 July 2014, attaching a copy of the photo taken on 12 July 2014. In relation to the soil issue, he wrote in his email:
- ...Can you please explain what you were saying on the phone about removing soil and why you were doing it. I am sure you said something about it being too wet which to me indicates a need for better drainage. Can you please confirm to me what this was all about. I have included a picture to help show how water IS affecting the site.
- I also heard something about bringing soil in? I have a huge problem with Simonds importing soil onto my property without discussing it with me first. There is no reason for you to be doing this and nothing in the contract that allows for you to do this without contacting me! **DO NOT BRING FOREIGN SOIL ONTO MY PROPERTY WITHOUT SPEAKING TO ME!** Where did this soil come from? Why not just let my soil sit open for a few weeks to dry?
- ...I think that it is important that we meet on-site to discuss the above issue [together with other issues raised in the email in relation to drain design and alleged site overcutting by Simonds]. We have engineers on paper saying we don't need drains and yet we have issues with wet soil and after [my] spending thousands of dollars on compaction work it is being destabilised at its most vulnerable point.
- 261 Following his inspection on 16 July 2014, the second mandatory inspection required prior to the concrete pour, Mr John Kitsoulis of Checkpoint provided a Certificate of Compliance pursuant to Regulation 1507 of the Building Regulations in relation to what was described as the “steel” works.
- 262 A further photograph taken on 20 July 2014, after Simonds had laid the slab, also shows the fill imported by Simonds.
- 263 Subsequent correspondence occurred between the parties between 21 and 22 July 2014, to which I have referred, about Mr Draper's concerns with the height of the slab.

264 Mr Draper alleges in his email to Simonds dated 9 September 2014 that on 22 July 2014 he contacted Mr Shannon Wall of Simonds, requesting Simonds to cease the works. By that email, Mr Draper wrote:

...Clause 11.2-Simonds imported fill onto my property without permission. I have repeatedly asked why and from where but no valid response. 11.2 claims new material unless otherwise stated in the contract. My property is not a dumping ground for Earthlift or your other jobs.

265 Mr Draper wrote to Simonds on 15 September 2014, as follows:

...**Clause 11.2-New material unless otherwise stated in contract**

Simonds imported soil onto my site without any contractual agreement or discussions. It is obviously not new and I have nothing to show that it was 'suitable for purpose'. The photograph I have [being the photograph dated 12 July 2014 or the photograph 20 July 2014] indicates it was as wet as the soil you took away. Do you have a certificate for the fill used? Please provide this or you will remain in breach of this clause.

266 It will be recalled that on 26 September 2014, Simonds suspended the works for non-payment of the frame stage payment invoiced by Simonds on 5 September 2014,

267 On 13 October 2014, a meeting was held on site to discuss this and other issues. The notes taken at this meeting by Mr Whitford of Simonds, state:

Earthworks; [Mr Draper] claims we removed fill and also imported fill via Earthlift? Also, apparently we exported soil from site to another home site nearby.

268 Mr Draper emailed Simonds on 5 November 2014 as follows:

Can you please tell me what you have discovered about the uncertified fill that was placed under my slab. It is important as it will change how my new builder needs to approach the correction. If your engineer knew nothing of it then I guess we won't have much to go on. I think they might want to start [the slab] again because of this fact.

269 Mr Whitford of Simonds emailed Mr Draper on 10 November 2014:

I've finally validated that we imported clean dry soil that was taken from a site in Craigieburn.

The soil was used to top up the below ground plumbing trenches due to the original soil that was dug up being water logged that wouldn't compact.

270 Mr Draper emailed a reply to Mr Whitford:

Thanks for this information. I can only assume that you have a certificate for this soil to prove what you are saying. It is a requirement of the engineers and is clearly written in the conditions of the foundation report.

I also suggest you review the photographic evidence of the site to confirm that there was nothing dry about the soil that was used for the drainage backfill and if it

was then it was turned to waterlogged sludge by excavating in inappropriate conditions.

If you have a certificate, please send it to me. If you do not, then I am not going to take what you have said as any sort of guarantee.

It's not about the contract anymore, it's about the [DBC Act] and how it can be used to achieve results.

271 Mr Whitford emailed Mr Draper on 16 November 2014:

I'm seeking written correspondence regarding the imported soil as I know how much and which site it was obtained from

As soon as I have it I'll forward onto you.

272 In mid-November 2014, Simonds provided to Mr Draper a letter from Intrax to Simonds dated 18 November 2014, stating:

As per discussion on November 17th 2014, this office was requested to provide advice on the suitability of the imported soil/fill taken from one Simonds Homes site to another.

The imported soil taken from Lot 516 Prime Street Mickleham was used in Lot 42 Alpine Drive Wallan.

The soil was used to backfill the below ground plumbing drains due the excavated soil taken out of the plumbing drainage trenches being excessively wet at the time.

Intrax confirms that both referenced sites are within the same Geological unit of Quaternary aged basalt therefore the material is considered to be acceptable for the works concerned and in accordance with [AS3798-2007 *Guidelines on Earthworks for Commercial and Residential Developments*] guidelines.

Furthermore to satisfy any concerned (sic) with the long term footing performance, the footing designed by the this office for lot 42 alpine (sic) dr Wallan was designed to adequately span over plumbing trenches 300mm wide in any instance.

Intrax was not engaged during the filling stage and no inspections were requested.

273 The Intrax letter was signed by a Ms Borzillo, described as an Account Manager of Intrax. It will be recalled that she was one of the witnesses upon whom Mr Draper had served a witness summons.

The Requirements Imposed by the BCA

274 As discussed earlier in connection with the P2 proposal, the BCA imposes on builders the obligation to construct a building or structure such that it achieves stipulated "Performance Requirements". In particular, the BCA specifies that a "Building Solution" (for instance, the construction of a footing system and associated foundation work) will comply with the BCA if it satisfies the "Performance Requirements".⁴⁷

⁴⁷ See Part 1.0.4 of the BCA.

- 275 In relation to such structural works such as these, the Performance Requirements are set out in Performance Requirements P2.1.1 of the BCA.
- 276 Part 3.1.1. of the BCA sets out “acceptable construction practice” in relation to such **earthworks** as may be required to construct a foundation. Such practices are deemed to satisfy Performance Requirement P2.1.1.
- 277 In relation to **filling** works, Part 3.1.1.4(b) of the BCA states that where fill is to be used to support footings or slabs, it must be placed and compacted in accordance with Part 3.2 of the BCA.
- 278 Part 3.2 of the BCA sets out the requirements to be complied with by Simonds in regard to **footings and slabs**. Unlike earthworks (for which compliance by a builder with stipulated acceptable construction practice is deemed to satisfy Performance Requirement P2.1.1), the Performance Requirement P2.1.1 is satisfied for footings and slabs if they are constructed in accordance with certain manuals⁴⁸, or in accordance with acceptable construction practice set out in Parts 3.2.2 to 3.2.5 of the BCA.
- 279 Clause 3.2.2.2 of the BCA sets out the acceptable construction practice in respect of *filling* under concrete slabs. Clause 3.2.2.3 of the BCA sets out the requirements to be complied with by Simonds in regard to *soil* on which footings and slabs (including edge beams of the type in Mr Draper’s slab), are founded.

Mr Draper’s Submissions

- 280 Simonds has produced no records concerning its preparation of the site for the slab works. Counsel for Simonds conceded that none exist.
- 281 Mr Draper submits that in the absence of a compliance certificate, demonstrating that the foundation material below the slab has been properly prepared and compacted, the foundations supporting the footings “must be considered as defective”, with the result that an order be made that Simonds must demolish the slab, and re-lay it, with proper certifications⁴⁹;
- 282 In support of his argument, Mr Draper relies on the provisions of the BCA. His submission, in summary, is that to the extent Simonds carried out earthworks and filling works associated with its construction of the footings and slab, Simonds is required to produce evidence to support the proposition that the form of construction meets Performance Requirement P2.1.1.
- 283 Mr Draper submits that Simonds’s compliance with Performance Requirement P2.1.1 can only be demonstrated by Simonds providing Evidence of Suitability in accordance with Part 1.2.2 of the BCA.
- 284 I disagree. It is concerned only with the requirements imposed on designers of buildings and the relevant approval authority, with respect to the latter being satisfied that a material, form of construction or design meets a “Performance Requirement” or a “Deemed-to Satisfy Provision”. It does not confer upon

⁴⁸ AS2870 for footing and slab construction, and AS2159 for piled footings (see Part 3.2.0 of the BCA).

