

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP401/2016

**CATCHWORDS**

Domestic Building work - Relevant building surveyor – land subject to overland flooding - report and consent of Council required for building work – Building surveyor issuing permit for building work notwithstanding that no report or permission obtained – Applicant constructing work in reliance on permit – order of Council to demolish work – claim by Applicant for wasted cost of construction and cost of demolition and other losses arising from reliance on permit – assessment of loss

<b>APPLICANT</b>	Azam-sam Mohamady
<b>RESPONDENT</b>	Protek Building Surveying Pty Ltd (ACN 105 384 727)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	5 to 8 June 2017
<b>DATE OF ORDER</b>	1 August 2017
<b>CITATION</b>	Mohamady v Protek Building Surveying Pty Ltd (Building and Property) [2017] VCAT 1164

**ORDERS**

1. Order the Respondent to pay to the Applicant \$251,942.23.
2. Costs and the Applicant's claim for interest are reserved for further argument.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	In person
For the Respondent	Ms S. Kirton of Counsel

## REASONS

### Background

1. The Applicant is the owner of a dwelling house in North Ringwood (“the House”). The Respondent is a building surveyor. Its director is a Mr Pisotek.
2. The House was purchased by the Applicant in 2004. It had been built as a three bedroom house on very high stumps, resulting in a substantial subfloor space underneath. A previous Applicant had laid a concrete slab and installed a toilet under the House and the area appears to have been used as a workshop.
3. In 2008 the Applicant was conducting a restaurant business and decided to convert the subfloor area under the House to a commercial kitchen for use in her business. She consulted the local council, which was the Maroondah City Council (“the Council”), and was informed that she would need to obtain a building permit from a building surveyor. She contacted the Respondent and subsequently, on 24 November 2008, made application to it for the issue of a building permit.
4. The permit application was accompanied by hand-drawn plans and professionally prepared engineering drawings. In the course of dealing with the application, the Respondent made some enquiries of the Council and was informed in writing that the allotment was designated as being affected by uncontrolled overland drainage and as a consequence, a report and the consent of the Council was needed for any building work. Notwithstanding this notification, a permit was subsequently issued by the Respondent on 24 March 2009 without the required report and without the consent of the Council having been obtained.

### Construction

5. Work began in about April 2009. Construction of the alteration was by a Mr Khoban, a long-time close friend of the Applicant who dealt with the Respondent and carried out all of the work.
6. After the permit was obtained the Applicant ceased business as a restaurateur and, during the course of construction, she decided that instead of constructing the area under the House as a commercial kitchen she would add some extra internal walls and construct it as a two-bedroom dwelling for herself.
7. The Respondent’s inspector was informed of this change at the time of the frame inspection and he requested that amended plans be provided to reflect the changes. According to the evidence of Mr Khoban, that was done.

### Occupancy

8. In about June 2010, when the construction was completed, the Applicant moved into the newly created dwelling (“the Apartment”) and occupied it

as her home. She did not live there continuously. She said that she was generally there three or four nights a week. At that time there had been no final inspection of the work by the Respondent.

9. In 2011 and again in 2014 the Apartment was flooded, causing extensive damage to the Applicant's carpets and other belongings.

### **Notices from the Council**

10. On 4 September 2013 the Council issued a building notice to the Applicant asking her to show cause why the Apartment should not be demolished and the House returned to its original condition as shown in the "approved plans". It appears that, although the Council had been informed by the Respondent on 14 January 2009 that Mr Pisotekhad been appointed as building surveyor for the construction of the Apartment, the Council employee who prepared and served this notice was not aware of the building permit the Respondent had issued. Hence, the "approved plans" referred to in the Council's notice were those of the House as originally constructed.
11. On that same day, the Applicant contacted the Respondent and asked for a final inspection. The Respondent's inspector conducted a final inspection but it was not approved. It was inspected again on 28 October 2013 and approved, subject to the production of certain certificates together with as-built plans.
12. On 24 September 2014, the following year a certificate of final inspection was issued by the Respondent. On 10 February 2015 a certificate of compliance was issued approving the ceiling height.

