

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO.D182/2014

CATCHWORDS

Major domestic building contract; Implied warranties under s 8 *Domestic Building Contracts Act 1995*; False and misleading representations under *Australian Consumer Law*; defective building work; repudiation of contract; admissions of Respondents; dishonest conduct of Second Respondent; Exemplary Damages; orders for restitution and damages.

APPLICANT	Ms Lin Lin
FIRST RESPONDENT	P & T Constructions (Vic) Pty Ltd (ACN 152 314 648)
SECOND RESPONDENT	Mr Wenbiao Lin
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	26, 27 June and 4 July 2014
DATE OF ORDER	10 September 2014
CITATION	Lin v P & T Constructions (Vic) Pty Ltd (Building and Property) [2014] VCAT 1125

ORDER

- 1 P & T Constructions (Vic) Pty Ltd is ordered to pay to the Applicant the sum of \$48,065.49.
- 2 Mr Wenbiao Lin is ordered to pay to the Applicant the sum of \$48,065.49. The amount payable pursuant to this order is to be offset by any amount paid to the Applicant pursuant to Order 1.
- 3 The Respondents, jointly and severally, are to pay the Applicant the sum of \$5,000 in exemplary damages.
- 4 The Applicant is granted liberty to apply for costs.

Judge Jenkins
Vice President

APPEARANCES:

For Applicant
For Respondents

Mr A Morrison of Counsel
Mr L Lee, Solicitor

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REASONS

NATURE OF APPLICATION

- 1 Ms Lin Lin (the 'Applicant') is the registered proprietor of a property in Burwood (the 'Property'). By a Contract dated 31 August 2013 (the 'Contract'), the Applicant engaged P & T Constructions Pty Ltd ('PTC') to perform landscaping works (the 'Works') at her property for the sum of \$65,000.00.
- 2 The Second Respondent ('Mr Lin') is the sole Director and Shareholder of PTC. Mr Lin is the person with whom the Applicant had negotiated the Contract and the person who performed the Works.
- 3 There was a gradual realisation by the Applicant and her husband Dr Jun Keat Chan ('Dr Chan') that Mr Lin had misled them on a number of matters including: that he had worked at Metricon Homes as a project manager; that he was a registered builder; that he had obtained the necessary building permit; and that he held appropriate building insurance.
- 4 The Applicant's dealings with Mr Lin came to an end on 16 December 2013 when Mr Lin collected his belongings amongst other things and abandoned the Works. The Applicant regarded that conduct to be a repudiation of the Contract and on 20 December 2013, the Applicant accepted that repudiation by letter from her then solicitor, Francis Lim, and brought the Contract to an end.
- 5 The Works which had been completed prior to the abandonment were later discovered to be seriously defective. The Applicant filed an expert report by Robert Lorich dated 25 March 2014 (the 'Lorich Report') which states that:

Inspection revealed that the works were only partially completed by P & T Constructions and that the works that were completed generally had major defects and required demolition to make safe and to allow reconstruction in a workmanlike manner.
- 6 The case proceeded to hearing on the basis that Mr Lin contested all of the material facts and allegations made against him and his company. A summary of the Respondents' defence up until the commencement of the hearing was as follows:
 - (a) Mr Lin expressly disclosed to the Applicant that he was a trades person and not a registered builder;
 - (b) Mr Lin denied ever representing that he was employed by Metricon Homes as a project manager, rather he said he was employed by Metricon Homes as a trades person;
 - (c) Mr Lin denied that PTC was responsible for any building defects because the Applicant represented to him that she was an 'owner builder' and accordingly it was the Applicant's duty and responsibility to instruct and supervise the landscaping works;

- (d) The Applicant was entirely responsible for ensuring that the Works were compliant with Council regulations. Accordingly, he was not responsible for obtaining the building permit;
- (e) The Applicant drafted the Contract by herself. Furthermore, he was not bound by the terms of the Contract, because he does not speak English and he did not understand the Contract when it was signed; and
- (f) He denied representing to the Applicant that he had obtained a building permit and denied forging an email purporting to attach an approved permit.

7 At the commencement of the hearing, Mr Lin admitted the existence of defects, and did not contest the estimated cost of demolishing the defective building work, as set out in the Lorich Report.

8 During cross-examination, Mr Lin frankly conceded that most of his defence was untruthful. He acknowledged that he could speak English and gave the remainder of his evidence in English.

9 On the final day of the hearing, which was scheduled to hear closing submissions, Mr Lin, through his solicitor, formally accepted that he:

- (a) did a poor job on the works, is regretful and willing to make up for what he has done;
- (b) is willing to repay the \$32,500.00 received from the Applicant; and
- (c) is willing to pay \$15,565.49 being the cost of reinstating the property to its original state.

10 Mr Lin continues to maintain that he never held himself out to be a registered builder and that he never claimed to have building insurance.

11 The Applicant makes various claims against the Respondents, which may be summarised as follows:

- (a) As against PTC, for breach of contract and the warranties implied by s 8 of the *Domestic Building Contracts Act 1995* (the DBC Act) the sum of \$87,630.00¹ representing the amount required to rectify and complete the Works;
- (b) Alternatively, as against PTC, the sum of \$32,500 by way of restitution of the sum already paid under the Contract by the Applicant; and
- (c) As against both PTC and Mr Lin, damages under the *Australian Consumer Law* ('ACL');² for misleading and deceptive conduct, or

¹ The quantum of that claim is the cost to rectify and complete the works in the sum of \$120,130.00 (as per the Lorich report) less the balance of the Contract price of \$32,500.00. This gives a figure of \$87,630.00.