⁴⁹ See paragraph 23 of “Summary-Key Points” of the Final Submissions, Claim 12 on pp 87-91 and Claim 26 on pp 121-123 of Part 5 “Points of Claim” contained in the Final Submissions, Part 12 of the Final Submissions and Part 16(2)(a) of the Final Submissions.

owners of buildings any power to demand evidence of compliance, as submitted by Mr Draper.

- 285 Mr Draper also relies on Regulation 1506-1507 of the Building Regulations, so as to impose an obligation on Simonds to demonstrate compliance with Performance Requirement P2.1.1.
- 286 I disagree. They only prescribe classes of proposed building work and prescribed categories and classes of practitioners in respect of proposed for the purpose of sections 238(1)(a) of the Building Act, and classes of building work and the prescribed categories and classes of practitioners in respect of building work for the purpose of sections 238(1)(b) of the Building Act. They do not confer upon owners of buildings any power to demand evidence of compliance, as submitted by Mr Draper.
- 287 Mr Draper also says that the warranty provided by Simonds in clause 11.1 of the Contract, in accordance with its legal obligation under the DBCA, demonstrates that he does not have to demonstrate that a particular defect exists in order for the conclusion to be drawn that the foundation works are not compliant or complete.
- 288 I disagree. I am far from satisfied from the photographs to which I have referred that Simonds brought uncertified fill onto Mr Draper's land for the limited purpose of backfilling the plumbing drainage trenches, as contended by Intrax. The amount of fill that is apparent from the photographs appears to extend far beyond such works. I also share Mr Draper's surprise that Intrax which, by its own admission was not engaged during the filling stage, nor carried out any inspections (contrary to its written requirements that it should do so where fill was to be placed over the site), was subsequently prepared to opine by its letter dated 18 November 2014 on the alleged provenance and use of the fill.
- 289 However, any failure by Simonds to carry out the work in a proper and workmanlike manner, and in accordance with the plans and specifications must be evidenced by a "defect" in the works referable to the alleged breach. Mr Draper has submitted no evidence of any defect in the slab as a result of being founded on allegedly defectively laid imported fill. Mr Draper's case is essentially, that he *fears*, in the absence of laying and compaction records, that Simonds laid the fill in such a manner that it will provide inadequate founding material for the footings, such that defects in the slab will result, causing a failure of the slab.
- 290 Mr Draper's claim for demolition and replacement of the slab, based on his fears, must fail.
- 291 Mr Draper also submits that in the absence of demonstrated compliance, it will be impossible for him to reach an agreement with Simonds that there are no defects or incomplete works, as required by clause 37 of the Contract. I disagree. If, on final inspection of the works, Mr Draper has evidence as to defect in the slab as a result of being founded on allegedly defectively laid imported fill, then his rights are set out in clause 37 of the Contract.
- 292 The claim is dismissed.

CLAIM 4

IN THE EVENT THAT AN ORDER IS NOT MADE TO DEMOLISH THE SLAB, MUST SIMONDS DELIVER AN ALTERNATIVE SOLUTION FOR COMPLYING WITH THE RELEVANT PERFORMANCE REQUIREMENTS?

- 293 I have found that Simonds is under an obligation to rectify defective building works, by demolishing the slab and replacing it.
- 294 If Simonds had been found not liable to do so, it would have been required to have persuaded the RBS that any “Alternative Solution” complied with the BCA, by the use of one of the “Assessment Methods”.
- 295 This would be an obligation upon Simonds at law, which therefore requires no order, to the same effect, from this Tribunal.
- 296 This claim is dismissed.

CLAIMS 5 AND 6

IN THE ABSENCE OF AN ORDER REQUIRING THE DEMOLITION OF THE SLAB, AND THE PROVISION OF A CERTIFICATE OF COMPLIANCE, MUST SIMONDS DEMOLISH THE FRAME AND RECONSTRUCT IT?

- 297 For completeness, I now turn to Mr Draper’s claim that, if the need for a new frame does not arise as a result of the Tribunal not making an order for replacement of the slab (and I have found that it does), before he makes payment of the frame stage claim, Simonds must provide a certificate of compliance in respect of the frame design and, that in the absence of a certificate of compliance, the frame must be demolished by Simonds and reconstructed in accordance with relevant requirements.
- 298 To the extent that Mr Draper submits that Simonds has breached its contractual obligation to carry out the framing works in a proper and workmanlike manner, he therefore makes no claim for damages in respect of such breach.

Background

- 299 Simonds engaged Timbertruss Geelong Pty Ltd (“**Timbertruss**”) to manufacture prefabricated wall members and roof trusses for the dwelling. Timbertruss did so using the loading and wind computations of its own contractor Mitek Australia Pty Ltd (“**Mitek**”). Mr Draper made numerous submissions during the hearing that he had not previously been provided by Simonds with truss and wall member layouts, or computations upon which they were manufactured.
- 300 In response to my direction that Simonds should do so, Simonds tendered a “Prefab walls” layout dated 11 July 2014, together with a Mitek Panel Elevation Report (the “**Panel Elevation Report**”) of the same date.
- 301 Simonds also tendered a set of Mitek wind and dead load computations dated 8 July 2014.
- 302 Mr Draper apprehends that there has been insufficient wind load testing on the truss system, given that the elevations used by Simonds appear not to accord with

his own dwelling. He considers that the presence of a ducting heating system on the roof will affect the calculations.

303 Simonds also tendered the truss layout with job number 75527AAA, together with the loading and wind computations of Mitek.

304 Mr Draper apprehends that there is insufficient bracing in the truss system to support a ducted heating unit. I note that an endorsement on the truss layout states as follows:

NB DH labelled trusses have been designed to support a ducted heating unit with maximum weight of 100 kgs. Platform to support must be located on ALL three trusses and spread load evenly. Platform detail and supply by others.

305 Timbertruss also warranted to Simonds that:

The trusses in this project have been designed using MiTek 20/20, a software suite developed by MiTek Australia Pty Ltd in accordance with the ABCB protocol for Structural Software incorporating engineering procedures that comply with the relevant requirements in BCA 2013 including AS/NZS 1170.0:2002, AS/NZS 1170.1:2002, AS/NZS 1170.2:2011, AS/NZS 1170.3:2003, AS 1720. 1:2010 & AS 4055:2012 among its list of documents.

These trusses should be erected, fixed and braced in accordance with Australian Standard AS4440, specifications provided by MiTek Australia Ltd , and any other requirements supplied by the truss manufacturer.

306 Timbertruss also warranted in writing to Simonds that:

PREFAB WALLS HAD BEEN DESIGNED AND MANUFACTURED TO AUSTRALIAN STANDARDS AS1170.1-2002, AS1170.2-2002 AND AS1684-2006.

307 The inspector from the relevant building surveyor, Mr Kevin Wilson (“**Mr Wilson**”) inspected the frame for the first time on 31 July 2014, noting 29 items in a list that in his view, needed attention. He marked his Building Inspection Report “FRAME-NOT APPROVED”. Simonds returned to the site in order to attend to those issues.

308 Mr Wilson again attended the site on 6 August 2014, deleted 22 of the 29 items on the list that he considered had since been satisfactorily attended to, but leaving 7 items on the list. He marked his second Building Inspection Report “FRAME-NOT APPROVED”.

309 On 14 August 2014, Mr Wilson returned to site and issued a frame approval certificate, stating:

FRAME-APPROVED

Previous items rectified.

NOTE: This report relates to frame only. All wall member design by Timbertruss.