### **Demolition order**

13. On 9 December 2014 the Council issued an order requiring the Applicant to demolish the Apartment. The wording of this document would suggest that the Council was still unaware that a permit has been issued for the construction. It provided that the building order would be cancelled if the Applicant provided certain certificates and documentation, including a building permit.
14. On 20 October 2015 the Council served a further notice expressing concerns about flooding and calling upon the Applicant to justify why the work carried out pursuant to the building permit issued by the Respondent should not be demolished and the House returned to its original condition.
15. On 14 December 2015 an order was issued by the Council to the Applicant requiring her to:

"Demolish the alterations made under the building permit number BS 16734/20090004/0 issued by Protek Building Surveying, and remove debris to reinstate the dwelling and land back in accordance with the original building permit issued by the City of Ringwood, building permit number 11289".

16. It is not disputed that the Applicant is now required to comply with this order although she has not done so yet and says that she does not have the money to do so.

### **This application**

17. By this proceeding, the Applicant seeks damages from the Respondent for the losses that she has sustained by reason of having acted on the faith of the building permit the Respondent issued.
18. The Respondent admits liability and the only issue is as to the quantum of the damages to be awarded.

### **The hearing**

19. The matter came before me for hearing on 5 June 2017 with five days allocated. The Applicant appeared on her own behalf and the Respondent was represented by Ms Kirton of counsel.
20. In support of the Applicant's case I heard evidence from the Applicant, from a Mr Schwab from the Council and from Mr Khoban. The Applicant had filed a report from a building consultant, Ms Georgia McKay, assessing the cost of complying with the council order and another report from an architect, Alan Green, assessing the cost to rebuild a house of similar size with similar finishes at the same location at present day rates. Neither Miss McKay nor Mr Green were called to give evidence. The only evidence called on behalf of the Respondent was that of a building expert, Mr Osborne.
21. Evidence concluded on the afternoon of the fourth day and after hearing short submissions I informed the parties that I would provide a written decision.

### **The expert evidence**

22. Ms Kirton said that since Ms McKay was not called I should give her report little or no weight. I do not accept that submission.
23. Quite obviously, sworn evidence must be given more weight than unsworn evidence and the evidence of a witness present at the hearing and available to be cross-examined must also be given more weight than the evidence of a witness who was not called. However that does not mean that an expert's report obtained by a party, usually at considerable expense, should be ignored simply because the expert is not called.
24. I summarised my view of the matter in the recent case of *Osborne v. Construc Builder Pty Ltd* [2007] VCAT 992 where I said (at paragraphs 7-10)
  - “7. An expert witness' report that accords with the practice note will set out the expert's observations and express his opinion concerning them. What the expert says in that regard is generally not able to be contradicted, in that, it is most unlikely

that anyone could say that the expert did not make the observations or form the opinions that he has expressed in the report. Whether those opinions are accepted or not depends on a number of matters, principally, whether any facts upon which the opinions are based have been established by the evidence as a whole. The observations recorded by the expert might not accord with the observations of other witnesses or the facts as found by the Tribunal. The expert's opinion must also be weighed against other expert opinion.

