VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D1088/2011

BUILDING AND PROPERTY LIST

CATCHWORDS

Proceeding remitted for further hearing following decision of the Court of Appeal. Building project at Dinner Plain Victoria; Domestic building contract entered by owners' agent; two builders named in contract; main builder replaced by further builder; works not completed; owners' claim for loss against named licensed builder named in contract who did not actually carry out building works. Claim successful. Assessment of damages for breach of contract. Damages awarded significantly less than damages claimed because much of the damages claimed do not meet not meet the "remoteness" of damage test.

FIRST APPLICANT BY CROSS-CLAIM	Desmond Thomas Fraser
SECOND APPLICANT BY CROSS-CLAIM	Maureen Fraser
FIRST RESPONDENT BY CROSS-CLAIM	Mr Guntram Sperling
SECOND RESPONDENTBY CROSS-CLAIM	Dr Heidi Kastner
BEFORE:	Senior Member M. Farrelly
WHERE HELD:	Melbourne
HEARING TYPE:	Hearing
DATE OF HEARING:	12 October 2017. Final written submissions received 19 October 2017.
DATE OF ORDER:	16 November 2017
CITATION:	Fraser v Sperling (Building and Property) [2017] VCAT 1891

ORDERS

1. The First and Second Respondents by Cross-Claim must pay the First and Second Applicants by Cross-Claim $55,931.
2. Costs reserved with liberty to apply. I direct the Principal Registrar to list any application for costs before Senior Member Farrelly, allowing half a day.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the First and Second Applicants by Crossclaim	Mr J Gray, solicitor
For the First and Second Respondents by Crossclaim	Mr G Sperling and Dr H Kastner, in person

REASONS

1 In September 2014, I conducted a six day hearing in this proceeding. On 16 October 2014, I handed down my decision which included my decision on the claim bought by the first and second applicants by cross-claim, Mr and Mrs Fraser, ("**the applicants**") against the first and second respondents by cross-claim, Mr Sperling and Dr Kastner ("**the respondents**").

2 The applicants appealed the decision. By decision of Associate Justice Daly in the Supreme Court dated 11 December 2015[1], the appeal was dismissed.

3 The applicants appealed further to the Court of Appeal. By decision of the Court of Appeal dated 17 March 2017[2], the appeal was allowed, the orders of Daly AsJ and my orders of 16 October 2014 were set aside, and the proceeding was remitted to the Tribunal for re-hearing and determination in accordance with the Court of Appeal's reasons.

4 On 5 June 2017, the matter returned before me for a directions hearing. At the directions hearing, the applicants were represented by Mr Gray, solicitor, and the respondents were represented by Mr Partos of Counsel. The parties consented to orders for the file and service of written submissions ahead of the rehearing, and for the rehearing to be allocated one day of hearing time. The allocated time for the rehearing was set on the basis that, subject to any further application by the parties or order of the Tribunal, no new evidence would be presented at the rehearing. At the rehearing, the parties would make submissions with reference to evidence presented at the original hearing before me with the aid of transcript.

5 Each of the parties filed written submissions ahead of the rehearing. The rehearing proceeded on 12 October 2017. The applicants were represented by their solicitor, Mr Gray, and the respondents represented themselves.

Background

6 The factual background to the claim brought by the applicants is set out in detail in my decision of 16 October 2014. I briefly set out the background below.

7 In early 2009, the applicants purchased a block of land ("**lot S2**") in the snowfields at Dinner Plain in Victoria. Their intention was to construct two homes on lot S2 and sell the completed homes for a profit. The applicants took on this development project at the encouragement of Mrs Fraser's son, Mr Atwell, who worked in real estate. Mr Atwell was to manage the development project for the applicants. Snowy Corner Pty Ltd ("Snowy"), a corporate entity controlled by Mr Atwell, had also purchased

[1] [2015] VSC 698
[2] [2017] VSCA 53, joint decision of Maxwell P, Santamaria and McLeish JJA

two blocks of land ("**lots 5 and 6**") adjacent to lot S2 for a similar development purpose.

8 The applicants obtained finance for the purchase of lot S2, and the latter construction of the homes on lot S2, from the National Australia Bank ("**NAB**").

9 Mr Atwell met with an unregistered builder, Mr Demetriou, and the two of them agreed on terms by which Mr Demetriou's corporate vehicle, Modern 1 Design Pty Ltd ("**Modern**") would build two homes on lot S2 and one home on each of lots 5 and 6.

10 A builder must not enter into a contract for the construction of a home unless the builder is a registered building practitioner ("**RBP**").[3] In the case of the builder being a corporation, at least one of its directors must be an RBP. In the case of the builder being in partnership, at least one of the partners must be an RBP. A building surveyor must not issue a building permit for the construction of a home unless he or she is satisfied that the builder is an RBP who is covered by *"required insurance"*.[4] The required insurance ("warranty insurance") is prescribed by Ministerial Order made under Division 3 of Part 9 in the *Building Act* 1993. In essence, warranty insurance provides indemnity to owners in respect of defective or incomplete building works.

11 Mr Demetriou was not an RBP. He approached Mr Sperling whom he knew to be an RBP. Mr Sperling, in partnership with his wife Dr Kastner, traded as a builder under the trading name the "Alpine Woodpecker". Mr Sperling and Dr Kastner agreed to assist Modern in the Dinner Plain building project.