[Mr Wilson set out here the written warranty given Timbertruss, referred to above]

310 On 1 September 2014, Mr Draper applied to the Victorian Building Authority (“**VBA**”) for an inspection to be undertaken of the dwelling pursuant to the

provisions of the DBCA and, by email to Simonds dated 8 September 2014, confirmed that he had done so. Mr Kukulka, Private Building Surveyor, was appointed by the VBA to undertake the inspection. Mr Draper's concerns at the time were summarised in a typewritten statement attached to his application. They included what he considered was the wrong FFL of the slab, the alleged overcutting of the site by Simonds, his drainage concerns ("risers drawn which will not drain water"), the alleged substitution by Simonds of engineering plans and his desire to "have the place ripped down, the design corrected and the FFL to be raised to suit BCA Building Regulations".

311 Having received the surveyor's approval of the frame dated 14 August 2014, pursuant to clause 29 of the contract Simonds sent Mr Draper a tax invoice dated 5 September 2014, being a progress claim for completion of the Stage 2 frame stage, in the amount of \$48,345 including GST, being for a 25% of the contract sum.⁵⁰

312 In the written progress claim dated 5 September 2014 Simonds stated:

In accordance with your contract this payment is due on 16-09-2014.

313 I find that Mr Draper received the frame progress claim on 9 September 2014.

314 By email dated 9 September 2014 Mr Draper informed Simonds that he refused to pay the frame stage claim, and set out his reasons for not doing so. They were as follows:

The frame was not complete at this time and the base stage is still in question to this day. It is not reasonable to claim completion of [base and frame] works after being told to stop due to design problems. I am challenging the 45% completion due to incomplete engineering documentation resulting in inadequate drainage and design errors.

315 In his written submission dated 10 June 2015, Mr Draper concedes that his primary motivation for taking the "drastic action" of not paying the frame stage claim was that:

"it appeared [to him] to be the only way to get the builder to stop building".
[Given my concerns about the incorrect FFL] I was not going to allow them to push past the point of no return!"

316 Mr Draper issued this proceeding on 9 September 2014.

317 Mr Draper met with Mr Kukulka at site on 15 September 2014. Also attending the meeting were Craig Harrington, Building Manager employed by Simonds and Jennifer Warren, Contracts Administrator of Simonds. Mr Draper then alerted Mr Kukulka to a number of issues, discussed elsewhere in these Reasons. In regard to framing, Mr Draper informed Mr Kukulka that in Mr Draper's view "the studs

⁵⁰ It will be recalled that on 5 September 2014, Simonds also issued a Notice of Suspension pursuant to clause 35 of the Contract for non-payment by Mr Draper of the base stage, and that that payment was received from Mr Draper on 8 September 2014

around window W8A in bedroom 1 and window W13 in the bathroom were inadequate”⁵¹.

- 318 Mr Kukulka’s inspection otherwise concerned Mr Draper’s other concerns, unrelated to framing.
- 319 On 15 September 2014, Mr Draper also sent a letter to Simonds purportedly pursuant to clause 43 of the Contract, setting out various claimed breaches of the Contract by Simonds.
- 320 On 26 September 2014, Simonds issued a Notice of Suspension of the works pursuant to Clause 35 of the contract for non-payment of the frame stage.
- 321 By early October 2014, and subsequent to his meeting on-site with Mr Kukulka, Mr Draper compiled a list of further items that concerned him concerning the framing. He informed Simonds of these matters in general terms.
- 322 In its email to Mr Draper dated 7 October 2014, Simonds wrote:

...construction has stopped as requested by yourself back in September quoting ‘Do not proceed with any further construction on my property! Continuing to build would be Negligent due to the pending inspection and my intention to have the height issues corrected’.

Since then we attended a site meeting with [Mr Kukulka] and yourself [following] which we have not had any correspondence to date and we have issued you with the Frame stage payment.

Further noting your claims that there [are] 20 or more frame items that exist we are happy to meet on-site and review the items.

If the items are of the nature that would deem the frame incomplete or non-compliant we will promptly action them and re-invoice this stage before taking the matter up with the surveyor and others.

If these items you identify have no bearing on the frame compliance (i.e wall junction block nailing, truss ready sticker etc) then we will explain why and claim delays pending the payment.

- 323 In other words, in order to quell Mr Draper’s concerns, Simonds agreed not to press for payment of the frame stage claim, pending a further inspection of the frame to determine its compliance or otherwise with relevant provisions of the framing standard AS 1684.
- 324 Mr Draper emailed Simonds on 9 October 2014, confirming 13 October 2014 as the date for a site meeting, writing:

I have also been thinking about the truss company being involved. That is really something between you and them rather than something we need to spend time on at our meeting. They are going to be annoyed to hear they are thee because of people playing stupid games. I believe it is the responsibility of the suitably qualified person to sign off that the frame is ‘complete’. It all comes back to proper installation, this

⁵¹ Mr Draper had previously informed Simonds by email dated 10 September 2014 that he would be raising this issue with the VBA inspector.

includes proper connections, bracing and then a thorough QC (sic) inspection to ensure the frame is compliant. The frame isn't actually 'a frame' under AS1684 until it is installed as a system. You then need to list any corrections Simonds staff make to be compliant and request compensation from the manufacturer. I can't really comment on pre-fab frame policies though as we always built our own and were 100% accountable for what we produced.

- 325 The meeting on 13 October 2013 was attended by Mr David Whitford, Shannon Wall and Hus Saglam of Simonds, representatives of Checkpoint and Robert Wallace and Mark Benson, both of Timbertruss.
- 326 Mr Saglam took notes of Mr Draper's items of concern, and then created a list of all the items that Mr Draper considered ought to be attended to in relation to the frame. Mr Saglam subsequently sent the list to Mr Wallace at Timbertruss. By responding email dated 15 October 2014, Mr Wallace highlighted in black the items that Timbertruss would attend to on site on 21 October 2014. It was agreed that Simonds employees would attend to items otherwise highlighted in red.
- 327 Mr Whitford of Simonds gave evidence that notwithstanding that the frame had been assessed by Mr Wilson, the building inspector, as compliant, he had then resolved not to insist on payment by Mr Draper for the frame stage until completion of these further works.
- 328 The Victorian Building Authority sent a letter dated 17 October 2014 to Mr Draper, enclosing the report of Mr Kukulka. In response to Mr Draper's singular concern about the frame, expressed to Mr Kukulka at the meeting on 15 September 2014, Mr Kukulka observed in Item 3 paragraph 6 that Simonds had since provided him with calculations, which I find was the Panel Elevation Report. Mr Kukulka further stated that he had concluded that there were at least 2 studs specified on each side of the relevant windows⁵², and therefore there was no defect in the window studs.
- 329 Mark Benson of Timbertruss gave evidence of having attended on site, with carpenter Craig Cusworth, on 21 October 2014. Mr Benson returned to the office, and gave evidence that Mr Cusworth telephoned him later in the day, confirming that he had attended to the items in black. A Timbertruss site report records that Craig Cusworth attended on site between 0745 and 1240 that day to attend to the various items.
- 330 Mr Vandouree, a carpenter employed by Simonds, gave evidence that he attended the site on 21 October 2014, with an apprentice, Dylan Kelly. They had been responsible for erecting the framing. He gave evidence that they attended to the items in red.
- 331 Mr Wilson gave evidence that he did not go back to re-inspect the frame, after he provided his approval on 14 August 2014. He agreed with Counsel for Simonds that, given the extent of the works undertaken on 21 October 2014, over 2 months after he undertook his final inspection, the frame may have been in a different condition to that which he had previously observed.

⁵² Referred to in the Panel Elevation Report as openings E11 and E5 respectively.

Has Mr Draper demonstrated that the frame suffered from such defects on 14 August 2014 that it was not complete?