8. By s.98 of the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal is bound by the rules of natural justice but it is not bound by the rules of evidence and it may inform itself on any matter as it sees fit. This tribunal commonly relies upon expert reports, quotations and other documents where the author of the document has not been called, giving these documents such weight as appears to be appropriate in the circumstances of the particular case.
  9. By s.102, the Tribunal must allow a party a reasonable opportunity to call and give evidence. Mr Ryan's reports were produced and sought to be relied upon by the Builder as part of its case. They had previously been served and it is apparent from the Scott Schedule that the Applicants' representatives had prepared their case on the basis that they would be relied upon. It was only during the hearing that it was known that Mr Ryan would not be called.
  10. Since the reports have been served and are sought to be relied upon by the Builder as part of its case I should look at them and give them such weight as seems appropriate in the circumstances, bearing in mind that the observations recorded in the reports were not supported by sworn evidence and that Mr Ryan was not available for cross-examination."
25. Miss McKay's report deals only with the cost of complying with the Council's order. It appears from the text of each report that the main factual basis of both Mr Osborne's opinion and Ms McKay's opinion on this issue is the inspection of the structure that each of them carried out. They were also provided with the information by the Applicant that is described in each report.
  26. Mr Green's report is much less detailed than the other two reports and costs a new construction at present day rates on a square meterage basis.
  27. Quite obviously, Mr Osborne was available to be questioned as to the observations that he made and the conclusions that he reached whereas Miss McKay was not. That must be borne in mind when comparing the two opinions but it is not a reason to reject Ms McKay's report out of hand.
  28. Ms Kirton pointed out that the Applicant said that she was dissatisfied with Ms McKay's report. That is true, but the Applicant said that this was

because she had asked Miss McKay to cost the construction of the Apartment, not its demolition.

### The claim

29. In her particulars of claim, the Applicant seeks damages with respect to the following alleged losses:

(a) Cost of construction of the Apartment	\$263,330.00
(b) Additional cost of construction of the Apartment	\$ 40,486.36
(c) Cost of demolition as per Council's order	\$103,348.64
(d) Bank interest	\$168,014.00
(e) Losses from the flood in 2011:	
Cleaning, (White Lilies Cleaning Service)	\$ 9,306.00
Loss of personal items <u>\$30,000.00</u>	\$ 39,360.00
(f) Rent from 15 December 2015 (continuing)	\$ 15,800.00
(g) Cost of advertising property for rental	\$ 379.50
(h) Personal cost and time, pain and suffering	\$ 65,000.00
(i) Legal costs paid to Hutchinson legal, Solicitors	\$ 428.00
(j) Legal costs to Maripa & Co, Solicitors	<u>\$ 8,427.00</u>
Total of amounts claimed	<u>\$536,559.50</u>

The Applicant also claims interest.

30. Although she claims losses arising from the flood which occurred in 2011, no claim is made with respect to the losses that she suffered in the further flood which occurred in 2014.

### How damages should be assessed

31. Liability is admitted and so the only issue is the assessment of the damages to be awarded. Since the negligence complained of is that the Respondent issued a building permit when it should not have done so, I accept Ms Kirton's submission that the task is to assess what it would cost to put the Applicant in the position she would have been in if the permit had never been issued.

### Cost of construction \$175,000.00

32. In her claim, the Applicant seeks \$263,330.00 as the initial cost of construction of the Apartment, plus the further sum of \$40,486.36, which is said to be the additional cost of construction. Neither of these figures was established by the evidence.

