

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP37/2015

CATCHWORDS

Domestic Building; breach of contract; repudiation; measure of damages.

APPLICANT: Walter Merolli t/as Mercon-Merrolli Concrete Constructions

RESPONDENT: Timetrex Pty Ltd (ACN: 006 586 223)

WHERE HELD: Melbourne

BEFORE: Member C Edquist

HEARING TYPE: Hearing

DATE OF HEARING: 4 August 2015

DATE OF ORDER: 31 August 2015

CITATION Merolli trading as Mercon Merrolli Concrete Constructions v Timetrex Pty Ltd (Building and Property) [2015] VCAT 1382

ORDERS

1. The respondent, Timetrex Pty Ltd, must pay to the applicant Walter Merolli t/as Mercon-Merrolli Concrete Constructions, the sum of \$11,692.00.
2. In addition, the respondent must reimburse to the applicant the application fee paid by the applicant of \$533.40.
3. The counterclaim of the respondent against the applicant is dismissed.

MEMBER C EDQUIST

APPEARANCES:

For Applicant

Mr W Merolli in person

For Respondent

Mr A Morrison of Counsel

REASONS

NATURE OF APPLICATION

- 1 Timetrex Pty Ltd is a builder which in October 2014 was engaged to construct a house in Mernda, Victoria. It engaged Walter Merolli to construct the concrete slab. A dispute arose because Mr Merolli, during excavation, struck rock which his machinery could not remove, and the parties did not have a written agreement which covered the situation. Timetrex engaged another contractor to complete the works. Each party accused the other of breaching the contract.
- 2 Mr Merolli issued proceedings in the Tribunal numbered C7088/2014 on 19 December 2014 seeking damages of \$22,627.00 for breach of contract. Timetrex filed its own application by way of counterclaim numbered BP37/2015 on 18 March 2015. It seeks damages of \$20,252.65. The two proceedings were consolidated, and came on for hearing on 4 August 2015.
- 3 At the hearing, Mr Merolli appeared on his own behalf, and also gave evidence. He had prepared a written statement which had been filed with his application. He confirmed this in his evidence. This was tendered as Exhibit A1.
- 4 Timetrex was represented by Mr A Morrison of Counsel. Mr Mazza gave evidence on behalf of Timetrex. Mr Mazza had filed a statement with his application. He confirmed the contents of this statement when he gave his evidence.

BACKGROUND FACTS

- 5 Mr Merolli gave evidence that he had not worked with Timetrex before this project. He says he was approached by Mr Mario Mazza, a director of Timetrex, in or around August 2014. In a telephone conversation they discussed the work and the price for the job. Mr Merolli says his proposed rates were acceptable and Mr Mazza said he would forward plans for him to look at.
- 6 On 6 October 2014, Mr Mazza sent an email to Mr Merolli with a dropbox attached which contained the soil report he had obtained. Further, on 8 October 2014 Mr Mazza arranged for plans detailing the steel reinforcing to be sent.
- 7 On 7 November 2014, Mr Merolli and Mr Mazza met in a coffee shop in Sydney Road, Brunswick in order to discuss the job. Mr Merolli says he handed Mr Mazza a handwritten note. This note was attached to his tendered statement. There are two disputes concerning this document. The first is whether it was handed to Mr Mazza at the meeting, or at all. The second relates to its significance. The page showed a price for the slab of \$41,373, on the basis that the pump for the slab was included. Mr

Merolli gave evidence that he had allowed for 340 square metres of concrete, at a rate of \$92 per square metre and added an allowance for the pump. Mr Merolli explained the rate of \$92, which was higher than the rate of \$85 per metre he had referred to in the telephone conversation, was adopted because of the extra reinforcement and the requirement to excavate to at least 750mm shown in the drawings he had received. 94 cubic metres in concrete was calculated as being required for the slab. The blinding concrete, as well as the pump required for it, was to be extra. The rate for blinding concrete was to be \$170 plus GST per cubic metre, on the basis the pump was excluded. Mr Merolli says the prices he proposed were agreed.