² The *Australian Consumer Law* is contained in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* and made the law of Victoria by *Australian Consumer Law and Fair Trading Act 2012*.

alternatively damages for fraudulent misrepresentation; comprising the cost of rectifying defective work, in the sum of \$15,565.49; plus recovery of the amount already paid under the Contract, in the sum of \$32,500; and

- (d) Exemplary damages for which the Applicant proposes \$20,000 as a minimum to act as sufficient punishment and denunciation of Mr Lin's conduct.
- 12 The Applicant readily acknowledged that repudiation and restitution figures should not be applied cumulatively to the damages claim. As such, any allowance for restitution of the money paid will reduce her claim for damages by the same amount. Any exemplary damages would be additional to other amounts ordered.
- 13 Although Mr Lin, on behalf of himself and his company, ultimately made significant concessions during the course of his cross-examination, in view of the Applicant's claim for exemplary damages, it is necessary to summarise the evidence in more detail, particularly to the extent to which it reflects upon the credit of Mr Lin and the additional expense and inconvenience caused to the Applicant.

RELEVANT LEGISLATION

- 14 The purpose of the DBC Act is, amongst other things, to regulate contracts for the carrying out of domestic building work,³ and to require builders carrying out domestic building work to be covered by insurance in relation to that work.⁴
- 15 The DBC Act also has, as its stated objectives, to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to both builders and building owners;⁵ and to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness.⁶
- 16 The Works required a building permit as they included retaining walls in excess of 1 m².⁷ The Contract between the Applicant and PTC is a 'major domestic building contract' under the DBC Act.⁸ Accordingly, the warranties set out under s 8 were implied terms of that Contract.

³ Sub-para 1(a).

⁴ Sub-para 1(b).

⁵ Sub-para 4(a).

⁶ Sub-para 4(b).

⁷ *Building Act 1993* s 16 and item 15 to Schedule 8 of the *Building Regulations 2006*.

⁸ See definition in s 4 and sub-para 5(1)(c).

- 17 Mr Lin is not a registered builder under the *Building Act 1993*, and accordingly, pursuant to s 29 of the DBC Act, he must not enter into a major domestic building Contract.⁹
- 18 Pursuant to s 136 of the *Building Act 1993*, a builder must not carry out or manage or arrange the carrying out of domestic building work under a major domestic building contract unless the builder is covered by the required insurance.¹⁰
- 19 Mr Lin produced no evidence of requisite warranty insurance for the Works and accordingly I am satisfied that he never obtained it.
- 20 The Victorian Civil and Administrative Tribunal (the ‘Tribunal’) has the power to make any order it considers fair to resolve a domestic building dispute.¹¹ The Tribunal may, amongst other things, order the payment of a sum of money found to be owing by one party to another party, by way of damages (including exemplary damages and damages in the nature of interest) and by way of restitution.
- 21 For the purpose of her claims in Misleading and Deceptive Conduct the Applicant relies upon particular provisions under the ACL which are outlined below.
- 22 The head of claim which the Applicant has framed in terms of the tort of deceit has not been articulated in terms of any jurisdiction vested in the Tribunal. Accordingly, it is not proposed to consider this claim.

BACKGROUND

Pre-Contractual Representations

- 23 The Applicant and Dr Chan gave evidence in support of the Application. Their account of the events were consistent with each other and I have set out their evidence together.
- 24 The Applicant purchased the Property, which included an old house, in July 2012. Carlisle Homes was engaged as the builder of a new home but landscaping did not form part of the Contract.
- 25 The Applicant found an advertisement for Mr Lin’s company under the heading, ‘P & T Constructions’ in a Chinese newspaper. When she contacted Mr Lin she asked whether they did landscaping and described the proposed Works.
- 26 Mr Lin told the Applicant:
 - (a) he could look after everything;

⁹ Subject to a number of exceptions which do not apply here. A penalty of 100 units applies for a breach of this provision.

¹⁰ A breach of this provision may incur a penalty of 500 penalty units, in the case of a natural person and 2500 penalty units, in the case of a body corporate.

¹¹ Section 55.

- (b) he had worked as project manager for Metricon Homes and left to start his own company;
 - (c) he came to Australia in his 20's and has been involved in the building industry since that time;
 - (d) his father was in the building industry; and he had been building with his father since he was a teenager; and
 - (e) his company had 'built a few homes', and he had done the landscaping for the new homes constructed by his company.
- 27 The Applicant and Mr Lin also discussed their children and she believed she had found someone that she could trust.
- 28 On 15 August 2013, the Applicant and her husband Dr Chan met Mr Lin outside their home where they discussed what they wanted. Mr Lin spoke to Dr Chan in English. Mr Lin said he would prepare a detailed quote. Upon questioning by the Applicant, Mr Lin said that he was a registered builder and member of the MBA and had taken exams to get himself qualified.
- 29 After Mr Lin visited the Applicant's home he provided a draft plan of what the landscaping would look like and the Applicant was pleased with it. Mr Lin told the Applicant that building insurance is a must and that his company has it. Dr Chan gave evidence that Mr Lin told him that he held \$1m insurance cover, but that it would not be necessary for their home as it was a much smaller scale.
- 30 The Applicant met Mr Lin on site and they agreed on a Contract price of \$65,000. Mr Lin then took the Applicant to a home which he said Metricon Homes had built. He told the Applicant that he was the project manager for the construction of the home and that PTC were contracted to complete the landscaping.
- 31 Dr Chan gave evidence that he first met Mr Lin at his previous residence in Craigieburn. Dr Chan discussed the landscaping project with Mr Lin and Dr Chan considered Mr Lin to be very knowledgeable about building practices and noted that he even made some comments about the construction of their Craigieburn home. Dr Chan and Mr Lin conversed in English as it is their only common language. Mr Lin told Dr Chan that he was a fully qualified builder with experience at Metricon Homes as a project manager.
- 32 On a subsequent occasion when Dr Chan asked Mr Lin to show his certification, Mr Lin said that he had lost it. Dr Chan described Mr Lin flicking through photos on his phone trying to find a photo of his registration but ultimately not being able to find the photo he was purporting to look for. Rather than producing evidence of his registration, Mr Lin said that he had an ABN and that if he was not a registered builder he would not have been able to obtain an ABN.