33. In a statement to the Victorian Building Authority, the Applicant said that the cost of the project was about \$235,000.00.
34. She said that to finance the construction she obtained a loan from her bank. The bank documents that were produced on subpoena showed that the application for finance was made on 4 April 2008.
35. The evidence of the actual cost incurred by the Applicant in constructing the Apartment is most unsatisfactory. According to her evidence there was a building contract prepared between herself and Mr Khoban but the only copy of the contract was held by her bank and it was discarded after seven years. The bank file was in evidence, having been produced by the bank under subpoena. There is no copy of the contract on the bank file and it seems unlikely that the bank would have discarded a copy of the contract and yet kept all the other documents. Nevertheless, it also seems unlikely that the bank would have advanced money for construction without a contract of some kind being supplied so it is plausible that such a document was prepared.
36. Even if the Contract had been produced it would have had little relevance, because the Applicant said that it was not to build the Apartment but rather, to construct a stand-alone two-bedroom home. Plans for such a structure were tendered.
37. Although a loan was obtained, the proceeds were not used directly for the construction of the Apartment, Instead, the money was used by Mr Khoban to finish another house he was constructing for himself in Box Hill. He then constructed the Apartment for the Applicant. The flow of funds from the loan to the construction of the Apartment is not directly established.
38. The Applicant said that she believes that she paid Mr Khoban between \$90,000 and \$120,000 towards the construction of the Apartment in various amounts as recorded in her banking records. She said that further money was credited to her in lieu of wages for work that she performed in Mr Khoban's business. She said that at that time was working two jobs, one in the restaurant and one doing the administrative and secretarial work for Mr Khoban's business.
39. Mr Khoban has provided the Applicant with a number of documents intended to prove the cost of construction of the Apartment. They were as follows:
  - (a) a tax invoice dated 10 October 2016 for the construction, purporting to claim \$298,416.00. However this document was prepared for the purpose of this proceeding and was not an invoice that he actually rendered to her.
  - (b) a document dated 15 April 2008, which purports on its face to be a quotation to carry out the work for a price of \$273,340.00. The Applicant said that this was to see what it would cost. She said that,

notwithstanding the date that it bears, the document was prepared in 2016 at the request of her solicitor.

- (c) a further document purporting to be a tax invoice dated 10 October 2016 from Mr Khoban's business, ASAP David's Plumbing. The total of this "invoice" is \$271,288.00. It purports to set out payments made to Mr Khoban on various dates that are stated but the dates do not tally with the banking records that have been produced.
  - (d) another document prepared by Mr Khoban, dated 15 April 2008, is under the name "A D Renovation". This document was actually prepared by the Applicant who was employed by Mr Khoban to prepare documents for his business. It purports to be a quotation to construct a two-bedroom unit behind the existing building for a price of \$135,000. Again, it is not a contractual document for the construction of the Apartment although the Applicant said that it was the document they used to obtain the bank finance.
40. Of the above documents, the first three seem to be reconstructions without supporting documentation and the last is not relevant.
  41. A table of construction costs was prepared by the Applicant and Mr Khoban from figures that were said to have been taken from Mr Khoban's diary. The Applicant said that she typed it on her computer using a template that Mr Khoban had.
  42. She said that she did not pay Mr Khoban the total of those costs but paid him according to the credits due to her for money that she lent him and by work that she did for him in his business. She was taken through the bank statements during cross-examination and there does not appear to be any clear correlation between the payments shown to have been made to Mr Khoban and what the Applicant says were the construction costs.
  43. The Applicant acknowledged in cross-examination that she did not know how much she had paid Mr Khoban but she said that she is obliged to pay him she owes. It is clear that the Applicant lent large sums of money to Mr Khoban for him to finish his own house and that he then proceeded to construct the Apartment. It is not clear she still owes him anything.
  44. Ms Kirton said that there was no evidence that the Applicant had paid Mr Khoban any money because their financially relationship was so complex with money passing in both directions. She said that I should allow either the total of the amounts that the Applicant lent to Mr Khoban as shown on the bank statements, which she said was \$91,750.00, or the theoretical benefit that she might have got from the construction, as to which there are no records apart from the spreadsheet that Mr Khoban produced. She said that this spreadsheet was based upon opinion evidence that Mr Khoban was not qualified to give. She said the factual basis of the spreadsheet was said to be a blue diary that Mr Khoban kept. Although she said that the diary



does not contain the information in the spreadsheet, it does contain some of the information.