12 On 2 December 2010, Mr Sperling, on behalf of himself and Dr Kastner trading as the Alpine Woodpecker, signed a standard form HIA "New Homes" building contract (in duplicate) which identified Modern and the Alpine Woodpecker as the "builders" of the two proposed new homes on lot S2 ("**the lot S2 contract**"). Similar building contracts were signed in respect of the homes to be constructed on lots 5 and 6. Mr Demetriou signed the contracts in his capacity as director of Modern. The lot S2 contract specified a contract price of $562,000 and a construction period of 240 days. Snowy was the named "owner" in the lot S2 contract and the lots 5 and 6 contracts. A short while later, the exact date being unknown, Mr Atwell signed the contracts in his capacity as director of Snowy.

13 Mr Atwell and the applicants say that, in executing the lot S2 contract, Snowy acted as agent for the applicants.

14 Sometime after signing the building contracts, Modern and the Alpine Woodpecker reached agreement as to their respective roles and remuneration. The Alpine Woodpecker would receive a fee of $10,000 for

[3] Section 29 *Domestic Building Contracts Act* 1995
[4] Section 24A of the *Building Act* 1993

each completed home, and Mr Sperling would adopt a supervisory role. Modern would construct the homes and receive the builder's profit under the contracts.

15 On 17 December 2010, QBE Insurance, on the application of Mr Sperling, issued a warranty insurance certificate for each of the two homes to be constructed on lot S2.

16 Building permits for the two homes to be constructed on lot S2 were issued to the applicants as the "owners" on 12 January 2011. The permits identified the Alpine Woodpecker as the "builder" and Mr Sperling as the designated RBP.

17 Construction of the two lot S2 homes and the homes on lots 5 and 6 commenced in early 2011, with the intention to have the homes completed in time for the winter ski season.

18 In around March 2011, Mr Atwell and Mr Demetriou fell into dispute with the result that Modern abandoned the construction projects altogether. At this time, subcontractors engaged by Modern on the project were owed a significant sum of money.

19 On 4 April 2011, the applicants' solicitors sent Mr Sperling an email which identified the applicants as the owners of lot S2 and asserted an obligation on the part of Mr Sperling to complete the works under the lot S2 contract.

20 Around this time, Mr Atwell met Mr David Winchester, a builder who was planning to build a new home on a further block of land adjacent to lot S2. Mr Winchester proposed that his company, Fingal Holdings Pty Ltd ("**Fingal**"), take over the role of Modern in respect of the construction of the homes on lot S2 and lots 5 and 6. The discussions resulted in an agreement signed on around 12 April 2011 by Mr Atwell on behalf of Snowy, Mr Winchester on behalf of Fingal, and Mr Sperling on behalf of the Alpine Woodpecker ("**the April 2011 agreement**"). The key terms provided in the April 2011 agreement were:

- Fingal Holdings Pty Ltd (David Winchester) takes on the obligations of Modern 1 Design Pty Ltd to complete the construction of Lots 5 & 6 and Lot S2. This will be done under the framework of the existing building contract arrangements with Guntram Sperling.
- Fingal Holdings Pty Ltd does not take on any obligation Modern 1 Design Pty Ltd has to any subcontractor prior to its (Fingal) commencement on site.
- Snowy Corner Pty Ltd (Atwell) place $50,000 in the Trust account of Burke & Associates to assist payment of the outstanding creditors as per above [a list of outstanding subcontractor creditors was set out in the April 2011 agreement]. Payments to be made from these funds on the

authorisation of Guntram Sperling, David Winchester and Michael Atwell.

- From the payment of the Lock Up Stage claim for S2 of $196,700 an amount of $72,000 to be paid into the Trust account of Burke & Associates to assist payment of the outstanding creditors as per above. Payments to be made from these funds on the authorisation of Guntram Sperling, David Winchester and Michael Atwell.
- Progress Claims for Building Works to be made on the invoice of Fingal Holdings Pty Ltd. The claim is to be supported by photographic evidence that works to that stage have been completed. The Progress Claim is to be paid directly by the NAB to Fingal other than for the $72,000 referred to above which is to be paid to Burke & Associates.
- David Winchester to take on the plumbing compliance obligations for all plumbing works on each of the 4 buildings.

21 Unfortunately, the proposed payments into the trust account of Burke and Associates, intended for payment of outstanding subcontractor creditors, did not occur. Payments were made by Snowy and the applicants to Fingal.

22 Further, at the request of Mr Winchester, the applicants made advance progress payments to Fingal, the overall effect being that the applicants paid $168,331 to Fingal allegedly in respect of the "fixing stage" payment under the lot S2 contract, before the fixing stage was completed. The lot S2 contract specified a fixing stage payment of only $140,500.

23 Monies owed to subcontractors were not paid and, as a result, the building project ground to a halt in August 2011.

24 By December 2011, Mr Atwell and the applicants reached the conclusion that Fingal would not be returning to complete the building works. On 22 December 2011, Snowy commenced this proceeding against Modern, Fingal and Mr Sperling and Dr Kastner. Fingal subsequently filed a counterclaim against Snowy and Mr and Mrs Fraser claiming it was owed money in respect of the building works it carried out at lot S2. Subsequently, on 29 November 2012, Mr and Mrs Fraser commenced their crossclaim in the proceeding against Mr Sperling and Dr Kastner, Modern and Fingal. Snowy was subsequently placed into liquidation, and Modern and Fingal were subsequently deregistered leaving only Mr Sperling and Dr Kastner as the "live" respondents to Mr and Mrs Fraser's crossclaim.