- 33 **Ms Eva Zelos** gave evidence on behalf of the Applicant. She works for Metricon Homes in their Human Resources Department, where her role extends to looking after the business organisation and human relations. Ms Zelos has access to the books and records of both employees and contractors. Ms Zelos confirmed from her searches and enquiries that:
- (a) There is no record of a person by the name of Wenbiao Lin or William Lin ever being an employee of Metricon Homes. She further confirmed that she could confidently say that no person by either name has been an employee for the last ten years; and
 - (b) After viewing reports produced by her colleague Jamie Kitchen, who accessed contractors' records, she confirmed that neither the First nor Second Respondent has ever been a sub-contractor for Metricon Homes.
- 34 **Mr Jun Lin Guan** is a painter. He gave evidence that he met Mr Lin when he did some painting for him. Mr Lin told him that he had previously worked for Metricon Homes as a project manager. It was not suggested that Mr Guan had any connection with the Applicant or any grievance with Mr Lin. Mr Guan's evidence is relevant as indicating that Mr Lin's representation about the nature of his connection with Metricon Homes was not isolated to the Applicant and Dr Chan.

Drafting of the Contract

- 35 The process by which the Contract was formed is relevant because of Mr Lin's assertion that he did not understand English and so he is not bound by the Contract he signed. This defence was quickly discredited by the Applicant producing an email which showed that the first draft of the Contract (written in English) was sent from Mr Lin to the Applicant on 28 August 2013.¹²
- 36 Furthermore, the Tribunal was shown a series of text messages between the Applicant and Mr Lin exchanged on 29 August 2013 (translated from Chinese to English). Mr Lin states in his text message 'I have sent through the Contract' and on the following day the Applicant replies 'There are many problems with the Contract. Can you call me tonight? Around 9pm?'.¹³
- 37 The Applicant described how she and Mr Lin sat together and amended the Contract at her computer and it was signed on 31 August 2013.¹⁴ Dr Chan confirmed the Applicant's account of how the Contract was formed, describing how the Applicant and Mr Lin sat next to each other; the Applicant was typing; and the process took approximately 2-3 hours.
- 38 On the evidence presented to the Tribunal, I am satisfied that Mr Lin:

¹² Exhibit D.

¹³ Exhibit E.

¹⁴ Exhibit F.

- (a) drafted the initial Contract and supplied it to the Applicant;
- (b) jointly participated in making amendments to the draft Contract; and
- (c) was fully aware of the contents of the Contract which he signed.

Mr Lin's English

- 39 **Mr Chris Fries** is a plumber and installer. Mr Fries gave evidence that he worked at the Applicant's new home for four days under instruction from Mr Lin. During this time he spoke often to Mr Lin, who described himself as a landscape gardener. Mr Fries worked closely with Mr Lin and they spoke only in English over a range of topics: Mr Lin spoke about his house in Sunshine; modifications to his truck; his wife and three girlfriends; his equipment; as well as giving instruction about the work. They also both examined a brochure in English which Mr Fries produced and which Mr Lin appeared to read. The Applicant would come to inspect their work a few times but at no stage did she give any instruction to Mr Lin as to how to perform his work.
- 40 **Mr Hao Sun**, one of the Applicant's friends who attended a meeting at her home on 15 December, gave evidence that Mr Lin spoke English whenever talking to or in the presence of Dr Chan.
- 41 I am satisfied on the evidence of Dr Chan, Mr Fries and Mr Sun, together with Mr Lin's presentation at the hearing, that his English was more than adequate for the purpose of understanding and negotiating the terms of the Contract.

Responsibility for obtaining a building permit

- 42 As part of the Respondents' defence, Mr Lin asserted that:
- (a) On or about 15 August 2013, he expressly disclosed to the Applicant that PTC was not a registered builder and he was only a trades person; and
 - (b) He understood that the Applicant was an owner builder. In support of this claim, Mr Lin produced a building permit application in which Dr Chan identified himself as an 'owner builder'.¹⁵
- 43 In reply, the Applicant denied both assertions.
- 44 Specifically, the Applicant gave evidence that:
- (a) While she understood that she was responsible for paying the fees associated with the permit, it was Mr Lin's responsibility to obtain any necessary permits; and
 - (b) On 25 November 2013, Mr Lin brought to their home forms for signing, to apply for the permit. Mr Lin gave the forms to Dr Chan to sign while the Applicant briefly left the room to attend to their

¹⁵ Respondents' Reply to Points of Claim at para 2.

children. When she returned she overheard her husband saying words to the effect that he had made a mistake. The forms were completed and Mr Lin left the Applicant's home.

- 45 Dr Chan gave evidence that he had mistakenly signed the first form identifying himself as a builder.¹⁶ Mr Lin corrected Dr Chan's mistake and Dr Chan duly signed a new form identifying himself correctly as the owner, which he scanned for their records.¹⁷ He left the first (incorrect) form on the table. Dr Chan presumes that Mr Lin has retained both signed forms and produced the incorrect form to the Tribunal as evidence that Dr Chan purported to be an owner builder.
- 46 I am satisfied by the evidence of the Applicant and Dr Chan that they did in fact sign an application for permit as owner, consistent with the basis upon which they engaged Mr Lin and his company.