45. It is clear that the Apartment was constructed at considerable expense and that this cost was defrayed by the Applicant advancing money to Mr Khoban that she never got back and by her working for him for an unknown period without payment. It is not possible to assess what the precise cost to her was because of the complex interrelationship between her finances and those of Mr Khoban. However at the completion of the construction she had an apartment that, if it had been lawfully constructed, would have been of considerable value. It is also reasonable to suppose that, had she not constructed the Apartment the money used to construct it would have been spent on some other project of equivalent value which she would now have.
46. The Applicant suggested that she owed Mr Khoban the amount in the spreadsheet and that she had to pay that to him. I think that statement strains credibility. The work was done over eight years ago and I think that if anything further was to be paid it would have been paid by now. Moreover, as Ms Kirton pointed out, any claim by Mr Khoban to recover the money would be unsuccessful because there was no domestic building insurance and the *Domestic Building Contracts Act 1995* has generally not been complied with.
47. I find it impossible to assess the construction cost of the Apartment on the basis of the evidence the Applicant has presented concerning contracts, banking records and the like.
48. Mr Green said in his report that, to construct a new residence the same size as the Apartment with similar features at today's rates would cost \$198,828 but he added that this was an estimate only. Some discount would have to be applied to arrive at a reasonable cost eight or nine years earlier. Mr Green was also not called to explain how that would relate to what I have to decide.
49. I asked Mr Osborne what he thought a reasonable cost of construction would have been for what he saw and he suggested a range of between \$120,000.00 and \$160,000.00.
50. Mr Khoban said in his evidence, and it was put to Mr Osborne during his cross-examination, that the space below the House had to be substantially deepened in order to allow the construction of the Apartment. He said that the soil was very difficult to excavate and he had to use a jackhammer to remove the existing concrete slab and extend the ceiling height from 1.6 m to over 2m. He said that because he was working under the House he could not use any equipment and the excavation had to be done by hand. He said that it took him a couple of months to carry out the excavation work.
51. Upon hearing this Mr Osborne agreed that if the work had to be done by hand the cost would be extra because there would be a much higher labour

cost. He did not put a final figure on it but he said he could not see an extra \$100,000.00 for doing that.

52. Doing the best I can on the very unsatisfactory evidence that I have I assess the likely cost of construction of the Apartment at \$175,000.00 at the time it was built.

**Loss of rental \$1,600.00**

53. The Applicant said that she was unable to let the House because she did not have a certificate of final inspection. That might have been a reason for not being able to let the Apartment but I cannot see why she could not have rented the upper part of the House, given that the Apartment was constructed as a separate dwelling. She also said that she had to ask the tenants to move out because the Council had told her that she was not able to lease the House. According to Mr Schwab's evidence, the Council's concern was that the Apartment was a separate dwelling and the original upper part of the House was being used as a rooming house and he told her that she could not do that.
54. Rental records provided by the estate agent showed rental for the House of \$1,238 per month between 7 October 2006 and 7 October 2007 and \$1,390 per month from 13<sup>th</sup> of October 2007 to 13 January 2008. That was before the Apartment was built.
55. The Applicant said that she had three or four boarders living on the property up until 2014 paying various amounts and that, in April 2015, her son and daughter in law moved in to help with the mortgage and pay the bills. She said that she then decided to try and let the House. An invoice dated 1 December 2015 from an estate agent for \$280.50 for advertising has been produced along with a receipt for payment. The property was advertised but she said there were no enquiries. The claim with respect to loss of rental for the upper portion of the House is not established.
56. There was also a claim with respect to rental that she said she paid for alternate accommodation because she was unable to live in the Apartment. I accept Ms Kirton's submission that this claim is misconceived. If the permit had not been issued there would have been no Apartment for her to live in. Indeed, she has been able to live for six years in an apartment that would not have been available to live in if the permit had not been issued.
57. Nevertheless, Mr Osborne has said that the House will be uninhabitable while the necessary demolition work is carried out and that will take four weeks. I will allow four weeks loss of rent for the House for the period of demolition which, on the basis of the limited evidence produced, I assess at \$1,600.00.