- 332 Mr Draper contends that his obligation to pay the frame stage progress claim depended upon the frame being “complete” at the time the claim was made, notwithstanding its approval by the building surveyor.
- 333 For reasons that follow, I reject this construction of the Contract. Assuming Mr Draper is correct, however, has he demonstrated, on the balance of probabilities, that the frame was so defective on 14 August 2014, the date it was approved by the building surveyor’s representative, Mr Wilson, that it could not be considered to be complete?
- 334 I now make some general observations about the witnesses called by the Simonds concerning this issue.
- 335 Mr Wilson is an experienced building inspector (with 20 years’ experience) with an “IN-U” qualification for 15 years. This means that he is qualified to inspect every type of building, whether domestic or commercial. Mr Wilson said in evidence that he considered himself to be the most experienced frame inspectors at Checkpoint. I accept the Respondent’s submission that he was a straightforward and direct witness who, the evidence demonstrates, was not prepared to approve the frame until he was satisfied that it was complete and satisfactory. He said that his “approval” carried with it his endorsement that the works had been completed, and was in no doubt that he should have approved the works when they were re-presented to him on 14 August 2014. His evidence was “At the time I approved the frame, the frame complied”.
- 336 Mr Wilson gave evidence that he considered that the items in the “black and red” email dated 15 October 2014 were lock-up items, and that they did not impact on the frame stage. For example, the item “wall junctions in house to be nailed in” was an item that Mr Wilson considers will typically be dealt with at lock-up.
- 337 Mr Kukulka is a highly qualified and experienced building surveyor. He has a Diploma of Building from RMIT in 1976, a degree in Building in 1983, and has been a qualified building surveyor and building inspector under the statutory regimes since the early 1980s. He has had approximately 35 to 40 years’ experience in these roles. He was appointed a VBA inspector in about 2003 and since then has conducted more than 50 house inspections a year. It is not possible to conclude from the terms of Mr Kukulka’s report dated 17 October 2014 that no defects were apparent in the framing work as a whole, because it is clear from its terms that, during the inspection on 15 September 2014, Mr Draper only expressed to Mr Kukulka his concerns about the studs around window W8A in bedroom 1 and window W13 in the bathroom.
- 338 I note that on 15 September 2014, Mr Draper, a carpenter by trade, who professes experience in Australia and overseas, only saw fit to draw to the attention of Mr Kukulka his concern about the studwork around two windows. It is clear from the contents of his application to the VBA dated 1 September 2014 for an inspection that, at that time, Mr Draper had not addressed himself to whether there were any defects in the frame or, that if he had, that he considered there were the broad

range of defects of which he now complains. If he believed that, as he wrote in his email dated 9 September 2014, that the frame was “not complete at [that] time”, it is noteworthy that he chose only to draw to the attention of Mr Kukulka his concerns about the window studs. I find from these matters, together with his concession made in his submission dated 10 June 2015, that at the time of the inspection, save for the window studs, he was not concerned about the quality of the framing. I find that he has endeavoured to mount a case based on allegedly inadequate framing, because of his despair over the foundation, FFL and drainage issues.

- 339 There are further reasons why, I consider, the evidence of Mr Wilson ought to be preferred over the evidence of Mr Draper. Mr Wilson is a highly experienced and accomplished professional in his area of work. He is more qualified and experienced than Mr Draper to speak on the topic. Mr Draper submits that, as a result of its having been engaged by Simonds as the relevant building surveyor, in the context of a commercial relationship with Simonds, Checkpoint (and by extension, its inspector Mr Wilson) failed to carry out its role objectively and independently. He says that Mr Wilson’s frame approval dated 14 August 2014 was therefore tainted, and failed to record relevant defects. I do not accept that there is any evidence as would fairly support this proposition.
- 340 In contrast, Mr Draper has struggled to remain objective about the quality of work on his own home.
- 341 Mr Draper’s frame claims were poorly identified, often developed during the running of the case, and (as appears below), again in final submissions.
- 342 Mr Draper failed to identify the provision of the contractual standard (for example AS 1684) or specification that he alleges has been breached,
- 343 Mr Draper purported to rely on evidence which post-dated the frame approval dated 14 August 2014; in a great number of instances, Mr Draper relied on photographs taken either just prior to or during the course of the hearing.
- 344 Mr Draper called no expert evidence in support of his frame claims.
- 345 Mr Draper was clearly personally motivated by the broader issues in the case which, in my view, compromised his ability to be objective. For example, the continual references to his wishing to take on the causes of others-on 21 May 2015 Mr Draper stated “This isn’t just me, this is systemic”. He also spoke of his desire to reform the building industry, particularly that feature of the industry that allows builders to appoint building surveyors to projects: in his view, particularly in the case of volume builders such as Simonds, this leads to building surveyors, mindful of sustaining their relationships with those who engage them, taking short-cuts in the performance of their statutory functions.
- 346 Mr Draper’s concern with broader issues was also demonstrated by his desire to “open up” Simonds’s conduct in connection with the Contract by inviting me, on the first day of the hearing, to refer certain matters to the BPB pursuant to Clause 12 of the Schedule 1 to the VCAT Act, in the hope that the BPB will decide to

conduct an enquiry into the conduct or ability of Mr Simonds to practise, and that that should occur before the hearing of his claim at the Tribunal.

347 I observe that Mr Draper clearly has allowed this circumstances in which he finds himself, to become influenced by other concerns. His observations such as “It’s not an acceptable practice in my world, therefore it can’t happen” and “it’s a case about my life” suggest that he remains equally concerned with achieving changes in building regulation in Victoria, as much as a resolution of the situation in which he and Simonds find themselves. One of Mr Draper’s main grievances, for example, was that Mr Simonds, being noted by Checkpoint on the building permit as the “Building Practitioner to be Engaged in the Building Works”, never took personal responsibility for the carrying out of the works under the Contract. Many of his emails to Simonds speak of his despair, in the absence of Mr Simonds, at not having a builder as a single point of reference for his complaints. His considerable disappointment that arises from this forms the principal reason for his submitting that Mr Simonds failed to exercise proper supervision, control and management of the works under the Contract.⁵³ Given Counsel for Simonds frank concession, on the first day of the hearing, that Mr Simonds knew nothing about this particular project, I quashed Mr Draper’s witness summons served on Mr Draper.

348 I accept Simonds’s submission, from my own observations of Mr Draper and the manner in which he chose to berate both junior and senior staff of Simonds in email correspondence during 2014 (and, subsequently, Members of the Tribunal), that personal difficulties and circumstances have impacted upon the way that he has brought and prosecuted his claims. He is a qualified carpenter, but has suffered injuries that prevent him from carrying on that work. He has clearly suffered personal difficulties as a result of his injuries and the medication that he is required to take. I accept that these personal difficulties have made it more difficult for him to carry out his role as owner, including the performance of his obligations under the contract.

Has Mr Draper demonstrated that on 13 October 2014, the date of the “frame meeting”, the frame was in the same state as on 14 August 2014, the date of the final approval by Mr Wilson?

349 Mr Wilson did not accept, in any event, that any “compliance related” items in the email were necessarily in existence at the date of his inspection on 14 August 2014. This is because the evidence indicates that certain plumbing and electrical works had been carried out after the frame inspection on 14 August 2014 which, it is reasonable to conclude, may have altered or otherwise affected the condition of the frame between 14 August 2014 and 13 October 2014. In these circumstances, Mr Draper has led no evidence as would satisfy me that the condition of the frame as inspected on 13 October 2014 was the same as it was on 14 August 2014, the date of the inspection by Mr Wilson.

⁵³ See part 15 of the Final Submissions.

350 Mr Benson of Timbertruss opined that items 10, 14, 20, 26, 27, 29, 30, 31 and 33 in the “red and black” email may have been compliance related items, but he is not a qualified building inspector.