Failure to obtain the building permit – fake building permit

- 47 The Applicant claims that Mr Lin represented to the Applicant that he had obtained a building permit, when in fact he had not.¹⁸ Mr Lin denies the allegation.¹⁹ The evidence advanced by the Applicant, is as follows.
- 48 On 14 December 2013, Mr Lin forwards an email to Dr Chan purporting to have been sent by Roxanne Griffin. The email (unedited) reads:

Hi Wil

we have been approved your application and the condition for this job is still there . but if you want you can start the job in anytime .

anyway when you got the time just come by to my house and pick up the approval letter .

regards

- 49 Attached to the above email was a picture of the landscaping works with an ink stamp placed in the middle of the picture which read:²⁰

APPROVED
By 05/12/2013

- 50 On 15 December 2013, a series of text messages were sent between Mr Lin and the Applicant. The text messages show that the Applicant was not satisfied by the purported approved permit. The following exchange occurs:²¹

Mr Lin: Email has been sent to you.

Applicant: In addition, we need an application approval with the council letterhead instead of a plan with the stamp of

¹⁶ Exhibit N.

¹⁷ Exhibit P.

¹⁸ Applicant's Points of Claim para 10.

¹⁹ Applicant's Points of Defence para 10.

²⁰ Exhibit P.

²¹ Exhibit A.

approval. Furthermore, we need the application fee receipt.

Mr Lin: That has to be Wednesday. I need to go to get it from my friend's home.

Applicant: We need these documents. Without these documents, how can you prove that the council has approved it? On Wednesday you promised to send me an email. Without seeing the official permit, we can not give you permission to build brick fence.

Mr Lin: Driving

Applicant: You give me the application reference number. I will call the council on Monday to confirm whether there is a permit.

Mr Lin: Has money been transferred?

Applicant: No permit, no money.

Mr Lin: I will certainly give you the permit. I have run out any money to do the work. Hope you can understand.

Applicant: According to the conversation records with you on Wednesday, the permit should be emailed to me on Wednesday. Until now I have not received it. Honesty is the precondition. No honesty, no talking about money. I will confirm with the council on Monday. If there is a permit, we can discuss the money issue again.

- 51 The Respondents' Points of Defence sets out a detailed response to the Applicant's allegations and assertions as to how Mr Lin was assisting the Applicant to obtain the permit. In summary, Mr Lin asserted that:
- (a) On 26 November 2013, Mr Lin's wife called the Monash City Council to enquire about the permit but she was informed it was unlikely to be approved;
 - (b) On 28 November 2013, Mr Lin engaged a building surveyor company named Inform Building Permits for the purpose of obtaining the permit. Mr Lin drew a landscaping drawing with the assistance of his wife;
 - (c) The drawing was then submitted to Roxanne Griffin of Inform Building Permits. A few days later Roxanne Griffin approved the drawings and stamped it with a company stamp which stated 'APPROVED'. It was this email which Mr Lin forwarded to Dr Chan.
- 52 The Respondents' defence on these points are nonsensical and did not explain why Roxanne Griffin would have marked a draft permit with the word 'APPROVED' unless it had been approved by Council. Mr Lin eventually admitted that he had falsified the approved permit and the words of the email.

- 53 The exchange of text messages that took place on 15 December 2013, as set out above, are also indicative of Mr Lin's state of mind. He was well aware that he had not obtained a permit, yet he was seeking further payment of money from the Applicant. Fortunately, the Applicant had by this stage formed the view that Mr Lin could not be taken on his word and accordingly she sought confirmation from the Council herself.
- 54 **Mr Steve Esler** is the principal of the building surveyor business Inform Building Permits, which employs Roxanne Griffin. Mr Esler's evidence revealed the opportunistic manner in which Mr Lin used his brief association with Mr Esler's firm to manufacture documents with the intent of deceiving the Applicant.
- 55 By reference to correspondence on file, Mr Esler gave evidence that Mr Lin had requested a quote for his services. Ms Griffin had responded by email dated 22 November, seeking confirmation of their fee proposal and documentation before commencing any work. The employee's signature on this email is automatically generated by Outlook. Mr Lin made no further contact with his firm.
- 56 Mr Esler confirmed that the emails which Mr Lin produced purportedly from Ms Griffin, dated 22 November and 28 November [neither of which contained a facsimile signature], were not generated within his business computer system. Furthermore, Ms Griffin has no authority in relation to the issue of building permits; and the correspondence under Ms Griffin's name is badly worded and contrary to their procedures. Accordingly, it is apparent that Mr Lin manufactured the subject emails, misrepresenting work allegedly done for Mr Lin on the Applicant's behalf with the intent of deceiving the Applicant.

The end of the Contract – Respondents' Repudiation

- 57 The Applicant arranged a meeting with Mr Lin by telephone which took place on the evening of 15 December 2013 ('15 December Meeting'). She felt threatened by Mr Lin's tone during the phone call so she asked two of her friends to be there for support.²²
- 58 Mr Lin appeared very agitated at the meeting. Dr Chan recorded part of the conversation and the Tribunal was handed a copy of the transcript of that conversation.²³
- 59 The precise meaning behind the words in the transcript are not entirely clear. Mr Lin appears to variously switch his position from saying: he can get a permit; obtaining a permit is too much trouble; he has already given the permit to the Applicant; and finally that a permit will surely be given.²⁴
- 60 The Applicant at this stage was not aware of the defective building work. The Applicant gave Mr Lin the opportunity to complete the Works and then

²² Mr Tony Chan and Mr Hao Sun.