25 The applicants took no further action to complete construction of the lot S2 homes or to otherwise mitigate their loss. As Mrs Fraser says in her witness statement:

> The non completion of S2 [the homes on lot S2] put us in an impossible position financially. We were unemployed pensioners and NAB refused to advance further funds until further work was completed. We could not afford to pay anyone else to complete the project.[5]

26 In February 2013, the NAB took possession of the incomplete lot S2 homes and sold them for a combined sum of $275,000, and in April 2013 the NAB took possession of the applicants' home in Corowa and sold it for $210,000.[6] The sale proceeds were insufficient to meet the debt owed to the NAB. As at June 2013 the applicant's residual debt to the NAB was around $524,000, and climbing.

27 By their crossclaim, the applicants claim:

a) the lost profit they say they would have made had the two Dinner Plain homes been completed and sold;

b) $250,000 as the value of their residential home in Corowa which was sold by the NAB; and

c) $524,012 being their residual debt to the NAB (as at June 2013), after their home in Corowa and the lot S2 homes were sold.

Decision 16 October 2014 and Appeal findings

28 In my decision of 16 October 2014, I dismissed the applicants claims because I reached the view that the respondents had not *caused* the loss claimed. The applicants' claimed losses flowed from the cessation of works in August 2011. The applicants say the respondents, as builders under the lot S2 contract, failed to meet their obligation to complete the building works. I found that a significant cause of the cessation of the works was the failure to establish the trust fund for payment of subcontractors, that is, a failure to comply with the April 2011 agreement. I found that responsibility for that failure lay with Fingal and, to some extent, the applicants, but not the respondents who had no control over contractual payments. I found also that the respondents had not breached their contractual obligation to supervise the building contract works.

29 The Court of Appeal held that I ought to have first dealt with the question of breach [of contract] before considering causation.[7]

30 The Court of Appeal found also that my finding that the respondents' contractual obligation was limited to a supervisory role, and that such obligation had not been breached, was wrongly founded on the evidence of Mr Sperling in respect of the agreement the respondents reached with

[5] paragraph 48 of Mrs Fraser's witness statement, at page 37 in the applicant's Tribunal book of documents

[6] In my decision of 16 October 2014, I state at paragraph 64 that the NAB sold the Corowa home for $250,000. Having re-read Mrs Fraser's witness statement, at paragraph 50, I find that the NAB sold the Corowa home for $210,000, not $250,000.

[7] Court of Appeal decision paragraph 87

Modern after the execution of the lot S2 contract. Whatever the agreement between Modern and the respondents, it could not alter the contractual obligations of the respondents, as "builders", as clearly set out in the lot S2 contract document. And, as noted by the Court of Appeal, if the obligation of the respondents was only to supervise work, this would amount to an impermissible and ineffective attempt to contract out of the mandatory statutory warranties under section 8 of the *Domestic Building Contracts Act* 1995[8].

31 As noted by the Court of Appeal, the obligation on the respondents to complete the works was unequivocal and derived from statute. It could not be excluded by reference to evidence of surrounding circumstances. As the Court of Appeal expressed:

> … the builder, namely Modern and [the] Alpine Woodpecker, was obliged to carry out and complete the works by the date specified…both Modern and the respondents were bound by the obligation to complete the building work by that date, and each of them warranted under the contract that this would be done.[9]

32 At the hearing before me in September 2014, I heard evidence from Mr Atwell and the applicants to the effect that shortly after Mr Atwell (as director of Snowy and as agent for the applicants) signed the lot S2 building contract, he amended the contract document by substituting the applicants' names, in place of Snowy's name, as the "owners" under the contract. The applicants then signed the amended document. The amended contract document was first produced by the applicants on day four of the hearing. The evidence was important in the context of the respondents' allegation in their defence that they entered a contract with Snowy, not the applicants. In my decision of 16 October 2014, I expressed my reservations as to the reliability of the evidence of the applicants and Mr Atwell in respect of the amended contract document, however I did not dwell on the issue as it was not a determinative factor in my decision.

33 The amended contract document became an important issue in the appeal before Daly AsJ. A contract document was produced at the appeal, however DalyAsJ found that the document produced before her was not the document produced at the hearing before me, and this finding was instrumental in her decision to dismiss the appeal.

34 The Court of Appeal found that the provenance of the amended contract document was not critical in circumstances where it was clear that the applicants were parties to the lot S2 contract. In my decision of 16 October 2014, I found that it was open to find that the applicants were, through the agency of Snowy, parties to the lot S2 contract. I commented also that, if the agency of Snowy was undisclosed to the respondents at the time the lot S2 contract was signed, it should have become apparent to the

[8] Court of Appeal decision paragraph 78
[9] Court of Appeal decision paragraph 79 .

respondents on 4 April 2011 when they received the email from Burke & Associates lawyers. In their joint decision, Maxwell P, Santamaria and McLeish JJA state:

> …the core finding that the applicant's ownership of the land was revealed to the respondents at that time is demonstrably correct. Even if that were not the case, however, the fact that the applicants owned the land and Snowy entered into the contract on their behalf (albeit originally without the knowledge of the respondents) was also plainly established. That sufficed to bind the applicants as the undisclosed principles of Snowy… It is not in doubt that both the builder and the owners signed the building contract, in the case of the applicants, through their authorised agent Mr Atwell.[10]

35 As to the April 2011 agreement, Daly AsJ found that it varied, but did not of itself discharge or "subsume" the lot S2 contract ["subsume" being the term I used in my decision of 16 October 2014]. The Court of Appeal found:

> There is some force in the argument that the April 2011 agreement varied the building contract in the manner submitted by the applicants. There is nothing inherently implausible in Mr Sperling acting on behalf of Alpine Woodpecker and its former partner Modern to re-constitute the existing arrangement with Fingal taking Modern's place. Alternatively, the document incorporated the earlier contract by reference and stood together with that instrument as an independent domestic building contract. In either event, the April 2011 agreement was effective to substitute Fingal for Modern as the respondents' partner in the building contract.
>
> But it is not necessary to decide whether the April 2011 agreement varied or replaced the building contract. The more important question for present purposes is whether, assuming it did either of those things, it served to alter and confine the obligations of the respondents…
>
> The associate judge held that the April 2011 agreement expressly continued the respondents' existing obligations under the building contract…
>
> For the reasons already given, the arrangement between Modern and the respondents did not have the effect of confining the respondents' obligations to the applicants. Nor does a different result obtain after the execution of the April 2011 agreement. In the circumstances, there is no basis for disturbing the approach of the associate judge. The appeal must proceed therefore on the basis that the respondents were at all times bound by their warranty to the applicants to complete the building works by the specified date.[11]

Finding on breach of contract

36 Having regard to the matters discussed above, and the evidence as set out in more detail in my decision of 16 October 2014, I find that:

[10] Court of Appeal decision paragraph 65
[11] Court of Appeal decision paragraph 83 to 87

a) The applicants were the "owners" under the lot S2 building contract.

b) The respondents were "builders" under the lot S2 building contract. Prior to the April 2011 agreement, Modern was the partner of the respondents under the contract. By reason of the April 2011 agreement, Fingal replaced Modern as the partner builder of the respondents.

c) The lot S2 building contract, executed by all parties by early December 2010, provided for the construction of two homes on lot S2 for a contract price of $562,000, with a construction period of 240 days. Building permits for the two homes to be constructed were issued on 12 January 2011. Taking the date of the building permits as the approximate date of commencement of the building works, the due date for completion of the building works was around mid-September 2011.

d) In August 2011, at which time the building works under the contract were approaching completion, the works ceased. As discussed later in these reasons, I find that the cost, at that time, to complete the remaining works was approximately $84,300.

e) The respondents failed to meet their contractual obligation, as builders, to complete the building works under the lot S2 building contract. In relation to this finding I note the evidence of the respondents that they considered the contractual responsibility for finishing the building works lay, not with them, but with Fingal and its director David Winchester. As the respondents state in their joint witness statement filed in the VCAT proceeding:

> … A conflict developed between Michael [Atwell] and David [Winchester], in which we were not involved at all… It resulted … in Michael starting to contact us again (first call 28.9.2011) and blaming us to be the builder and responsible to finish the buildings. … We pointed out that Michael signed an agreement [the April 2011 agreement] that makes David responsible for the building progress and they should resolve the problem together …
>
> All building sites ceased… despite lots of promises and plans from David to finish at least to fixing stage… Atwell tried again to get us finishing the buildings. We sticked on the new agreement [the April 2011 agreement] to work the situation out with David, but offered David many times to give him a hand free of charge to finish the houses, but he always rejected with different reasons.[12]

[12] pages 11 – 12 respondents joint witness statement dated 7 August 2014

Repudiation

37 In their Further Amended Points of Claim ("**FAPPC**") filed in this proceeding, the applicants make a number of assertions in respect of the respondents' failure to complete the works under the lot S2 contract[13]:

a) they say that the respondents abandoned and repudiated the contract;

b) they say that the contract was brought to an end by:

i. the NAB taking possession of and selling lot S2 and the building works, alternatively

ii. the effluxion of time, alternatively

iii. "*the applicants hereby* [in the FAPPC] *terminating*" the contract;

c) they say they are entitled to sue the respondents for damages for breach of contract.

38 In my view, the evidence supports a finding that the respondents abandoned their obligations under the lot S2 contract. In any event, the respondents' failure to complete the building works, a consequence of their assertion that they were not contractually obligated to do so, constituted a repudiation of the contract. The applicants were entitled to "accept" the repudiation and bring the contract to an end, and they elected to adopt this course of action as clearly confirmed in the FAPPC.

DAMAGES

39 The applicants are entitled to sue for damages arising from the respondents' breach of the lot S2 contract.

40 The respondents submit that my finding, as set out in my decision of 16 October 2014, that the respondents had not *caused* the applicants' loss and damage, is still applicable in the sense that, if there is a breach of contract on the part of the respondents, I have found on the evidence that there is no causal connection to any loss or damage. I do not accept the submission. As noted in the Court of Appeal's decision:

> It is evident that the Tribunal's conclusion on causation was bound up with its finding as to the limited nature of the respondents' obligations under the contract. Apart from anything else, the applicants are correct to submit that the question what loss was caused by the breach depends, logically, on first identifying that breach. For the reasons given, in our opinion, the Tribunal erred in its identification of the respondents' obligation and necessarily was also incorrect in its view of the breach. [14]

41 The respondents were the "*builders"* under the lot S2 contract, and as such they carried the obligation to complete the lot S2 contract works. The fact

[13] paragraphs 21A, 21B and 21C in the Further Amended Points of Cross Claim
[14] paragraph 98 in the Court of Appeal decision

that they were builders in partnership with Modern does not alter this obligation. By failing to do meet the obligation, the respondents breached the contract, and the applicants are entitled to sue for damages arising from that breach. Causation, in respect of damages, is to be determined in light of this finding as to breach of contract, and the Court of Appeal remitted this task back to the Tribunal.[15]