351 In relation to the specific frame defect claims made by Mr Draper, I find as follows:

Mr Draper’s Submissions	My Findings
<p>1. Twenty or more nails were protruding out of the sides or had split framing elements, studs, noggins etc). This results in improper fixing of frame elements, which has a large effect on the overall stability of the frame as it settles.</p>	<p>I am not satisfied that the evidence established that there was this amount of nails protruding, or split frame elements. I also accept the evidence of Messrs Wilson, Kukulka and Whitford that Simonds would have attended to these during lock-up or fixing. I am not satisfied that Mr Draper has established that the particular work was defective on 14 August 2014, by reference to the contractual and/or specified standard. The claim is dismissed.</p>
<p>2. All internal wall junctions were not fixed in accordance with AS 1684-6.2.1.3</p>	<p>I accept Mr Wilson’s evidence that it is common practice to completely nail these items at lock-up, and that when inspecting the frame, he ensures that the timber elements are nailed together, but not necessarily “hit home”. I am not satisfied that Mr Draper has established that the particular work was defective at the time of Mr Wilson’s inspection on 14 August 2014, by reference to the contractual and/or specified standard. The claim is dismissed.</p>
<p>3. The top plate connections for multiple wall junctions was not installed correctly. The installation of gang nails was done after truss installation, and that due to lack of clearance to instal them properly, they have still not been all completed.</p>	<p>I accept Mr Wilson’s evidence that when he inspected, these items were satisfactory. I also note that Mr Draper relied on photographs 9, 12 and 13 in Exhibit A7, that were taken on 25 May 2015, many months after the frame inspection by Mr Wilson. I am not satisfied that Mr Draper has established that the particular work was defective at the time of Mr Wilson’s inspection on 14 August 2014, by reference to the contractual and/or specified standard. The claim is dismissed.</p>
<p>4. Internal wall brackets have been installed incorrectly. The brackets</p>	<p>Mr Draper relies on the “frame not approved” certificates of Mr Wilson dated 31</p>

<p>are designed to allow the roof trusses to settle properly but this cannot happen when they are nailed incorrectly.</p>	<p>July 2014 and 6 August 2014, which preceded Mr Wilson’s “frame approved” certificate dated 14 August 2014. The alleged defect is referred to in the “red and black” email dated 15 October 2014 at item 13 which, the evidence establishes, were rectified on 21 October 2014. I am not satisfied that Mr Draper has established that the particular work was defective at the time of Mr Wilson’s inspection on 14 August 2014, by reference to the contractual and/or specified standard. The claim is dismissed.</p>
<p>5. Visual inspection of framing members reveal multiple visual defects such as broken and split plates as well as knots that are bigger than allowable for specific timber grades.</p>	<p>Mr Draper relies on the “red and black” email dated 15 October 2014 which, the evidence establishes were rectified on 21 October 2014. To the extent that they were not, I accept the submission of Simonds to the effect that it would attend to rectification of such items during the balance of the construction phase. I am not satisfied that Mr Draper has established that these alleged defects make the frame non-compliant. . I am not satisfied that Mr Draper has established that the particular work was defective at the time of Mr Wilson’s inspection on 14 August 2014, by reference to the contractual and/or specified standard. The claim is dismissed.</p>
<p>6. Sections of frame remain unsupported, waiting for excessive clearances for plumbing penetrations to be filled.</p>	<p>I accept the submission of Simonds that this item was not previously referred to in the List of Claims, nor has any evidence been adduced to support the claim. The claim is dismissed.</p>
<p>7. 50mm notching of jamb studs for the installation of 45 mm lintels is not specified in AS1684-6.2.3(b) pages 48-49. Notching must be D/2 maximum. He submits that 90 mm studs should have 45 mm maximum to properly support lintel.</p>	<p>Mr Draper relies on a photograph no 3 forming part of Exhibit A7. The photograph was taken in October 2014. Mr Benson gave evidence that it was not possible to discern how much had been taken out of the stud. I also accept his evidence that there may be a small variance in “90 mm” studs. I am not satisfied, from the photograph, that Mr Draper has adduced sufficient evidence of the alleged defect at the time of Mr Wilson’s inspection on 14 August 2014. The claim is</p>

	dismissed.
<p>8. Top chord bracing/roof battens have not been installed in accordance with MiTek Fixing and Bracing Guidelines and AS 1684. Mr Draper submits that battens have “specific” fixing requirements, when designed for N2 wind loading (Ref: AS1684-Section 9-Table 9.7-page 106.</p>	<p>I accept the evidence of Mr Wilson and Mr Vandouree that roof battens are fixed by the roof tiler, and are not matters usually checked by the framing inspector. I accept the submission of Simonds that the work has not yet been fully performed, and cannot be considered defective. I am not satisfied that Mr Draper has satisfactorily demonstrated on the evidence that the work was defective at the time of Mr Wilson’s inspection on 14 August 2014., or how it departed from the requirements of AS 1684. The claim is dismissed.</p>
<p>9. Noggins were missing in numerous locations, and a number of noggins do not comply with AS1684-6.2.1.5 Figure 6.5. The stagger in any row of noggins should not exceed 150mm</p>	<p>I am not satisfied from the photo no 16 at Exhibit A7 that the position of the noggins is in breach of AS 1684 as alleged by Mr Draper. Mr Benson stated that the noggins were manufactured by TimberTruss to AS 1684. I am not satisfied on the evidence that noggins were missing in numerous locations at the date of Mr Wilson’s approval. Mr Draper also relies on a photograph taken on 25 May 2015, rather than 14 August 2014, when Mr Wilson approved the frame. This affects the weight of Mr Draper’s submission. I am not satisfied that Mr Draper has satisfactorily demonstrated on the evidence that the work was defective at the time of Mr Wilson’s inspection on 14 August 2014., or how it then departed from the requirements of AS 1684. The claim is dismissed.</p>
<p>10. Nominal fixing requirements for bracing have not been met in numerous locations (Ref: AS 1684-8.3.2.5-Table 8.3(b). Mr Draper says that they were listed in Mr Wilson’s “non-approved” inspection report dated 31 July 2014, but not all have been corrected.</p>	<p>Mr Draper relies on a photograph no 7 forming part of Exhibit A7. The photograph was taken on 23 May 2015. Mr Draper again relies on one of Mr Wilson’s “non-approved” frame inspection reports dated 31 July 2014. Mr Wilson’s evidence was that when all defects listed in his two earlier reports had been rectified, when he inspected the frame on 14 August 2014. I am not satisfied that Mr Draper has satisfactorily demonstrated on the evidence that there were</p>

	<p>numerous fixing defects concerning the bracing at the time of Mr Wilson’s inspection on 14 August 2014, or how they then departed from the requirements of AS 1684. The claim is too vague, and is dismissed.</p>
<p>11. Mr Wilson required by his inspection report dated 31 July 2014 only 3 nails to be in place for “speed wall bracing”. Walls P5, P11, P29, E27 and E28 are all Type B bracing units (in accordance with AS1684 Table 8.3(d)), which requires 4 nails to top and bottom plates.</p>	<p>I am not satisfied that his work would not have been carried out during the balance of the construction phase. The claim is dismissed.</p>
<p>12. The “not approved” frame inspection report dated 31 July 2014 stated that there was then an excessive 50 mm of slab beyond the bottom plate extending into the garage from the south, and also beyond bottom plate of the second bedroom towards the west. If the slab had to be cut to accommodate full brick to rebate, engineers design must be submitted to Checkpoint for approval. Photo 7 of A7 shows where the slab has been jackhammered away, without seeking the approval of Checkpoint.</p>	<p>I am not satisfied, having regard to the words of item 28 of the “not approved” frame report of 31 July 2014 that Simonds has failed to comply with Mr Wilson’s instructions. Mr Wilson’s evidence was that the slab had not been “cut back” as contemplated by the direction, and that no approval of rectification was required. The claim is dismissed.</p>
<p>13. Excessive notching to bottom plates. The plates in both shower areas have been notched 40 mm. The ensuite wall is a critical defect due to it being a load-bearing wall which carries concentrated point loads. This has already resulted in the plates developing stress cracks. This has already resulted in the plates developing stress cracks</p>	<p>Mr Draper relies on photographs 8, 18 and 19 for this claim. The first two of these were taken on 25 May 2015. The third photograph was taken in July 2014. There are no specific measurements that support this claim. There is no evidence to suggest that this item presented itself to Mr Wilson when he undertook his inspection on 14 August 2014. There is no specific evidence of breach. There is no expert evidence of the consequences on any claimed load bearing function. The claim is dismissed.</p>