²³ Exhibit Q.

²⁴ Exhibit Q.

receive the balance of the contract price. Otherwise, the Contract would be terminated and he would be paid no further money. Mr Lin said he wanted to consider the two options and left the meeting.

- 61 **Mr Hao Sun**, one of the Applicant's friends who also attended the 15 December Meeting, gave evidence consistent with the evidence of the Applicant and Dr Chan. In particular, Mr Sun confirmed that Mr Lin spoke in English and made various claims about the building permit, from having obtained a permit, to having applied for a permit, to he expects to get a permit.
- 62 The following day, on 16 December 2013, Mr Lin retrieved his tools and the blue stone pavement which had already been laid and said to the Applicant that he would no longer work for her. He also wanted to retrieve his tools from the garage which was closed. The Applicant refused to open the garage because, in light of the bluestone pavers being removed, she was fearful that he may also take her belongings. She offered to open the garage when her husband was at home but Mr Lin insisted on the garage door being opened immediately. The police were eventually called and Mr Lin was able to retrieve his property in the company of police.
- 63 By letter dated 9 January 2014, the Applicant received a Building Notice from the City of Monash requiring her to show cause as to why she should not be required to demolish the retaining wall. Consequently, the Applicant has demolished the retaining wall.

FINDINGS

Credit

- 64 The following matters go to the heart of Mr Lin's credit.
- 65 Mr Lin continued to maintain under cross-examination that he was unable to speak English, other than perhaps to say and write his name. He gave this evidence in face of the following evidence having been presented:
- (a) Dr Chan and Chris Fries, both detailed the many occasions that they conversed with him at length despite sharing no other common language but English;
 - (b) Mr Sun heard Mr Lin speak in English to and in the presence of Dr Chan at the 15 December Meeting;
 - (c) Mr Lin passed a citizenship exam and an International English Language Testing System (IELTS) exam, despite both being written in English;
 - (d) Mr Lin maintained a Facebook account, and was presented with posts written in English;
 - (e) Mr Lin attended Ozford College, a Melbourne business and language college;

- (f) Mr Lin was recorded speaking in English by Dr Chan on 15 December 2013; and
- (g) Mr Lin engaged with questions under cross-examination in English without the assistance of his translator on numerous occasions.
- 66 Mr Lin maintained the façade until instructed by the Tribunal to answer questions in English and to only ask the interpreter for assistance if required. At this point, Mr Lin then competently spoke English for the remaining duration of his evidence.
- 67 When faced with evidence from Eva Zelos of Metricon Homes that neither he nor his company had been employed or engaged as a tradesperson in any capacity, he then stated that he had merely been employed by someone else who was a project manager for Metricon Homes; and that his representation to customers that he was a project manager was mere ‘exaggeration’ on his part.
- 68 Mr Lin conceded that he and the Applicant had drafted the Contract together on 31 August 2013 by amending two earlier drafts he had sent to her on 28 and 29 August 2013. In making such concession, he thereby abandoned his defence that he should not be bound by the Contract as he did not speak English and did not understand the contents of the Contract.
- 69 I am satisfied that Mr Lin engaged in an elaborate deception by forging an email dated 22 November 2013; and another email dated 28 November 2013 from Roxanne Griffin of Inform Building Permits, the latter email attaching a diagram of the landscaping plans with an ‘Approved’ stamp inked in the middle. The email was sent to the Applicant and Dr Chan purporting to be an approved building permit. Mr Lin did not admit this deception in his evidence-in-chief. It was not until the Tribunal asked Mr Lin specific questions, that he finally declared that he had lied about the emails, and that he had in fact manufactured the ‘Approved’ plan himself.
- 70 I am further satisfied that Mr Lin opportunistically attempted to take advantage of the fact that Dr Chan accidentally identified himself as a builder in his first attempt at completing the application for a building permit. I accept Dr Chan’s evidence that he signed the first application in error and subsequently completed a second form correctly as owner. Fortunately, Dr Chan retained a copy of the correct form.
- 71 In Mr Lin’s defence, he makes no reference to the two forms having been completed. Mr Lin attempted to use the mistakenly filled out form as evidence that the Applicant had purported to be the builder.
- 72 The only explanation offered by Mr Lin for his conduct was that he was pushed too hard by the Applicant; he needed money and time to complete the Works; and he tried to do everything that she wanted. Ultimately, he was not able to meet her expectations because her demands became unreasonable.

- 73 In my view, the evidence is more consistent with Mr Lin having, by a number of misrepresentations, procured a contract for which he was ill-equipped to perform. His explanation for his subsequent misconduct is self-serving and disingenuous.
- 74 Consistent with the approach taken by Hansen J in *Westpac Banking Corporation v Hilliard*²⁵ I found Mr Lin to be an unreliable witness and in matters of contention prefer the evidence of the Applicant and Dr Chan, both of whom were responsive witnesses with clear recollections of relevant facts. They also made concessions where appropriate, in contrast to Mr Lin who only made concessions when the evidence presented left him with no feasible alternative.
- 75 Accordingly, I find that Mr Lin did represent to the Applicant that:
- (a) he was an experienced builder and prior project manager with Metricon Homes;
 - (b) he was a registered builder prior to his company entering into the Contract; and
 - (c) that his company held the necessary building insurance.