- 8 Mr Mazza disputes this. He says a figure of \$42,662 for the slab and blinding was agreed, but this figure excluded the hire of the pumps for the blinding concrete and for the slab. Mr Mazza says the slab area covered by that price was 352 square metres, and at a rate of \$92 per square metre, the cost of the slab was \$35,622.40 inclusive of GST. The balance of \$7,040 was for 40 cubic metres of blinding concrete, at \$160 plus GST per square metre.
- 9 Despite the disagreement on price, there was agreement that the job involved excavating the trenches to a depth of at least 750mm, using packing sand to regularise the formation of the trenches, placing reinforcing concrete, pouring an estimated 40 cubic metres of blinding concrete, and subsequently pouring a 100mm thick slab with edge and internal beams.
- 10 The parties agree that Mr Merolli commenced works on 21 November 2014. Mr Merolli says that works were delayed on Monday 24 November 2014 as Timetrex had to clear the spoil, but resumed the next day and continued for some days.
- 11 The parties also agree that a problem emerged, which was that a contractor working on an adjacent site, Metricon, had poured footings which encroached on the Timetrex site. The excavation work had to stop until the encroaching footings were jackhammered out.
- 12 Mr Merolli says that he returned to the site and completed his excavation work on 2 December 2014. Mr Merolli says that he asked Mr Mazza by text to organise a pre-slab inspection on Wednesday 3 December 2014. It is to be remarked that Mr Merolli conceded in his oral evidence that he had not excavated deep enough. This was also expressly stated by him in a text sent to Mr Mazza on Saturday 6 December 2014. The explanation, as Mr Merolli explained in that text, is that he had encountered 'some fairly large rocks that need to be extracted'.
- 13 It is agreed that the Relevant Building Surveyor inspected the site early on 3 December 2014.

- 14 Mr Mazza's evidence is that the Relevant Building Surveyor telephoned him after the inspection and advised that the slab edge and internal beams were to be excavated deeper and founded into the stiff clay as per the soil report and approved plans.
- 15 A Building Inspection Work Direction issued by the building surveyor, Mr Tom Kastanos of Kinban Building consultants, dated 13 December 2014, was tendered by Timetrex as Exhibit R6. This Direction confirmed that the pre-slab inspection on 3 December 2014 was not approved because the excavation was not dug to approximately 900-1000mm and founded 100mm into the stiff silty clay.
- 16 Mr Mazza says that he informed Mr Merolli of the Building Surveyor's refusal, and the reasons behind it, and says that Mr Merolli responded that the design engineer and the geotechnical engineer:

... did not know what they are talking about.
- 17 Mr Merolli disagreed with this assertion. His evidence was that Mr Mazza agreed he would speak to the engineer to see if the slab could be re-engineered.
- 18 Mr Mazza said that he told Mr Merolli that he would arrange for the geotechnical engineer to attend site to test if the founding depth and the material was satisfactory. Mr Merolli agreed with that statement.
- 19 Mr Mazza's evidence was that the geotechnical engineer attended the site on 4 December 2014 and confirmed that excavation did not penetrate the fill and had to be deepened as required in the soil report, the engineering drawing and by the Building Surveyor.
- 20 On Friday 5 December 2014, Mr Mazza directed Mr Merolli to dig deeper.
- 21 Mr Merolli said that in this conversation he told Mr Mazza he was ready to come back to the site and continue working, with the qualification that he would only return to go deeper if heavier machinery was hired. This would be at Timetrex's cost.
- 22 Mr Mazza's evidence confirms that Mr Merolli agreed to come back only if he was paid extra money for a bigger excavator and a rock crusher which would be required.
- 23 Mr Merolli and Mr Mazza are agreed that at this point the conversation became heated, and came to an end.
- 24 Mr Merolli's further evidence is that at 4.12pm on 5 December 2014 he got a text from Mr Mazza saying he was not to worry about the job as he (Mr Mazza) had another concreter. Mr Merolli says that he continued to text Mr Mazza about the job on Saturday 6 December 2014 and again on Monday 8 December 2014.