<p>14. Multiple cracked trusses.</p>	<p>Mr Draper relies on the “black and red” email dated 15 October 2014. The claim is too general and lacks specific evidence. Insofar as it is suggested by Mr Draper that this item is no 15 in the email, then the evidence establishes that this and other items were completed on 21 October 2014.</p>
<p>15. Actual on-site dimension of bed 1 are different to what is shown on the contract plans. This appears to be an error in the dimensioning of the contract drawings.</p>	<p>There was no evidence led about this. It does not appear in the List of Claims. The claim is dismissed.</p>
<p>16. Roof design layout fails to recognise load points that should be included in truss layout. Mitek Guideline 159 shows the importance of including any truss point loads. The current truss design fails to include stiffened top chords (MGP12) required to support 65 kg evaporative cooler and two solar collectors weighing approximately 50 kg each.</p>	<p>Mr Draper has led no expert evidence concerning alleged defective truss design. The roof works have not been completed. The claim is dismissed.</p>

- 352 It follows that had I not ordered demolition and replacement of the slab, I would have dismissed Mr Draper’s request for a certificate of compliance in respect of the frame design.
- 353 Having regard to my findings above, particularly the approval certificate of Mr Wilson dated 14 August 2014, the fact that much of the evidence of Mr Draper post-dates by some months the date of the approval certificate, I would also have also dismissed Mr Draper’s claim for an order, particularly whilst the contract remains on foot that, in the absence of a certificate of compliance, the frame must be demolished by Simonds and reconstructed in accordance with relevant requirements.

Is Mr Draper in breach of the Contract for not paying the frame stage payment?

- 354 I now address, for completeness, an argument relating to the legal obligations of the parties, had I not made an order that Simonds rectify defective works in the manner now required.
- 355 Simonds submits, in relation to the frame stage, that Mr Draper agreed to a process of approval by and independent and expert certifier, the building surveyor. Schedule 3 to the Contract, Simonds argues, defines when the frame stage is to be considered complete, such that payment of the frame stage is then due to Simonds.

Simonds submits that Mr Draper's failure to pay on approval by that certifier, results in his being in breach of the Contract.

356 Simonds submits that whatever view that may be taken may be taken by Mr Draper concerning the completion or otherwise of the frame stage, Mr Draper's obligation was to pay the frame stage upon approval by the building surveyor.

357 It is necessary for me to set out the provisions of the Contract relied on by Simonds. Clause 12.0 of the Contract provides:

Owner Must Pay the Contract Price

The Owner must pay the Builder the Contract Price set out in Item 2 of Schedule 1 and other amounts to be paid by the Owner under this Contract in accordance with Clause 30 or as otherwise stated in this Contract

358 Clause 29.0 of the Contract provides:

Builder to Claim Progress Payments

The **Builder** must give the **Owner** a written claim for each **Progress Payment** when each state has been completed, as set out in Schedule 3. The claim must set out each of the following:

- the amount paid or to be paid the stage or stage is completed to date;
- the amount paid or to be paid for, and details of any variations may and other amounts paid or to be paid by the **Owner** under this Contract;
- the sum of those amounts;
- payments that have already been made by the **Owner**, and the total claim, taking into account the payments already made.

359 Schedule 3 to the Contract provides:

PROGRESS PAYMENT STAGES AS PRESCRIBED BY SECTION 40 OF THE DOMESTIC BUILDING CONTRACTS ACT

... 'Frame stage' means the stage when a home's frame is completed and approved by a building surveyor

360 Clause 30.0 of the Contract provides:

Owner Must Make Progress Payments

The **Owner** must make the **Progress Payments** set out in Schedule 3 within the number of Days set out in Item 7 of Schedule 1 after both:

- the stage has been completed: and
- the **Owner** has received a notice to that effect from the **Builder**.

361 Item 7 of Schedule 1 to the contract provides that number of days for the Owner to make progress payments after stage completed and notice received is 7 days.

362 Clause 31 of the Contract provides:

Builder's Right to Agreed Damages

If the Owner does not make a **Progress Payment**, or the **Final Payment**, within is 7 **Days** after it becomes due, the Builder is entitled to interest on

the unpaid amount, at the rates set out in Item 8 of Schedule 1, from the date the payment becomes due until the date the payment is made.

363 Item 8 of Schedule 1 to the Contract provides that the agreed interest for late progress payments is 14% per annum.

364 Clause 25.0 of the Contract provides:

Owner Must Provide Land Access

The **Owner** gives the **Builder** and exclusive licence to occupy the **Land** during the currency of this Contract. The **Builder** has the **Owner's** authority to allow or refuse anyone access, and may remove will remove unauthorised people from the **Land**.

365 Clause 35.0 of the Contract provides:

Suspension of Work

The **Builder** may suspend the **Building Works** if the **Owner**:

- does not make a **Progress Payment** is due within is 7 **Days** after it becomes due; or
- is in breach of this Contract.

366 Clause 35.2 of the Contract provides:

Suspension of Work continued

The date on which the **Building Works** are to be completed is changed and extended to cover the period of suspension.

367 Clause 36 of the Contract provides for an inspection to be arranged as between Simonds and Mr Draper, and for the submission of a final claim by Simonds.

368 Clause 37 of the Contract provides:

List of defects and Final Payment

37.0 On final inspection, if the **Owner** agrees that there are no defects or incomplete **Building Works**...the **Owner** must make the **Final Payment** within **14 Days** of the **Notice of Completion**. If the **Owner** claims that there are defects or incomplete **Building Works**, the **Owner** must give the **Builder** a list of them. The **Builder** and the **Owner** must sign the list and each must keep a copy. The **Builder** must carry out any necessary **Building Works** with **14 Days** or as soon as reasonably practicable. The **Owner** must make the **Final Payment** within 7 days after both:

- the defects are fixed and/or outstanding work is completed; and
- the **Owner** has received a notice to that effect from the **Builder**

37.1 The fact that the **Builder** signs the list is not an admission that the defects exist or there is incomplete **Building Works**

37.2 The fact that the **Owner** pays the final claim is not evidence that there are no defects or incomplete work nor a waiver of any rights under a statutory warranty.

37.3 'Defect' does not include a defect arising from the fact that something has to be supplied or done by the **Owner**.

369 Clause 39 of the Contract provides:

Defects Within the 3-Month Period

39.0 The **Builder** must fix any additional defects in the **Building Works** that the **Owner** notifies in writing within 3 months from the date when the **Building Works** are completed and the home is handed over...

39.3 The Builder must fix defects at no cost to the **Owner**...

39.4 If the **Builder** fails to fix any defects within 21 **Days** after the 3 month period has expired, the **Owner** may give the **Builder** a further written notice listing the outstanding defects and stating that they will lodge a formal claim with the relevant insurer.

370 Clause 43 of the Contract provides:

43.0. The **Owner** may bring this Contract to an end..., if the **Builder**

- fails to proceed with the **Building Works** competently and diligently...
- refuses or persistently neglects to fix or replace faulty works or materials...;
- is unable or unwilling to complete the **Building Works** or abandons this Contract; or
- is in breach of this Contract.

371 Mr Draper submits that there are two requirements that must be satisfied before he is obliged to pay the frame stage progress claim. First, that the frame must be completed as matter of fact, and that it was not. Secondly, that it must also be approved by the building surveyor. He relies on the definition of when the 'frame stage' payment is due, set out in Schedule 3 to the Contract, in particular the use of the word "and", suggesting two pre-conditions each with separate independent force.

372 I do not agree. I accept Simonds's submission that by clause 29 of the Contract, Simonds was entitled to give Mr Draper a written progress claim "when [the frame stage had] been completed, as set out in Schedule 3 [to the Contract]. Schedule 3 to the Contract is to the effect that completion will be deemed as having occurred when the frame has been approved by the surveyor.⁵⁴ That occurred on 14 August 2014.