Repudiation

- 76 On or about 15 December 2013, Mr Lin threatened not to complete the Works unless the Applicant made further progress payments. In light of her discovering that Mr Lin was not registered and that he had not obtained a building permit, the Applicant refused further payments. In any event, those payments were beyond the schedule of payments as set out in the Contract.
- 77 The Tribunal finds that on 16 December 2013, Mr Lin, on behalf of himself and his company, unconditionally refused to perform any further Works thus repudiating the Contract, which was accepted by the Applicant.

Restitution

- 78 The claim for restitution is for the amount of \$32,500, being the amount that has already been paid to PTC by way of progress payments. The progress payments, in light of the Lorich Report, are effectively moneys thrown away by the Applicant.
- 79 Mr Lin, on behalf of PTC, has conceded that it is willing to repay all the moneys paid by the Applicant, and the Tribunal is otherwise satisfied from the evidence that the Applicant's claim for restitution ought to be accepted.
- 80 Accordingly, the Tribunal proposes to order PTC to pay to the Applicant the sum of **\$32,500** by way of restitution.

²⁵ [2006] VSC 470 at [230].

Damages – Loss of Expectation

81 The general principle governing the measure of damages for breach of contract is stated in *Robinson v Harman*:²⁶

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

82 In accordance with the general principle, the Applicant submits that she is entitled to damages and that the quantum of that damage is what it would cost to bring the Works to completion under the Contract, including performing all outstanding works and rectifying defects.

83 The Lorich Report assesses the cost of bringing the Works to completion at \$120,130. This figure includes a component of \$15,565.49 needed to remove and demolish PTC's defective work, comprising of the following sums:²⁷

Item No	Amount	Running total
Front Fence	\$2,608.00	\$2,608.00
Footing at Driveway	\$1,374.00	\$3,982.00
Retaining Wall	\$3,910.00	\$7,892.00
Timber Connecting Walls	\$790.00	\$8,682.00
Aluminium Side Gate	\$352.00	\$9,034.00
+ 35% margin	\$3,161.90	\$12,195.90
+ 10% GST	\$1,219.59	\$13,415.49
Plumbing repairs	\$1,400.00	\$14,815.49
Shed	\$750.00	\$15,565.49

84 The remaining amount is to complete the Works originally contracted by the First Respondent.

85 The corollary to the general principle as stated above is that it is also necessary when awarding damages for breach of contract that the Tribunal must be conscious not to place an applicant in a better position than what he

²⁶ Stated in *Robinson v Harman* [1848] EngR 135; (1848) 1 Ex 850, per Parke B. at p 855 [1848] EngR 135; (154 ER 363, at p 365).

²⁷ Applicant's closing submissions at para 4.

or she would have been, had the contract been performed. An exception in this case being exemplary damages, which are considered below.

- 86 I note again that Mr Lin has already agreed to pay \$15,565.49 for demolition and \$32,500 for restitution. Putting aside for the moment delay, legal costs and personal distress that these events have caused the Applicant, the sums offered by the Respondents at least put the Applicant back into the position she would have been had she not entered into a Contract with the First Respondent.
- 87 However, the \$48,065.49 offered to the Applicant falls significantly short of what it would cost to complete the job and satisfy the Applicant's expectation in accordance with the Lorich Report.
- 88 I am not satisfied, in all the circumstances, that the Respondents should be ordered to pay the \$120,130 specified in the Lorich Report (reduced by the amount which was remaining unpaid when the Contract was repudiated, being \$32,500) for the reasons that follow.
- 89 The Tribunal is concerned that the comparison between the service contracted by the Respondents, and the hypothetical services contemplated in the Lorich Report, are not sufficiently comparable.
- 90 In order to compare 'like with like', the cost of the demolition needs to be subtracted from the Lorich Report estimate, in which case the Lorich Report estimation becomes \$104,564.51. The quote is still appreciably higher than the quote from PTC, and the Tribunal is therefore concerned that the Lorich estimate may place the Applicant in a significantly better position.
- 91 The Applicant gave evidence that she obtained three other quotes around the same time as she received a quote from the PTC. The amount quoted for the same landscaping works at the time were \$64,000, \$74,000, \$78,000. From this evidence alone, it is apparent that there are contractors available in the market who are willing to complete the work for around the same cost as PTC.
- 92 The difference in price can also be partly explained by the addition of a 35% margin for 'overheads, supervision and profit'.²⁸ The Applicant chose PTC to undertake the Works and she understood that Mr Lin was effectively working for himself, in that he was not supported by a construction company, did not have an administrative assistant or the assistance of other builders and apprentices.
- 93 By implication, it was expected that Mr Lin would be working from a low cost base and that he would not be supervising other workers. Therefore, the work would be completed for a price appreciably lower than typical market rates hypothesised in the Lorich Report. A more relevant comparison could have been made if the Applicant had produced an

²⁸ Lorich Report, Summary at page 3.

equivalent quotation from a registered builder operating from the same business model as the Respondents.

- 94 While the Tribunal accepts that the Lorch Report provides an estimate for completing the Works in a ‘workmanlike manner’, it does not necessarily follow that the standard expected from PTC would be the standard contemplated in the Lorch Report. A simplistic analogy is that two different car models may be roadworthy, but they will not necessarily cost the same.
- 95 In the Tribunal’s opinion, if PTC pays to the Applicant the sum of \$48,065.49, she will have been repaid all the money she has paid plus the money to demolish the defective work and start again. As far as money is capable, she is placed in the situation she would have been upon signing the Contract and assuming it would be properly performed, according to its terms.
- 96 Accordingly, the Tribunal will order PTC to pay the Applicant the sum of **\$48,065.49** by way of damages. This amount is to be offset by any money paid to the Applicant by way of restitution.