42 In closing written submissions, the applicants refer to the following helpful passages from ***Archibald v Powlett***,[16] a recent Court of Appeal decision, where McLeish JA sets out principles in respect of assessment of damages for breach of contract:

> Damages are awarded for breach of contract in order to put the plaintiff in the position they would have been in if the contract had been performed.[17] The plaintiff must prove that the loss suffered resulted from the breach and that, when the contract was made, such loss was reasonably foreseeable as likely to result from such a breach.[18] That means that the loss must be such as may fairly and reasonably be considered either as arising naturally from such a breach, that is, in the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties, when they made the contract, as the probable result of its breach.[19]
>
> This test of remoteness has been expounded as presenting the question whether, on the information available to the defendant when the contract was made, the defendant should, or a reasonable person in the defendant's position would, have realised that such loss was sufficiently likely to result from the breach of the contract to make it proper to hold that the loss flowed naturally from the breach, or that loss of that kind should have been within the defendant's contemplation.[20]

43 The applicants submit that, had the respondents performed their obligations under the lot S2 contract and completed the contract works, the applicants would have been in the following position by around the end of September 2011:

- the 2 homes on lot S2 would have been completed;

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[15] paragraphs 98 and 99 in the Court of Appeal decision

[16] McLeish JA , Archibald v Powlett [2017] VSCA 259, paragraphs 72 and 73

[17] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 [13]; *Amann Aviation* (1991) 174 CLR 64.

[18] *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516, 523 (Barwick CJ, McTiernan and Menzies JJ).

[19] *Hadley v Baxendale* (1854) 9 Ex 341, 354; 156 ER 145, 151; *Amann Aviation* (1991) 174 CLR 64, 91–2 (Mason CJ and Deane J), 98–9 (Brennan J); *Baltic Shipping* (1993) 176 CLR 344, 368 (Brennan J).

[20] *C Czarnikow* [1969] 1 AC 350, 385 (Lord Reid); *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 667 (Wilson, Deane and Dawson JJ); *Amann Aviation* (1991) 174 CLR 64, 91–2 (Mason CJ and Deane J), 99 (Brennan J); *Baltic Shipping* (1993) 176 CLR 344, 368–9 (Brennan J); *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, 613 [24] (McHugh J); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 435 [46] (McHugh J).

- the applicants would have been able to access funds to pay the respondents $28,369, that being the balance of the contract remaining to be paid by the applicants;
- the applicants would have been able to settle sale contracts in respect of each of the 2 completed homes, each with a sale price of $575,000;
- upon settlement of the sale contracts, the applicants would have paid off their loans to the NAB, and as such, they would have retained ownership of their home in Corowa, and have no residual debt to the NAB.

44 The applicants say that, to put them in the position they would have been in had the respondents fully performed the lot S2 contract, in so far as an award of damages may do so, the applicant should be awarded damages for:

(a) The lost profit on the 2 sale contracts for the lot S2 homes. They say this lost profit is $428,000, calculated as the total of the 2 contract sale prices, $1,150,000, less the combined cost of the purchase price of the lot S2 land ($160,000) and the lot S2 contract price ($562,000). The applicants say that interest should also be added to this sum;

(b) $250,000 as the lost value of the applicants' home in Corowa. As noted above, the NAB sold the Corowa home in April 2013 for $210,000. There is no evidence, other than the applicants' opinion, that the house had a value of $250,000. The applicants say that interest should also be added to this sum.

(c) $524,012 being the applicants' residual debt to the NAB as at June 2013 after the 2 lot S2 homes and the Corowa home were sold by the NAB. The applicants submit that because the sum of their residual debt to the NAB cannot be ascertained after June 2013, due to their inability to access their bank accounts, interest at a modest rate of 6% should be added to this sum to reach a figure that more accurately reflects their loss.

45 Before assessing damages, I set out below my findings as to:

- the unpaid balance of the lot S2 contract, and the capacity of the applicants to meet such payment;
- the approximate cost to complete the building works under the lot S2 contract as at August 2011 when the works ceased;
- the estimated value of the lot S2 homes in September 2011, assuming they had been completed and were ready for sale; and
- the sale by the NAB of the lot S2 properties and the applicants family home in Corowa, and the applicants residual debt to the NAB.

Unpaid contract balance and the capacity of the applicants to pay the contract balance

46 The respondents accept that the applicants made the following payments to Modern and/or Fingal:

- base stage payment, $84,300
- frame stage payment, $84,300,
- part lock-up stage payment $40,000
- remainder lock-up stage payment $156,700
- further 'advance' payments of $30,000, $43,081 and $95,250.

Total payments $533,631

47 With a contract price of $562,000, and having regard to the above payments made by the applicants, the parties agree on the unpaid contractual balance of $28,369.

48 Mrs Fraser says that NAB funds were available to meet the final payment under the lot S2 building contract, however the NAB would not advance any further funds until the works were completed.[21]

49 I accept Mrs Fraser's evidence in this regard. There is no contradictory evidence. Further, it is consistent with statements in valuation reports dated 23 August 2011, obtained by the NAB.[22] The reports, one for each of the two homes being constructed on lot S2, were prepared by a certified property valuer, Mr Read, who had been engaged by the NAB. Mr Read, who gave evidence by telephone at the hearing in September 2014, confirmed the contents of his reports.

50 In his reports, Mr Read states his opinion that the lot S2 building works had reached around 80% of the fixing stage, and he recommends a progress payment equivalent to 80% of the fixing stage payment identified in the lot S2 building contract. It was the NAB, and not the applicants, who engaged Mr Read to assess the value and progress of the works. In my view, in the circumstances where Mr Read has recommended a partial progress payment founded on the partial completion of the fixing stage, it is implicit that further funds will be available for payment upon completion of the works.