**Interest** Reserved for submissions

58. In her application, the Applicant claimed bank interest of \$168,014.00 that she said she had to pay on her loan.

59. There is no direct connection between the loan the Applicant obtained and the construction of the Apartment. According to the quotation that she used to get the loan, the purpose of the advance, as stated to the bank, was to construct a two bedroom unit behind the House but she had no intention of constructing such a unit. When the loan was obtained, much of the money was used to complete Mr Khoban's house.
60. At the hearing the Applicant expressed the interest claim as being for loss of use of the money and the opportunity that she would have had of investing her money in something else. The Applicant said that, if she had not obtained the building permit she and Mr Khoban would have purchased a property in Box Hill which would now be worth \$1.5 million. She said that instead, Mr Khoban bought the property on his own.
61. As Ms Kirton pointed out, the property in Box Hill she referred to did not become available for purchase until much later and she had entered into other investments with Mr Khoban apart from that in the meantime. There is no clear evidence of any particular opportunity that she has lost and it is speculative to say what she might have otherwise done with the money. The allowance of the cost of the construction is intended to compensate the Applicant for the loss of the capital outlay that she made and she had some use of the Apartment until the Council required her to move out.
62. The claim for interest under s.53 of the Act will be reserved for the forthcoming costs application.

**The flood damage** \$2,000.00

63. This claim is with respect to damage suffered from the 2011 flood. There is no claim with respect to the 2014 flood. The Applicant acknowledged that the insurance company had paid for the damage to the building and for the removal of the mud. She said that her claim was for the cleaning and the removal of the contents, including curtains and carpets.
64. Since the act of negligence complained of was the issue of a permit to construct a dwelling on land subject to flooding I think that a loss due to flood damage was reasonably foreseeable, both at the time the contract was made and also at the time the breach occurred. The difficulty is assessing the amount of the loss.
65. She acknowledged that White Lilies Cleaning Service was a business name that she registered herself, that the cleaning work was done by family members and that the invoice that she produced was prepared by her nephew because she needed it for her case. She said that the address for the cleaning service that appears on the invoice is her sister's house.
66. A number of business name searches were put to her, to the effect that the business name was not in fact registered and that the ABN stated on the invoice belonged to a business in South Australia known as "White Lily Cleaning Services". She said that she did not know that but claimed that the amount set out in the invoice was what the work was worth. She said that

she was no longer relying upon the invoice and sought instead an amount of \$4,550.00 for cleaning.

67. In regard to the claim for \$30,000.00 for loss of personal belongings she said that she did not know what it cost her to replace everything.
68. The photographs produced show substantial damage caused by the floodwater and a considerable amount of cleaning must also have been carried out. Although her household insurance paid for the damage to the structure of the Apartment, the Applicant also said that her computer hard drive and records were destroyed as well as Persian carpets and other belongings.
69. In an affidavit prepared for her to swear, she stated:

“I was required to make payments for the replacement of my personal items from the 2011; some of my badly damaged/destroyed contents were my entertainment set, TV, PC, leather furniture, washing machine, dishwasher, fridge, walnut bedframe, mattresses, lots of leather brand shoes, bags, clothes electrical in the boxes, five Persian rugs, lots of cloths..... Over the next five years I slowly replaced and paid with my bankcard some of which are reflected in my purchasing receipts at exhibit SM 11”.(sic.)
70. In the exhibit SM 11 referred to, there are no receipts or invoices which date from after the time of the flood that might relate to the replacement of any items of the descriptions given. They all appear to be documents generated in 2015 Moreover, the photographs relied upon do not indicate that the floodwater was particularly high. One photograph shows a set of shelves sitting on the floor. There are mud stains on the bottom shelf but none on the shelf above.
71. The onus of proof is on the Applicant and without reliable evidence as to what the actual losses were I can only allow \$2,000.00 on the basis that, whatever the loss was, I think that it must have been at least that much.