- 25 Mr Merolli now acknowledges that the contract was terminated by Mr Mazza on Friday 5 December 2014. His position is that this termination was ‘unfair’. In other words, he says he was illegally terminated. He seeks to recover damages in respect of the work performed plus profit foregone, a total of \$22,627.
- 26 Where Mr Mazza differs from Mr Merolli with respect to the conversation on 5 December 2014 is that he says the requirement for payment for heavier machinery amounted to a repudiation of the contract. Mr Mazza says that he accepted the repudiation; and that it is Timetrex that is entitled to damages. The damages sought are \$20,252.65, and are set out in Timetrex’s calculation of quantum, which was tendered as Exhibit R7.

ISSUES

- 27 The fundamental issue in this case is whether the contract made between Mr Merolli and Timetrex was repudiated by Mr Merolli or was illegally terminated by Timetrex. The underlying questions are:
- (a) What were the terms of the contract?
 - (b) Did Mr Merolli repudiate the contract?
 - (c) If Mr Merolli repudiated the contract, did Timetrex accept Mr Merolli’s repudiation of the contract.
- 28 If the Tribunal finds that Mr Merolli repudiated the contract and that Timetrex accepted Mr Merolli’s repudiation, it will have to assess Timetrex’s claim for damages.
- 29 If the Tribunal rules that there was no repudiation of the contract by Mr Merolli, then Timetrex has illegally terminated the contract, and the Tribunal will have to assess Mr Merolli’s claim for damages.

FORMATION OF THE CONTRACT

The first telephone conversation

- 30 Mr Merolli says in his written statement, which he confirmed orally, that when he spoke to Mr Mazza by telephone in around August 2014, he priced the works as follows:
- (a) he normally charged \$85 for a H class slab plus GST;
 - (b) he would work out the allowance of concrete based on how many square metres of concrete were required;
 - (c) the possibility of deeper trenches would be allowed for in the rate for blinding concrete, which was \$170 plus GST per cubic metre of concrete;
 - (d) rocks and anything that was not of a loose nature and could not be extracted would be charged at \$200 per cubic metre of rock

extracted, alternatively, Timetrex could hire machinery to remove larger rocks;

- (e) Timetrex had the option of removing spoil using its own subcontractors, which it accepted; and
- (f) as additional steel would be required for this particular slab, 'the figures' would be worked out when the plans had been forwarded.

31 Mr Merolli's position is that this conversation has contractual status. In particular, Mr Merolli seeks to rely on the term that rocks that were not of a loose nature, and thus could not be extracted by his machinery, would have to be excavated using larger machinery hired by Timetrex.

The meeting on 7 November 2014

32 Mr Merolli and Mr Mazza agree that at the meeting which took place in Brunswick on 7 November 2014 the terms of the contract were discussed. As discussed above (at paragraphs 7 and 8), there is only a relatively small difference between the views of the parties as to what was agreed at the meeting regarding the pricing of the slab and the blinding concrete.

33 From Mr Mazza's evidence regarding the meeting on 7 November 2015 some agreement with Mr Merolli's recollection can be identified, as well as some differences. There is agreement that the rate for concrete was to be \$92 per square metre plus GST. A difference between the parties, however, was that Mr Mazza said the rate of \$92 per metre plus GST only applied for the first 100 cubic metres of concrete. After this, the rate per metre increased to \$160 per metre. Moreover, Mr Mazza said that there was a fixed area of concrete of 352 square metres, not 340 square metres. Mr Mazza also disagreed with Mr Morelli regarding the cost of blinding concrete. Mr Mazza said the agreed rate \$160 per cubic metres plus GST, not \$170 plus GST.

34 In the final analysis, the difference between Mr Merolli's view of the contract sum and Mr Mazza's view is not critical to the outcome of the case. This is because the core issue is repudiation, and this issue turns on whether terms of the contract have been breached by one party or the other, not on the contract sum.