51 In her witness statement,[23] Mrs Fraser confirms that the applicants arranged loans with the NAB for the lot S2 development project as follows:

[21] Mrs Fraser's evidence, transcript pages 178 – 179
[22] The valuation reports are produced at pages 56 – 62 in the applicants' Tribunal book of documents produced for the hearing in 2014.
[23] paragraphs 3 and 8 of Mrs Fraser's witness statement

(a) a $200,000 loan for the purchase of the lot S2 land. Although the purchase price was only $165,000, $200,000 was borrowed to assist with development/building costs;

(b) a further $500,000 building construction loan; and

(c) a further $135,000 line of credit.

52 A number of bank statements were produced showing the balance in the above three loan accounts at various times. The respondents say that the movement of funds out of, and sometimes between, these accounts reflect dealings between the applicants and Fingal that cannot be reconciled with the applicants' progress payment obligations under the lot S2 contract and the April 2011 agreement. Whilst that may be the case, there is nothing in the statements to suggest that the NAB would not have released funds to meet the final payment due under the lot S2 contract upon completion of the building works.

53 On the evidence before me, I find that had the respondents completed the building works under the lot S2 contract, the applicants would have been able to access funds to meet the final payment due under the contract, namely $28,369.

Completion cost as at August 2011 and the value of the lot S2 homes on completion

54 The applicants say that they had entered a contract of sale in respect of each of the two homes to be constructed on lot S2, the sale price in each contract being $575,000. The evidence in respect of these sale contracts is limited.

55 In her witness statement, filed in this proceeding, the applicant Mrs Fraser says:

> We had two presale contracts for $575,000 for each townhouse…[24]
>
> At the start of the project in December 2010 we expected to make a profit of about $365,000… we had sale contracts with purchasers for each of the townhouses at lot S2 totalling $1,150,000.[25]

56 When giving evidence, Mrs Fraser confirmed, in response to a question put by her solicitor, that one of the sale contracts was with her daughter Ms Terri Atwell, and the other was with "York Developments" [26][York Developments Pty Ltd" was a company under which Mr Atwell and his wife operated a real estate business].

57 Documents produced by the applicants to substantiate the existence of the alleged sale contracts is limited.

[24] paragraph 4 of Mrs Fraser's witness statement
[25] paragraph 52 in Mrs Fraser's witness statement
[26] page 174 of transcript of original hearing

58 In respect of the sale contract with Ms Terri Atwell, there are two documents. The first is a one-page document headed "Contract of Sale of Real Estate" which notes Terri Atwell as the purchaser and the applicants as the vendor. The document appears to have been signed by Ms Atwell on 24 November 2010 and also by the applicants on 24 November 2010. The document makes no reference to a contract price or the address or title details of the real estate being sold.

59 The second document in respect of the alleged sale to Terri Atwell is a Contract of Sale which, on its face, appears to have been prepared by "Leonard & Associates", solicitors. The contract sets out particulars of the sale including a purchase price of $575,000 and details of the lot being sold. However, the document is not dated and it has not been signed by anyone.

60 In respect of the alleged sale contract with York Developments Pty Ltd, one document only has been produced. It is a one-page document headed "Contract of Sale of Real Estate" which appears to have been signed by Mr Atwell on 5 February 2010 in his capacity as director of York Developments. It has also been signed by the applicants on 5 February 2010. The document makes no reference to a contract price or the address or title details of the real estate being sold.

61 Ms Terri Atwell was not called to give evidence in the proceeding.

62 Mr Atwell filed witness statements in the proceeding, however there is no reference in those witness statements to the alleged sale contract between the applicants and York Developments Pty Ltd.

63 There is little probative value in an apparent contract note which does not identify the land being sold or the contract price. Likewise, there is little probative value in a Contract of Sale document that is not dated or signed.

64 On the evidence before me, I am not satisfied that the applicants had an enforceable sale contract in respect of either of the homes to be constructed on lot S2. As such, I do not accept the applicant's submission that each of the homes on lot S2, had they been completed around the end of September 2011, would have been sold for $575,000.

65 However, there is other evidence sufficient for me to find that, if the homes had been completed, upon completion they would each have had a value of around $410,000.

66 The aforementioned Mr Read was engaged by the NAB in December 2010 to provide a property valuation on lot S2. He valued the vacant lot at $165,000, and he estimated the market value of the proposed homes, upon completion, to be $410,000 each.[27]

[27] See Mr Read's valuation certificates dated 21 December 2010, at page 165 and 175 of the respondents Tribunal book of documents produced for the hearing in 2014.

67 As noted above, Mr Read produced further reports dated 23 August 2011 wherein he confirmed his view that the works had reached approximately 80% of fixing stage. In those reports Mr Read also estimated the cost to complete the homes was approximately $47,625 for each home, or $95,250 in total.

68 Having examined Mr Read's reports, and having heard evidence from Mr Read, it is clear that Mr Read's completion cost estimate was founded on an assumed building contract price of $635,000. As noted in my decision of 16 October 2014[28], when they were arranging finance with the NAB, the applicants provided to the NAB a false building contract identifying a contract price of $635,000. Under that false contract, the fixing stage payment, 25% of the total contract price, was identified as $158,750, and the completion stage payment, 10% of the total contract price, was identified as $63,500. Mr Read's estimate of $92,250 to complete the building works was a simple calculation made up of 20% of the fixing stage payment, $31,750, added to the completion stage payment of $63,500.