Misleading and Deceptive Conduct – Australian Consumer Law

- 97 The Applicant seeks damages under the *Australian Consumer Law* for misleading and deceptive conduct. She makes that claim against PTC, but also against Mr Lin, either in his own right or as a person involved in PTC’s contravention.
- 98 The quantum of that claim is her reliance loss, being the cost to remove PTC’s defective work (but not to complete the Contract) of \$15,565.49 plus the amount paid under the Contract of \$32,500.00, in the total sum of \$48,065.49. For the reasons stated above, I propose to order PTC to pay this amount to the Applicant by way of restitution and damages arising from the PTC’s repudiation of the Contract. The question of significance is whether Mr Lin ought to be made personally liable for any acts.
- 99 The Applicant relies on three key representations made by Mr Lin to the Applicant and Dr Chan prior to entering into the Contract, which are:
- (a) that he was a registered building practitioner;
 - (b) that he had previously been employed as a project manager by Metricon Homes, and that his duties included extensive landscaping and building work for that company; and
 - (c) that he had taken out the necessary insurance for the Works to proceed.
- 100 I also note evidence of the advertisement placed by Mr Lin in a Chinese newspaper, to which the Applicant responded, which advertised that PTC performed ‘New Home Construction’; ‘Old Home Extension’; and ‘New Home Timber Frame’. Under cross-examination, Mr Lin gave an

implausible explanation that PTC did not itself perform any new construction but when requested to do so, Mr Lin would refer the customer to a registered builder and take a commission. Mr Lin gave no information about any such business arrangement with other registered builders.

- 101 Mr Lin has conceded that he represented that he was a project manager at Metricon Homes (and also admitted that the Applicant was not the only person to whom he has made that representation).
- 102 He has not conceded representing that he was a registered building practitioner or that he has obtained all necessary insurance for the Works to proceed. For the reasons already given above, I am satisfied that the representations, as alleged by the Applicant, were made to her.
- 103 The Applicant and Dr Chan separately confirmed that the representations were a central part of their decision to engage Mr Lin's company and that if they had not been made they would not have engaged him. The representations were made to induce entry into a commercial contract, and they were made in trade or commerce.
- 104 Each of the representations were clearly false. Mr Lin does not have, and never did have, building registration. He has never worked for Metricon Homes in any capacity and his oral evidence about working as an assistant to someone who was working for Metricon Homes is unreliable and in any event, a far cry from himself being the project manager.
- 105 He has produced no builders warranty insurance for the Works and no building permit.
- 106 Accordingly, the representations were misleading and deceptive and in contravention of sub-s 18(1) of Schedule 2 of the ACL.
- 107 If Mr Lin had not made the misrepresentations, I am satisfied that: the Applicant would not have entered into the Contract; PTC would not have had occasion to perform defective works on her property; the Applicant would not have paid progress payments amounting to the sum of \$32,500 to PTC; and the Applicant would not have incurred the expense of rectifying the defective building works.
- 108 The quantum of the Applicant's claim is set out in the report of Robert Lorich, which Mr Lin has conceded. The estimated cost to remove the defective works is \$15,565.49.

Personal Liability attaching to Mr Lin

- 109 The Applicant submits that the representations were Mr Lin's own representations, and as such liability under s 236 of the ACL rests with Mr Lin.
- 110 Section 236 of the ACL states the following:

236 Actions for damages

- (1) If:

(a) a person (the claimant) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

111 The term ‘involved’ is defined in s 2 of the ACL which states:

a person is involved, in a contravention of a provision of this Schedule or in conduct that constitutes such a contravention, if the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

112 Section 236 of the ACL is a reproduction of s 75B of the *Trade Practices Act 1974*. The High Court considered s 75B in the case of *Yorke v Lucas*.²⁹ It follows from that decision that a natural person will not be held liable as a ‘person involved in a contravention’ if that person acted innocently and did not have knowledge of the essential matters which constituted the contravention.

113 In *Rafferty v Time 2000 West Pty (No 4)*,³⁰ Besanko J stated:

In a case where a party seeks to establish that another party has been involved in a contravention within s 75B(1) of the TPA, there are two questions. The first question is whether the person’s acts are sufficient to bring the person within the terms for the subsection. The second question is whether the person has sufficient knowledge for the purpose of the subsection.

114 Having regard to these authorities, it is clear to the Tribunal from the analysis above that Mr Lin is an accessory to the contravention of the ACL. Mr Lin has aided, abetted and procured the contraventions by making representations about PTC which he knew to be false and which he reasonably knew would be fundamental to the Applicant’s decision to enter into the Contract with PTC.

115 Accordingly, Mr Lin is personally liable for the loss suffered by the Applicant as a consequence of her being induced to enter into the Contract in reliance upon the misleading and deceptive representations. The Tribunal will order that he pay to the Applicant the sum of **\$48,065.49**. This figure is to be offset by any amount paid by PTC to the Applicant by way of restitution and damages.

²⁹ (1985) 158 CLR 661.

³⁰ [2010] FCA 725 at [313].