THE CONTRACT TERMS

35 The contract terms are contentious in two respects. The first issue is: what documents were included in the contract? The second is: does the first telephone conversation between Mr Merolli and Mr Mazza have contractual status.

The handwritten note

36 The first issue in identifying the terms of the contract is whether the handwritten note which Mr Merolli says he handed to Mr Mazza at the

meeting on 7 November 2014 formed part of the contract. As observed (at paragraph 7), Mr Mazza disputes the note was handed to him at the meeting, or at any time. He says it was prepared by Mr Merolli for his own benefit during their initial conversation.

- 37 I consider that the note was very likely to have been prepared by Mr Merolli for the purposes of the meeting on 7 November 2014, as it sets out Mr Merolli's price for the slab of \$41,373 inclusive of GST and inclusive of the pump. Also, on its face, it bears little resemblance to the list of items Mr Merolli says were discussed during the initial conversation.
- 38 However, I am not satisfied that the note is part of the contract, for two reasons. The first of these is that I am not satisfied it was handed to Mr Mazza at the meeting, or sent afterwards. Mr Mazza denies the note was given to him, and Mr Merolli was unable to produce an email or fax transmission evidencing that it had been sent. The second reason is that there remains a dispute as to whether the sum for the slab was agreed at \$41,373 inclusive of the pump and that the rate for the blinding concrete was to be \$170 plus GST per cubic metre, plus pump.

The engineering drawings

- 39 The engineering drawings prepared by KK Consulting Engineers Pty Ltd (which were tendered by Timetrex as R2) are not controversial. It is not disputed by Mr Merolli that these had been forwarded by Mr Mazza prior to the meeting on 7 November 2015. The parties agree that they are part of the contract.
- 40 The relevant engineering drawings were referred to at the hearing. It is agreed between the parties that the drawing titled 'Footing Details(1)' indicates that the footings of the slab were to be a least 600mm deep, and that under the edge beams and internal beams there was to be blinding concrete (if required) penetrating at least 100mm into the natural silty clay. It was from these details that the assumption was drawn by Mr Merolli that the excavation would have to be to a depth of at least 750mm.

The soil report

- 41 There is a dispute as to whether the soil report was part of the contract. The soil report, which was prepared by Apex Soil Testing (Aust) Pty Ltd, was tendered by Timetrex as Exhibit R4. Mr Mazza's evidence is that he sent an email to Mr Merolli on 6 October 2014 with a drop box containing the soil report. This email was tendered as Exhibit R3. In its subject line it refers to 'Masons-soil report'. As the job was in Mason's Road, Mernda, Mr Merolli can be taken to have understood its significance.
- 42 In his evidence at the hearing, Mr Merolli acknowledged that he had received the email with the dropbox on 6 October 2014, but said that as he could not open the dropbox, he did not have the soil report.

- 43 Mr Mazza gave evidence that when Mr Merolli's workers first came to the site he handed them a copy of the soil report. His view, accordingly, is that Mr Merolli had a copy of the soil report before he started work.
- 44 It is not necessary for me to make a finding as to whether Mr Mazza did hand a copy of the soil report to Mr Merolli's workers on site, because that is not relevant to the question of whether the soil report was a contract document.
- 45 The relevant issue is whether the soil report was received by Mr Merolli before the contract sum was discussed at the meeting in Brunswick on 7 November 2014. I find that as Mr Merolli admits that he received the email of 6 October 2014 with the dropbox containing the soil report, he did receive the soil report for the purposes of formation of the contract. It is immaterial that Mr Merolli did not open the dropbox. I find accordingly, that the soil report is a contract document.
- 46 The requirement on the drawings that the slab edge beams and any load bearing internal beams should be founded at least 100mm into the natural silty clay was drawn from the soil report, which set out this requirement at page 3. The extent of the excavation that would be required could be determined from the bore log results set out on page 6. The bore logs showed that silty clay was to be found at depths of 800-1,500mm (bore 1), 900-1,500mm (bore 2) and 900-1,500mm (bore 3). Accordingly, if Mr Merolli had read the soil report, he would have understood that excavation to a depth of 900mm as a minimum would be required.