69 Had Mr Read made his calculation on the basis of the stage payment sums identified in the "real" lot S2 contract, where the fixing stage payment was $140,500 and the completion stage payment was $56,200, he would have nominated a total sum of $84,300 to complete the building works. Mr Read confirmed this when giving evidence.[29]

70 Mr Read also gave evidence that he had seen some documentation suggesting sale contracts for the homes to be completed on lot S2, with a sale price of $575,000. He confirmed his opinion that, having regard to his market valuation of $410,000 for each of the proposed homes, a sale price of $575,000 was excessive.

71 Accepting the evidence of Mr Read, I find that at the time works ceased in August 2011, the cost to complete construction of the two lot S2 homes was approximately $84,300. I find also that if construction of the lot S2 homes had been completed in September 2011, they would have had a market value of $410,000 each, or a total value of $820,000.

72 The applicants say that in the event I find, as I have, that the value of the completed homes cannot be founded on the alleged sale contracts with Ms Terri Atwell and York Developments, they adopt Mr Read's valuation of $410,000 for each of the 2 homes.

The sale of homes and the NAB Debt

73 As discussed above, when the building works came to a halt in August 2011, the unpaid balance of the lot S2 contract was $28,369. Also as discussed above, I find that at that time the estimated cost of completing the building works was around $84,300. This unfortunate circumstance

[28] paragraph 26 in my reasons dated 16 October 2014
[29] Mr Read's evidence pages 367 and 368 of the transcript

came about because the applicants had, at the request of Mr Winchester/Fingal, made "advance" payments to Fingal.

74 With the respondents and Fingal refusing to carry out any further building works, the applicants needed to find approximately $84,300 to have the building works completed by another builder.

75 Mrs Fraser says that the NAB would not advance any further funds until the building works were completed. This evidence is not contested.

76 Mrs Fraser says that the she and her husband were unable to pay another builder to complete the building works.

77 The unfortunate result was that no further works were carried out and the applicants' debt to the NAB steadily climbed. Eventually, in 2013, the NAB acted on its securities.

78 I accept Mrs Fraser's uncontested evidence that :

(a) In February 2013 the NAB took possession of lot S2 and sold it, together with the incomplete homes, for a total sum of $275,000.

(b) In April 2013, the NAB took possession of the applicants' home in Corowa and sold it for $210,000.

79 I also accept Mrs Fraser's evidence that the sale of the properties only partially satisfied the applicants' debt. The applicants produced NAB bank statements that show:

- as at 6 May 2013, the balance in their line of credit account was $13,273.16;
- as at 9 May 2013, the balance in their loan account established for the purchase of the lot S2 land was $18,448.19; and
- as at 28 June 2013, the balance in their loan account established for the building construction loan was $496,054.11

80 The respondents do not dispute the applicants' evidence as to their residual debt to the NAB.

Mitigation

81 As noted above, Mrs Fraser says that she and her husband were in an impossible position financially. The NAB refused to advance further funds until further work was completed, and they could not afford to pay another builder to complete the construction of the lot S2 homes.

82 The respondents say that the applicants failed to take reasonable action to mitigate their loss. In particular, the respondents say that the applicants could have obtained funds from an alternative source to complete construction of the lot S2 homes.

83 The respondents say that the applicants might have borrowed funds from a member of their family. This is merely speculation. There is no evidence

that the applicants might have been able to source funds from family members, or anyone else, to complete the construction of the lot S2 homes.

84 There is no evidence from the applicants as to any attempts on their part to arrange finance from an alternative bank or other institutional lender. But there is also no evidence that any such alternative lender might have been willing to loan the applicants sufficient funds to complete the construction of the lot S2 homes. Accepting, as I do, that the applicants were unemployed pensioners whose properties were tied up as security for the NAB loans, I find that there was no real prospect of the applicants obtaining further finance from an alternative bank or institutional lender sufficient to complete the construction of the lot S2 homes.

85 On the evidence before me, I find that after the lot S2 building works came to a standstill in August 2011, the applicants were unable to source funds to complete the construction of the lot S2 homes.

Assessment of damages for breach of contract

86 In my view, the damages claimed by the applicants do not fall within the realm of allowable "remoteness" as described by McLeish JA in *Archibald v Powlett*.

87 The applicants submit that a reasonable person in the respondents' position, that position being "builder" under the lot S2 contract, would have realised that the loss now claimed by the applicants was sufficiently likely to result from or flow naturally from the breach (the breach being a failure on the part of the respondents to complete the lot S2 contract works), thus making it proper to hold that the loss flows naturally from the breach, or that loss of that kind should have been within the respondents' contemplation.

88 I do not accept the submission.

89 In my view, a reasonable person in the position of the respondents at the time the lot S2 contract was entered could not reasonably have contemplated the extent of the losses now claimed by the applicants.

90 As McLeish JA says: *"The remoteness inquiry commences by identifying the information that was available to the defendant when the contract was made*"[30]. At the time the lot S2 contract was entered, the respondents did not know the applicants, and did not know that the applicants were, through the agency of Snowy, the "owners" under the lot S2 contract. The respondents did not and could not have known of any financing arrangements of the applicants.

[30] *Archibald v Powlett*, paragraph 77

91 Further, there is insufficient evidence for me to find that the respondents' "partner" builder at that time, Modern, knew any more than the respondents in respect of the applicants.

92 In my view, it might reasonably have been contemplated at the time the parties entered the contract that a failure on the part of the respondents to complete the building works might result in the "owner" incurring further cost and expense, over and above the contract price, to have the works completed by another builder.