EXEMPLARY DAMAGES

- 116 The Applicant seeks an order for exemplary damages against Mr Lin or PTC. The Tribunal is empowered to make such an order by sub-para 53(2)(b)(ii) of the DBC Act.
- 117 Exemplary damages are awarded rarely. They are designed to go beyond compensation, and are intended to recognise and punish fault as proof of the ‘detestation of the jury to the action itself’.³¹ However, it is not every finding of fault or breach of contract which warrants such an award. Something more must be found. Although rarely awarded, it is also recognised that they may be appropriate in very different kinds of cases.³²
- 118 To attract an award of exemplary damages, the defendant’s conduct in committing the wrong must amount to ‘conscious wrongdoing in contumelious disregard of the plaintiff’s rights’.³³
- 119 In *Gray v Motor Accident Commission*,³⁴ the majority of the High Court said:

In considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged. (The reaction of the party who is wronged to high-handed or deliberate conduct may well be a reason for awarding aggravated damages in further compensation for the wrong done. But it is not ordinarily relevant to whether exemplary damages should be allowed.) The party wronged is entitled to whatever compensatory damages the law allows (including, if appropriate, aggravated damages). By hypothesis then, the party wronged will receive just compensation for the wrong that is suffered. If exemplary damages are awarded, they will be paid in addition to compensatory damages and, in that sense, will be a windfall in the hands of the party who was wronged. Nevertheless, they are awarded at the suit of that party and, although awarded to punish the wrongdoer and deter others from like conduct, they are not exacted by the State or paid to it.

- 120 In determining an amount, all of the circumstances of the case are relevant. In *Halsbury’s Laws of Australia*,³⁵ the learned authors wrote as follows in respect of the assessment of exemplary damages (citations omitted):

All of the circumstances of the case are relevant to the assessment of exemplary damages, including the means of the defendant, the plaintiff’s provocation of the defendant’s conduct and the extent of any punishment which has already been inflicted on the defendant. In determining the amount of exemplary damages which is appropriate in any case the court must avoid the temptation to be extravagant.

³¹ *Lamb v Cotogno* (1987) 164 CLR 1, 8; (1987) 74 ALR 1881 192 (citing *Wilkes v Wood* (1763) Lofft 1, per Pratt LC).

³² *Gray v Motor Accident Commission* [1998] HCA 70 at [11].

³³ *Whitfeld v De Lauret and Co Ltd* (1920) 29 CLR 71 at 77, per Knox CJ.

³⁴ [1998] HCA 70 at [15].

³⁵ At [135-515].

- 121 The question to consider is whether Mr Lin and/or his company are deserving of a punitive penalty in all the circumstances.
- 122 The Tribunal considers that Mr Lin has exhibited serious and aggravating misconduct in defending this proceeding and in the conduct of the hearing such as to warrant exemplary damages. In addition to the findings that Mr Lin engaged in deliberate false representations to the Applicant designed to induce her to contract with PTC; the Tribunal also finds that Mr Lin made further false statements to the Applicant concerning the building permit; and has conducted his defence in an untruthful manner causing the proceeding to be significantly protracted with additional expense and distress to the Applicant; including requiring the Applicant to call a number of witnesses and be put to the proof on a number of matters, entirely as a result of further false statements. I refer in particular to Mr Lin:
- (a) Dishonestly pretending not to speak, write or understand English;
 - (b) Forging an email from Roxanne Griffin purporting to attach an approved building permit; and
 - (c) Attempting to use the application for a building permit on which Dr Chan accidentally signed as an owner builder, as physical evidence in support of his case.
- 123 I also note Mr Lin's conduct in the second day of hearing, by which time he was openly speaking in English and he had admitted forging the Roxanne Griffin email. At this stage Mr Lin asked the Tribunal for an indulgence, namely, that he be allowed to address the Applicant directly to apologise for his conduct. The Tribunal allowed Mr Lin the opportunity. Mr Lin then bowed in the direction of the Applicant and appeared to be delivering a heartfelt apology to the Applicant in his native tongue of Mandarin.
- 124 During the course of Mr Lin's purported apology, the Applicant appeared increasingly distressed. Subsequently, the interpreter who had been called to assist the Applicant, gave evidence to the effect that while Mr Lin commenced to express an apology, he quickly reverted to a criticism of the Applicant's behaviour: complaining about what she did wrong; what she should have done; and essentially blaming her for the fact that this matter has ended up at the Tribunal for determination.³⁶
- 125 The purported apology is, in the Tribunal's opinion, further aggravating behaviour which has fortified the opinion of the Tribunal that an award for exemplary damages is appropriate in all the circumstances.
- 126 Applicant's Counsel submitted that a sum in the vicinity of \$20,000 would be appropriate to represent appropriate condemnation of and punishment for Mr Lin's conduct. In my view, such amount would be excessive having regard to the fact that Mr Lin is effectively a sole trader and will not otherwise have benefited financially from the Contract. Accordingly, it is

³⁶ Mr Lin's Mandarin speaking solicitor did not contest the account given by the interpreter.

proposed to order exemplary damages of \$5,000. In reaching this figure the Tribunal takes into account that Mr Lin and/or his company, already suffer a significant financial imposition from the orders made for restitution and damages and Mr Lin and his company will not otherwise have earned any income for the period during which Mr Lin was working at the Applicant's home. Furthermore, Mr Lin may yet face an application by the Applicant, to pay the Applicant's legal costs.

CONCLUSION

127 For the reasons detailed above, the Tribunal finds that:

- (a) Mr Lin made false representations on behalf of PTC upon which the Applicant relied and which induced the Applicant to enter into a major domestic building contract in circumstances in which Mr Lin did not have the building experience as alleged, was not a registered builder and PTC was not covered by requisite insurance;
- (b) Mr Lin deliberately concocted correspondence with the intent of deceiving the Applicant that a building permit had been approved;
- (c) Mr Lin deliberately misrepresented to the Tribunal to the effect that his spoken and comprehension of English was minimal; and
- (d) PTC performed defective building work and ultimately repudiated the Contract causing loss and damage to the Applicant.

128 The Tribunal will make orders as foreshadowed in these Reasons.

Judge Jenkins
Vice President