The first conversation

- 47 Mr Merolli's recounting of his initial conversation with Mr Mazza in or around August 2014, as set out in his tendered statement, includes this term:
- Rocks and anything that wasn't of a loose nature and couldn't be extracted would be charged at \$200 per cubic metre of rock extracted or he [Mr Mazza] could hire the machinery to remove larger rocks if necessary and depending on what the engineer determined on site if the need arises.
- 48 Mr Mazza disputes that this was proposed by Mr Merolli in their initial conversation.
- 49 I prefer Mr Merolli's evidence on this point, for these reasons:
- (a) At the time of the initial conversation, Mr Merolli had no information about the site. In particular, he had not been sent the soil report, let alone read it.
 - (b) Mr Merolli, according to his evidence, has long experience as a concreter as well as being a registered building practitioner (domestic). Furthermore, he has an excavator of limited capacity. It would have been prudent for him to discuss with Mr Mazza a requirement for

compensation if large rocks were found during excavation which could not be extracted by his machine.

- (c) The circumstantial evidence points to Mr Merolli telling the truth about the initial conversation. Mr Merolli's statement about what was discussed in the initial conversation, as set out in his statement, is quite detailed.¹ Later events demonstrate that he recalled accurately four of the matters discussed. These events were:
- (i) he worked out the allowance of concrete based on how many square metres of concrete were required according to the drawings;
 - (ii) he allowed for the possibility of deeper excavations in the rate for binding concrete;
 - (iii) Timetrex removed spoil during the course of Mr Merolli's works, which is consistent with the election Mr Merolli says Mr Mazza made during the first conversation to remove spoil using his own subcontractors;
 - (iv) 'the figures' relating to the additional steel required for the slab were worked out when the plans had been forwarded.
- (d) I consider that it would be surprising if Mr Merolli's recollection regarding these four matters was accurate, but was faulty in respect of the disputed term which was set out in Mr Merolli's statement regarding 'Rocks and anything that wasn't of a loose nature and couldn't be extracted'.
- (e) A further factor is that the articulation of the full term regarding loose rocks, as set out in paragraph 47, is quite detailed but it is consistent in form with the other detailed terms which the circumstantial evidence suggests were discussed.

50 For these reasons, I consider it unlikely that the clause is 'a recent invention' as was suggested by Timetrex's counsel in cross-examination, but denied by Mr Merolli.

51 I acknowledge that Timetrex has a fallback position regarding the disputed term, which is that, even if it was proposed in the initial conversation, it was not discussed at the meeting on 7 November 2014 when the parties attempted to agree the contract sum. Accordingly, Timetrex contends, it did not become part of the contract. As Timetrex pointed out, the term was not even mentioned in Mr Merolli's handwritten note, which Mr Merolli says he handed to Mr Mazza in that meeting.

52 I accept that there is no evidence that the disputed term was discussed at the meeting on 7 November 2014. However, that is not conclusive of the issue of whether it formed part of the contract. That meeting was for the purpose of agreeing the contract sum, which was made up of a price for the slab and

¹ Refer to paragraph 30 above.

a rate for blinding concrete. Neither party suggested that latent conditions were discussed at the meeting. This does not mean that the earlier conversation, about rocks and other material which could not be extracted by Mr Merolli, was to be ignored.

- 53 I find that it was a term of the contract that rock and anything that could not be extracted by Mr Merolli's equipment would be charged at \$200 per cubic metres of rock extracted, alternatively, Timetrex could hire the machinery necessary to remove larger rocks.

THE CRITICAL CONVERSATION ON 5 DECEMBER 2014

- 54 The parties are agreed that, after Mr Mazza informed Mr Merolli that the geotechnical engineer required the excavation to continue, Mr Merolli said that he needed a bigger machine and a rock breaker, and would be charging Timetrex for them.