#### **Demolition and reinstatement costs**

72. The Applicant produce a quotation in an amount of \$88,450 plus GST, for the demolition of the Apartment, purportedly given by a Jason Aldridge who was not called. Again, this does not appear to be a genuine quotation.
73. Ms Kirton said that the only room to move in regard to the cost of demolition was whether the slab is left or whether it is removed. Those were the two scenarios costed by Mr Osborne.
74. Mr Osborne said that he visited the property on 12 May 2017 accompanied by the Applicant. He said that he had been instructed to:
  - (a) provide a scope of works required to comply with the Council’s building order of 14 December 2015 and a costing for the carrying out of the work;

- (b) provide a scope of works required to reinstate the premises back to the condition that it was in when the building permit was issued on 24 March 2009 and a costing for the carrying out of the work;
  - (c) estimate how many days it would take to carry out the work;
  - (d) say whether it would be necessary for the Applicant to relocate to temporary accommodation while the works is carried out; and
  - (e) provide a fair and reasonable salvage value of the materials to be removed.
75. He said that he was on site for 45 to 50 minutes and that he did not speak to Mr Khoban or seek any information from him but he spoke to the Applicant.
76. He said that his costing for each scope of works that he suggested was based on the work being carried out by a small competitive builder with access to the required trades, suppliers and subcontractors. The hourly rates he allowed were \$65 for general trades, \$55 for labourers and \$75 for licensed trades such as electricians and plumbers. He also allowed \$75 per hour for painters and plasterers, that figure to include materials as well as labour.
77. He said that he added a loading to some items for contingencies. He assumed that:
- (a) no repair work would be required to the current building elements due to any demolition damage;
  - (b) the subfloor frame to the original dwelling had not been altered in any way;
  - (c) the original stumps were in decent condition. Although he allowed for rectification of three that he had been told were damaged he did not allow to replace any which might need replacement.
78. He said the margin added to each item was intended to cover preliminaries, permit fees, warranties, overheads and profit and that a rate of 30% has been used generally.
79. In cross-examination he acknowledged that he did not know whether any of the stumps were missing or would need to be replaced which is why he had allowed for an engineer to come out and inspect them. He said that he had assumed that they were all there. He said he had allowed a 10% contingency on the overall costing in case any additional work needed to be done.
80. Mr Khoban said that, in the course of building the Apartment, he removed the pads supporting the stumps that were supporting the House. Mr Osborne said that he could not comment on that. He said that the soil report suggested a founding depth of 1.1 m but that a builder would normally bore the hole for each stump down to a suitable foundation then put concrete in it

to support the stump. He said there should be about 150 mm concrete between the bottom of the stump and the founding depth. He did not suggest that Mr Khoban's evidence concerning the removal of the pads was unlikely to be true.

81. In answer to a question from the Applicant, Mr Osborne agreed that it was not known whether the stumps would need to be replaced and that if the stumps were inadequate it would be dangerous, which is why he allowed for an engineer to come in and why he had said that no one should occupy the upper floor while the work was being carried out. He said that all he had allowed for was a single visit by an engineer to come in and \$1,200.00 for the cost of reinforcing three stumps. He said that there was a contingency sum if any stumps have to be replaced.
82. Miss McKay said in her report that she inspected the property on 5 September 2016. She said that she assumed that the ground floor or subfloor of the House was completely enclosed with hardwood timber baseboards and that she was advised by the Applicant that there was a fully enclosed workshop on the south-west corner which included a toilet with light and power supply. She said this was not shown on the original permit documents as identified in the building order so she separated the cost to reinstate it to this condition.
83. Included in her assessment were the following allowances:
  - (a) for two site inspections by an engineer to examine the condition of the original concrete stumps before progressing to resolve any issues of design modifications;
  - (b) to take up the concrete slab including all internal and edge beams. She noted that the stumps may be damaged in the process because they may not have been isolated from the slab but she made no allowance to replace any stumps;
  - (c) the removal of the timber deck at the western end of the building;
  - (d) all rubbish removal.
84. For that scope of works, she assessed a cost of \$103,348.64, inclusive of GST.
85. Mr Khoban said that the posts would have to be replaced and that Mr Osborne had not allowed for that. Ms Kirton pointed out that Ms McKay had not said in her report that the stumps would require replacement and also, she said that Mr Khoban was not qualified to give that evidence. In matters of opinion, I must prefer the expert evidence but, since the stumps are enclosed within the walls, Mr Khoban is the only one who has observed the actual condition of the stumps.