373 Clause 30 of the Contract is to the effect that Mr Draper was required to make payment within 7 calendar days of the later of the frame stage having been completed [within the meaning of Schedule 3 to the Contract], and Mr Draper having received notice from Simonds that the frame stage had been completed. The latter event occurred on 9 September 2014 when, I have found, Mr Draper received the invoice from Simonds dated 5 September 2014. That invoice stated:

⁵⁴ I note that the frame stage is the only progress claim requiring, under the contract, an approval by the building surveyor.

Progress claim for completion of STAGE 2/45% [of total works completed]

- 374 The invoice charged 25% of the Contract Sum.
- 375 I find that Mr Draper, having received the invoice on 9 September 2014, was obliged to make payment by 16 September 2014-the payment date claimed on the face of the invoice.
- 376 In summary, therefore, I accept the submission of the Respondent that, in relation to the frame stage, Mr Draper agreed to a process of approval by and independent and expert certifier, the building surveyor, and to pay on approval by the building surveyor. That occurred on 14 August 2014.
- 377 I also accept Simonds's further submission that the contractual regime supports the proposition that payment for the frame stage was due by Mr Draper upon approval by the building surveyor. This is because Simonds remains under an obligation (and has a right) to correct and fix defective works throughout the lock-up, fixing and completion stages. This is demonstrated by clause 37 and 39 of the Contract. The clauses of the Contract must be given a commercial and business-like construction, and the payment clauses, together with the clauses concerning rectification by Simonds of defects must be read together, and construed harmoniously. Reading these clauses of the Contract, Mr Draper was required to pay the framing stage progress claim after receipt of the notice from Simonds that the stage was complete, and that payment was on account. If Mr Draper wished to assert that there were defects in the frame stage, they could be raised later by him pursuant to the provisions of the Contract.
- 378 Seen in this context, and whilst the Contract remains on foot, I accept Simonds's submission that Mr Draper's claim that Simonds should now rectify the alleged frame defects prior to any payment is incompetent, alternatively premature, or both. It amounts to an impermissible attempt to subvert Simonds's lawful rights under the Contract.
- 379 I find that at the meeting on 13 October 2014, Mr Draper also raised his concerns about "how weak and poorly put together" the contract was. By his email to Mr Draper dated 26 October 2014, Mr Trent Smith of Simonds informed Mr Draper that he had referred to contractual issues raised by Mr Draper for legal advice.
- 380 By email to Mr Whitford of Simonds dated 5 November 2014 headed "Uncertified fill used as foundation material", Mr Draper stated:
- Sorry for not answering your call today but I think I have had enough of the delays and am now taking a different course of action.
- ...I have also spoken to my bank and I am now planning to end our contract. Although your recent efforts gave me hope, I am not really seeing any improvement in the process.
- ...Most importantly I have no intention of paying [Simonds] the [frame stage] and until someone begins to renegotiate the contract to cover damages, delays and the time I have wasted on this, I am going to actively pursue ending the contract. Hopefully I can find a building company where the builder is accessible and actually involved in

the build process. It seems administrators are not very good at getting houses built when the client knows the tricks they would normally use to cover their butt.

- 381 Following the undertaking of the corrective works that I have described, and contrary to Mr Whitford's intentions not to press Mr Draper for the frame stage payment after the corrective works were undertaken, Simonds does not appear to have demanded payment of the frame stage progress claim. In his email to Mr Whitford of Simonds dated 7 November 2014, in response to a letter from Simonds dated 3 November 2014 claiming delays for non-payment of the frame stage, Mr Draper stated that his understanding was that following the correction of the frame, a new claim would be issued.
- 382 Mr Whitford's emailed response dated 7 November 2014 stated that he had indeed instructed Simonds not to re-apply for the frame stage payment, or claim delays arising from non-payment, and that this had been agreed at the site meeting on 13 October 2014.
- 383 I find that Simonds subsequently sought payment of the frame stage. The earliest date on which that appears to have occurred in writing was by the issue to Mr Draper of a statement of account dated 4 March 2015, referring to the progress claim dated 5 September 2014 being then still outstanding for payment.
- 384 I find, however, that by Simonds's subsequent agreement not to press for payment of the frame stage progress claim, and the lack of evidence as to when Simonds subsequently demanded payment, that there was no obligation upon Mr Draper to pay until 4 March 2015, the date of Simonds's Statement of Account.
- 385 Therefore, were it not for my order that Simonds is now obliged to rectify the level of the slab, with consequential demolition of the frame, Mr Draper's failure to do so would have resulted in his being in breach of the Contract, and Simonds would therefore be entitled to be paid its frame stage progress claim, plus interest at 14% from 4 March 2015.

CLAIM 7

TO THE EXTENT THAT SIMONDS'S PROPOSED DRAINAGE RECTIFICATION IS AN "ALTERNATIVE SOLUTION" SIMONDS MUST COMPLY WITH THE RELEVANT PERFORMANCE REQUIREMENTS

- 386 Mr Draper has always complained that the drainage is inadequate. He considers that a proper solution must be presented to him for consideration and approval. It will be recalled that as early as his email dated 22 July 2014 to Simonds, he was suggesting that the use of risers alone, without "complete and functioning drainage systems" was a defect and not fit for purpose.
- 387 The drainage design was amended in early September 2014. It is contained in Drawings S2-S6, dated September 2014, issued by Intrax. Intrax certified on 11 September 2014 that that part of the design described as "retaining wall; driveway design; stormwater drainage" complied with the relevant regulations.
- 388 Simonds submits that it has since produced a variation PCVC4, which includes 2 silt pits in elevation B, instead of risers.

- 389 Mr Draper to sign, but that Mr Draper had refused to sign it, partly because it assumes current FGLs, which are not acceptable to Mr Draper. Another reason for not doing so is because the proposed solution adversely affects his driveway. His evidence includes his own manuscript comments on Drawings S4 and S5.
- 390 Drainage on the western side of the Site will need to be redesigned to cater for the demolition of the existing slab, and construction of a new slab at a higher level.
- 391 If not, to the extent that the new drainage design by Intrax is an “Alternative Solution” within the meaning of the BCA, Simonds would have been required to have persuaded the RBS that any “Alternative Solution” complied with the BCA, by the use of one of the “Assessment Methods”.
- 392 This would be an obligation upon Simonds at law, which therefore requires no order, to the same effect, from this Tribunal.
- 393 This claim is dismissed.

CLAIM 8

IS MR DRAPER ENTITLED TO A DECLARATION THAT THE COMMENCEMENT DATE OF THE CONTRACT IS 31 MAY 2014, AND THAT DAMAGES OF \$400 PER WEEK MUST BE PAID BY SIMONDS TO MR DRAPER FROM 7 JANUARY 2015 (BEING MR DRAPER’S CALCULATED DATE OF COMPLETION OF THE WORKS) AND CONTINUING?

- 394 Clause 10 of the Contract obliged Simonds to complete the building works within the Building Period of 220 days. Mr Draper has calculated that assuming a start date of 31 May 2014, the Building Period therefore extended to 7 January 2015.
- 395 Mr Draper submits that the delay to the completion of the dwelling has caused him to live in a property owned by him that he would otherwise have rented out at \$400 per week. I am also not satisfied that Mr Draper adduced any satisfactory evidence of the rental that would have been obtainable by him had he rented his house in January 2015.
- 396 Item 8 of Schedule 1 to the Contract entitles Mr Draper to claim liquidated damages of \$200 per week for Simonds’s late completion of the works. Any claim for general damages, of the type now made by Mr Draper, must therefore fail.
- 397 Were it a claim for liquidated damages, it would appear to be based on the proposition that the delay to the completion of the works under the Contract has been caused by Simonds without any justification, or without any conduct on the part of Mr Draper.
- 398 I consider that the claim for damages for late completion cannot be brought until the Building Works (as defined in the Contract) are completed.