- 55 Mr Mazza gave evidence to this effect, and Mr Merolli, in substance, agrees with this allegation. In particular, in his statement, Mr Merolli says he told Mr Mazza he would return to the site to go deeper but that this would be an additional expense if rocks were encountered:

as the reasons for us stopping at that level was that my machine couldn't go deeper as there were large rocks.² (sic)

- 56 Mr Merolli clearly had in mind the arrangement he thought had been agreed, namely, that Timetrex would pay for the hire of the larger equipment required.

- 57 The fact that Mr Merolli required payment for extra equipment is verified by the exchange of emails which took place on 5 and 6 December 2014. Specifically, at 10.35am on Saturday 5 December 2014, Mr Merolli wrote:

Mario, you are being very hasty. We do not need to argue or fight about this job. I have not denied that i haven't gone down deep enough. What i am saying that there are some fairly large rocks that need to be extracted. As a result we will need to bring in a bigger machine with a breaker if necessary at the rock rate and at the industry standard. I will replace the sand and labour at my cost as you shouldn't have to wear this and is fair for you. The blinding is per usual and as was discussed and agreed upon at \$170 plus gst plus pump cost. (sic)

- 58 Mr Mazza also alleges that Mr Merolli refused to confirm when he would be returning to site as he said:

I have other jobs to worry about and will return when I am ready.

- 59 Mr Merolli denies this. This denial is consistent with Mr Merolli's email sent at 10.35am on 5 December 2014, where he stated:

I will go back Monday morning If (sic) we can resolve this....

² See Exhibit A1.

FINDINGS ON THE ISSUE OF REPUDIATION

- 60 On 3 December 2014, when he was informed by the Relevant Building Surveyor that the pre-slab inspection had failed, Mr Mazza behaved in what I consider to be a measured way. Specifically, he informed Mr Merolli of the decision, and the reasons behind it. It is agreed that in this discussion Mr Mazza says that he told Mr Merolli that he would arrange for the geotechnical engineer to attend site to test if the founding depth and the material was satisfactory. On 5 December 2014, the day after the geotechnical engineer had attended the site and confirmed that excavation did not penetrate the fill and had to be deepened, Mr Mazza was still within his rights under the contract when he gave a direction for Mr Merolli to proceed with the works as designed.
- 61 When Mr Merolli was given the direction to proceed on 5 December 2014, he responded in a manner which was consistent with his understanding of the contract. He knew that he had not excavated the trenches to the required depth. He had run into rock which, according to his evidence, his machine could not extract. He accordingly told Mr Mazza that he would only go on with the work if he was paid for the hire of a larger excavator and a rock crusher. He made this demand in accordance with a term of the contract which he thought had been agreed, and which that I have found existed, namely that:
- Rock and anything that couldn't be extracted by Mr Merolli's equipment would be charged at \$200 per cubic metre of rock extracted, alternatively Timetrex could hire the machinery necessary to remove larger rocks.
- 62 Because Mr Merolli's action in insisting that Timetrex hire the larger equipment which had become necessary was consistent with the terms of the contract in the circumstances which had arisen, it was not repudiatory.
- 63 On the other hand, I find Mr Mazza's decision to refuse to allow Mr Merolli back onto the site effectively terminated Mr Merolli's contract. This action itself was a breach of the contract. Mr Merolli was relieved of the burden of discharging his unperformed obligations under the contract. He also became entitled to seek damages for Timetrex's breach of contract.
- 64 On the other hand, Timetrex's claim for damages must be dismissed.

DAMAGES

- 65 In a letter of demand sent by his lawyers to Timetrex, dated 9 December 2014, which was appended to his statement, Mr Merolli claims damages in respect of work performed of \$11,692.00, together with loss of profit of \$10,935.00, a grand total of \$22,627.00.
- 66 I am not satisfied that Mr Merolli is entitled to such an award. In accordance with ordinary contractual principles, Mr Merolli is entitled to be restored to the position he would have been in had he been allowed to perform his contract. I consider that if Mr Merolli had completed his scope

of work, even if Timetrex had paid for the cost of any heavier equipment required, he would have lost money.