93 As noted above, on the limited evidence before me I have found that at the time the building works came to a standstill in August 2011, the cost to complete the remaining building works was around $84,300. I have found also that $28,369 remained to be paid under the contract. I am satisfied that the difference between the two sums, $55,931, represents the reasonable extra cost, over and above the contract price, that the applicants would have incurred in completing the building works under the lot S2 contract, had they been in a position to do so. I am satisfied that this sum, $55,931, is recoverable loss and damage.

94 I find that the losses otherwise claimed by the applicants are not recoverable. The loss of profit on sale of the lot S2 homes, the default in the applicants obligations to the NAB and the financial consequences of such default may have arisen by reason of the applicants' inability to complete construction of the lot S2 homes, but in my view such losses could not have been contemplated by a reasonable person in the position of the respondents at the time the lot S2 contract was made. They are losses which do not meet the remoteness test.

95 For the above reasons, I assess damages for breach of contract as $55,931. I make no allowance for interest on this sum because the applicants did not actually incur this cost.

False and misleading conduct / Negligence

96 I turn now to alternative causes of action raised by the applicants in their FAPCC and referred to very briefly in their final submissions.

97 In their FAPCC, the applicants assert false or misleading conduct on the part of the respondents in breach of the relevant Australian Consumer Law provisions that came into operation in November 2011 pursuant to section 9 of the *Fair Trading Act* 1999.

98 As I understand it, the applicants assert that the respondents, by reason of them being the builders, together with Fingal, under the lot S2 contract, were parties to false representation/s made to the applicants which resulted in the applicants making "overpayments" to Fingal. The "overpayments" is a reference to the "advance" payments made by the applicants to Fingal before such payments were due and payable under the lot S2 contract. These payments are discussed in more detail in paragraphs 47 to 55 in my decision of 16 October 2014.

99 The applicants assert that the invoices issued for the "overpayments" amounted to a representation that such payments were due and payable under the lot S2 contract. As discussed in my decision of 16 October 2014, it was Fingal, through its director Mr Winchester, which made the payment claims to the applicants. There is no evidence that the respondents had any knowledge of such payment claims or the payments made by the applicants. The applicants assert, however, that because the respondents were, with Fingal, the builders under the lot S2 contract, they share responsibility in respect of the conduct of Fingal in making the so-called "*overpayment representation*". At paragraph 22B in the FAPCC, the applicants assert that the overpayment representation was false, misleading or deceptive and:

> "put the Applicants in an untenable financial position due to the facts:
>
> i. the Applicants financial resources were stretched to the limit of their capacity;
>
> ii. the Applicants were unemployed pensioners with a small income stream;
>
> iii. the Applicants as at August 2011 were indebted in the amount of about $733,000 to the National Australia Bank to pay for the land & building works at Lot S2;
>
> iv. the Applicants could not afford to pay anyone else to complete the building works at Lot S2;
>
> v. the NAB financing the project would not advance funds until further work was completed …"

100 The applicants also assert that the *overpayment representation* constituted unconscionable conduct within the meaning of the Australian Consumer Law.

101 At paragraph 22C and 22D in the FAPCC, the applicants briefly plead a further alternative cause of action in negligence as follows:

> 22C Alternatively the [respondents] … owed the applicants a duty of care in the conduct of their obligations under the [lot S2 contract]
>
> 22D The [respondents] in making the overpayment representation breached their duty of care to the Applicants.

102 In the applicants' written submissions dated 8 September 2017, the applicants make the following submission in respect of the *overpayment* invoicing:

> This invoicing was false misleading and deceptive and negligent and caused the [applicants] to exhaust their own funds and be unable to complete the project themselves.

103 In paragraph 23 of the FAPCC, the applicants assert that:

> by reason of the foregoing [the "foregoing" meaning the matters pleaded in the FAPCC] the applicants are entitled to damages.

104 In my view, the applicants have no entitlement to the damages as claimed pursuant to any of these alternative causes of action.

105 Having regard to the fact that the respondents took no actual role in the making of the alleged "overpayment representation", I am not persuaded that the respondents made or took part in the alleged representation constituting the alleged misleading or deceptive conduct.

106 The evidence, little as it is, is that the applicants made the advance payments or "overpayment" to Fingal in the knowledge that such payments were in advance of the schedule of payments prescribed under the terms of lot S2 contract. As such, I do not accept that the applicants were misled or deceived by the so-called "overpayment representation".

107 And even if it might be said that the respondents have partaken in the alleged misleading or deceptive conduct, and the applicants were misled or deceived, I do not accept that the applicants have suffered the loss and damage they now claim "because of the conduct".[31] The damages, if any, that flow from such conduct would, in my view, be no more than the damages I have assessed as flowing from the breach of contract.

108 In the circumstance where the respondents played no active role in invoicing the applicants in respect of the alleged "overpayments", or indeed in respect of any payments made by the applicants, I do not accept that the respondents' conduct meets the level of moral obloquy required to establish "unconscionable conduct".

109 Finally, if the respondents owed the applicants a duty of care as alleged, I do not accept that the alleged participation of the respondents in the making of the *overpayment representation*, amounts to a breach of such duty of care.

CONCLUSION

110 For the reasons set out above, I will order that the respondents must pay the applicants damages in the sum of $55,931. I will reserve costs with liberty to apply.

SENIOR MEMBER M. FARRELLY

[31] "because of the conduct" being the words referenced in section 236 of the Australian Consumer Law which makes provision for an action for damages for breach of the Australian Consumer Law