CLAIM 9

MUST SIMONDS PAY MR DRAPER \$70,000 IN “RESTITUTION”?

399 Mr Draper has not explained the factual or legal basis which is said to give rise to a claim in restitution.

400 In general terms, such a claim seeks the restitution of a benefit conferred on the defendant at its request, at the expense of a claimant, and for which it would be unconscionable not to make payment to the claimant.

401 The amount claimed does not appear to relate to the amount of \$38,676 already paid by Mr Draper for the base stage, or the further amount of \$48,345 for which I have found Mr Draper is liable to Simonds. I accept the submission of Simonds that the claim appears to be arbitrary.

402 A claims in restitution is not available where a contract remains on foot, which governs the rights and obligations of the parties at law.⁵⁵

403 Mr Draper’s claim in restitution is dismissed.

CLAIM 10

MUST SIMONDS PAY MR DRAPER \$50,000 FOR “DISTRESS AND MENTAL TRAUMA”

404 Mr Draper claims \$50,000 for distress and mental trauma.

405 Mr Draper submits that this “is confirmed by Acting Psychologist Nicole Davy who diagnosed Draper on July 31 2015 as having symptoms consistent with ICD-10 diagnosis of F43.2-Adjustment Disorder as a result of this situation.”

406 I find that Simonds has been given insufficient notice of this claim by Mr Draper. Simonds was unable to address it.

407 There is no explanation by Mr Draper as to how the figure of \$50,000 is arrived at.

408 Mr Draper’s claim for “distress and mental trauma” is dismissed.

CLAIM 11

MUST SIMONDS PAY MR DRAPER \$200,000 FOR EXEMPLARY DAMAGES

409 Mr Draper’s submission is as follows:

Draper has a case, as a matter of public interest, to demand that the tribunal punish [Simonds] heavily in response to the vexatious handling of not only this proceeding but the entire contract provision and build process. While [Simonds] denies they are doing anything wrong in their opinion, a penalty needs to be applied that reinforces the need to make changes and discourage the builder from continuing with this type of careless practice and attitude

⁵⁵ See *Lumbers v W Cook Builders Pty Ltd (In Liquidation)* (2008) 232 CLR 635

- 410 Non-compensatory damages, such as punitive or exemplary damages, are not awarded for breach of contract.⁵⁶
- 411 In any event, such a remedy, even if it were available, would fail on the facts. To the extent that Mr Draper seeks any relief in respect of Simonds vexatiously conducting its defence of the proceeding, that is a matter that can be argued by Mr Draper on any application that he may make for costs.⁵⁷
- 412 The claim is dismissed.

OTHER RELIEF SOUGHT BY MR DRAPER

Referral Under clause 12(1) of Schedule 1 to the VCAT Act

- 413 Clause 12(1) of Schedule 1 to the VCAT Act states as follows:

The Tribunal may request the Director, the Victorian Building Authority, or the [BPB] to investigate any matter that arises in a proceeding under the [DBC Act].

- 414 The remaining question is whether I have made any findings as would leave room for the exercise of my discretion to refer these matters to the BPB under Clause 12(1) of Schedule 1 to the VCAT Act. Mr Draper seeks such a referral.

- 415 Mr Draper contends that a number of matters demonstrate that Mr Simonds committed acts or omissions of the type described in section 179 of the Building Act, and that is why he wants a referral by the Tribunal, in the event that the BPB may decide to hold an inquiry under section 178 of the Building Act.

- 416 Section 178 of the Building Act provides:

Subject to section 179A(2), the Building Practitioners Board may conduct an enquiry about the conduct or ability to practice of a registered building practitioner-

- (a) on its own initiative; or
- (b) on the recommendation of the person appointed under section 177; or
- (c) on a referral by the Authority; or
- (ca) on a referral by the Victorian Civil and Administrative Tribunal.

- 417 Section 179(1) of the Building Act provides:

On an enquiry into the conduct of a registered building practitioner, the Building Practitioners Board may make any one or more of the decisions mentioned in subsection (2) if it finds that the registered building practitioner-

- (a) is guilty of unprofessional conduct⁵⁸; or
- (b) has failed to comply with [the Act] or [the Building Regulations]; or
- (c) has failed to comply with a determination of the Building Appeals Board or a direction of the Authority; or
- (d) has been guilty of conduct in relation to his or her practice as a building practitioner which-

⁵⁶ See *Cheshire & Fifoot's Law of Contract*, Eighth Australian Edition, at [23.2]

⁵⁷ See section 109(3)(a)(vi) *Victorian Civil and Administrative Tribunal Act 1998*

⁵⁸ As to which, see Regulation 1502(a) of the Building Regulations.

- (i) is constituted by a pattern of conduct or by gross negligence or gross incompetence in a particular matter; and
 - (ii) shows that he or she is a fit and proper person to practice as a building practitioner; or...
- (e) is employed or engaged to do, on his or her behalf, work of a kind that can only be done by a person registered under this part in a particular category of or class, a person who is not so registered; or
- (fc) has failed to comply with the **Domestic Building Contracts Act 1995**; or...

418 Regulation 1502 of the Building Regulations relevantly provides:

Professional standards

A registered building practitioner must-

- (a) perform his or her work as a building practitioner in a competent manner and to a professional standard; and...

****Note**

A building practitioner who contravenes the requirements of Regulation 1502 may be the subject of an enquiry under section 179 of the Act.

419 Section 179B of the Building Act provides:

If a company or partnership of which a registered building practitioner is a director or partner fails to comply with this Act all the Building Regulations and carrying out building work, that failure is taken to have been the conduct of the registered building practitioner and a failure by the registered building practitioner to comply with this Act and the Building Regulations for the purposes of sections 178, 179 and 179A.

420 Relying on section 179 of the Building Act, Mr Draper alleges that numerous alleged failures by Simonds to comply with the Act and/or the Building Regulations in carrying out the building work is taken to have been the conduct of Mr Simonds, and a failure by Mr Simonds to comply with the Building Act and the Building Regulations for the purposes of sections 178 and 179 of the Building Act.

421 Section 179(2) of the Act sets out the decisions the BPB can make if it makes any findings against Mr Simonds of the type set out in section 179(1) of the Building Act.

422 By his email dated 1 April 2016, Mr Draper confirmed that he still sought a referral by the Tribunal to the BPB pursuant to section 178(1)(ca) of the Act. He naturally considers that a referral from the Tribunal may be a relevant consideration for the Board when it resumes its consideration whether it will hold such an enquiry.

423 Members of the Tribunal will have their own views about the circumstances that must present themselves before they refer matters to the Building Practitioners Board pursuant to clause 12(1) of Schedule 1 to the VCAT Act.

424 I consider that the power of referral should only be exercised when there are facts that will tend to prove any of those acts or omissions described in section 179 of

the Building Act, and only where there is evidence that they were egregiously committed by a builder.

- 425 I have concluded that the expression “any matter that arises in a proceeding” as used in Clause 12(1) of Schedule 1 to the VCAT Act, does not enable an owner to raise any matter related to the alleged conduct of a building practitioner, as Mr Draper has sought to do, that is unrelated to the actual relief an owner seeks in law against a builder. There are many such instances in the allegations Mr Draper makes against Simonds. These claims do not sound in any claim made by Mr Draper for rectification, or for other relief.
- 426 The Tribunal has an express jurisdiction to deal with “domestic building disputes” as defined but not, in my view, to receive submissions from a party concerning the alleged acts or omissions of a building practitioner, simply for the purpose of then being invited by that party to refer those matters to the BPB.
- 427 To allow otherwise would result in the Tribunal being a forum for the preliminary litigation of matters that are within the express remit of the VBA, and the BPB in particular.
- 428 Further, for reasons explained, the BPB is already seised of matters relating to this project. In the circumstances, I will make an order for the provision of a copy of my Orders and Reasons to the BPB.

RELIEF

- 429 I make the accompanying orders.
- 430 I have heard no submissions on the question of costs, and so I reserve that issue.

A T Kincaid
Member