- 67 I say this because of two factors. First, it is likely that if he had gone on with the contract he would have lost much, if not all, of the benefit of the excavation and sand packing work he had performed at the time of termination. The benefit of the excavation performed would have been lost because the trenches he had excavated would, largely, have had to have been backfilled to allow the larger machinery hired at Timetrex's expense to traverse the site. Those trenches which were not backfilled would likely have been damaged. For these reasons, many, if not all, of the original trenches would have had to have been re-excavated and re-packed with sand.
- 68 That much of the earlier work would have been lost is demonstrated by the scope of work performed by the subsequent contractor Nigido. The invoice from Nigido addressed to Timetrex dated 17 December 2015, covering its labour and machine hire and packing sand, is for \$34,530.65 inclusive GST. This figure did not include concrete and reinforcement used in the slab, which were sourced separately. Evidently, the machine hire and labour components of the completion of the works were much higher than the sums allowed for these items by Mr Merolli.
- 69 The second factor is that the cost of materials actually required to complete the works, namely \$28,435 for concrete, and \$5,241.50 for reinforcement, in total greatly exceeded Mr Merolli's expectations. Part of the explanation no doubt lies in the fact that when the slab was laid after the re-excavation had been completed, its dimensions were larger than originally designed. Timetrex contended that this was because the re-excavation affected the stability of the surrounding earth. Mr Merolli did not dispute this.
- 70 I consider the conclusion is inescapable that, if Mr Merolli had been allowed to go on with his contract, he would have substantially lost the benefit of the works he had performed and, in addition, would have had to spend far more to complete the project than he had allowed for in his contract. The termination, in effect, protected him from losing money.
- 71 I accordingly find that Mr Merolli has not made out his claim for damages for loss of profit.
- 72 However, as the innocent party, Mr Merolli is entitled to recover a fair sum for the work he performed prior to the point his contract was wrongfully terminated.
- 73 Mr Merolli, in his solicitor's letter, claims damages in respect of work performed of \$11,692 comprising:
- Labour, 4 men at \$440 per day for 4 days, or \$7040;
 - Packing sand, 28 metres at \$55 per metre plus delivery of \$123, rounded down to \$1660; and

Excavator, at \$85 per hour for 4 days, \$2,992.

- 74 The figure of \$11,692.00 was attacked as excessive by Mr Mazza, but no detail was given.
- 75 Analysis of Mr Merolli's statement suggest that his workers were on site on at least four days. How many workers were involved was not clear. By way of comparison, the new contractor, Nigido, charged for 357 man hours, which at 8 hours a day (as worked by Mr Merolli's men), equates to 44.6 man days. On this basis, Mr Merolli's claim for 16 man days of labour appears modest.
- 76 The implied rate for labour of \$50 per hour plus GST does not appear unreasonable. Indeed, this rate is precisely what Nigido charged, and Timetrex accepted.
- 77 The rate of \$50 plus GST for packing sand appears reasonable. Again, it is the same rate as Nigido charged.
- 78 Finally, the rate of \$85 plus GST for the excavator compares favourably with the \$105 plus GST per hour charged by Nigido, albeit for a 9 tonne excavator.
- 79 None of these rates were specifically attacked by Mr Mazza, and I am prepared to accept them. Given that Mr Merolli is seeking in total less than 25% of his version of the contract sum, which is \$43,373 for the slab inclusive of pump, plus 40 cubic metres of blinding concrete at \$170 per metre plus GST = \$7480, plus pump, I am prepared to accept his figures for the cost of performing excavation and sand packing prior to termination.
- 80 I am aware that the value of these works may have been lost to Mr Merolli had he remained on site for the reasons discussed above. However, as he was deprived of the opportunity to complete his works, this is not relevant to the assessment of his damages.

FINDING AND PROPOSED ORDERS

- 81 I find Timetrex is liable to Mr Merolli in the sum of \$11,692.00, and I will make an order accordingly.
- 82 Pursuant to s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*, I will order that Timetrex reimburse to Mr Merolli the filing fee paid by him of \$533.40.

MEMBER C EDQUIST