## **The scope of Works**

86. The building order requires the following work to be undertaken:
- “Demolish the alterations made under the building permit number BS 16734/20090004/0 issued by Protek Building Surveying, and remove debris to reinstate the dwelling and land back in accordance with the original building permit issued by the City of Ringwood, building permit number 11289”.
87. In order to comply with this order, everything that has been done pursuant to that building permit will need to be removed. Mr Osborne provided costings for two scopes of work, one involving the removal of the concrete slab and the other leaving it in place. It was suggested during evidence that, since there had been a concrete slab of unknown construction in the workshop area under the House before the Apartment was built, it will not be necessary to remove the concrete slab. I have some sympathy with that view as a matter of common sense but, since the order has not been varied to allow that, I cannot assume the Council will permit the slab to remain.
88. It was also suggested that, if the slab were to be removed, it would not be necessary to remove the edge beams and internal beams and Mr Osborne has only allowed to remove the slab down to ground level. Although it might seem pointless to remove beams that are buried in the ground, the entire concrete slab was part of “the alterations” and so it will all have to be removed, including the beams, because that is what the order says. Again, I cannot assume that the Council will be willing to accept some lesser scope of works.
89. In addition, at the time the building permit was issued, there was an enclosed workshop, concrete slab and toilet under the House which was demolished in order to construct the Apartment. Quite apart from the order, if the Applicant is to be put in the position she would have been in had the building permit not been issued, this would need to be reinstated to an equivalent standard but no-one has costed that.

## **The respective costings**

90. The items in the costings and the amounts that I shall allow are as follows:

- (a) Engineer \$1,800.00

Mr Osborne allowed \$1,200.00 for an engineer’s inspection of the subfloor once the demolition has taken place. Ms McKay allowed \$1,800.00 for two inspections. After listening to the evidence of Mr Osborne and his responses to the matters that were put to him by Mr Khoban and the Applicant and the uncertainty that he acknowledged existed concerning the state of the stumps and the potentially dangerous condition of the House once the support of the Apartment is removed I think it is appropriate to allow for a second inspection.

(b) Removal and storage \$1,495.00.00

Mr Osborne has allowed \$480.00 for the storage of the Applicant's boat for four weeks, \$300.00 for four hours labour to pack the Applicant's belongings and \$265.00 to store the Applicant's belongings for one month. Ms McKay has allowed \$150.00 to purchase boxes and \$1,200.00 for 20 hours labour in packing the contents of the Apartment into the boxes. She has also allowed a further \$300.00 for removal and wrapping of the artwork and wall hangings. She has made no provision for the storage of the boat.

The photographs show a considerable quality of clothing, furniture and other items in the Apartment as well as a number of artworks on the walls. It seems to me unlikely that the contents could be packed in as little time as the four hours Mr Osborne has allowed. Ms McKay was not present to explain why she thought it would take as long as 20 hours. I will adjust Mr Osborne's figures to allow a full day to pack the contents, the purchase of the boxes and the storage of the boat and contents for a month. Altogether that amounts to \$1,495.00.00.

(c) Preliminaries \$4,802.00

Mr Osborne allowed \$1,800.00 for a building permit, \$1,000.00 for a Council asset protection permit, \$852 for an item called "Storage on Council asset" and \$1,150.00 for insurance.

Miss McKay agreed with the figures for the building permit, and the warranty insurance but does not mention the storage on Council asset item. She has allowed an additional \$200.00 for the asset protection permit although she said that the bond was only \$1,000.00. She has allowed the bin hire elsewhere in her assessment.

Since Miss McKay was not present to explain the different figures I will allow Mr Osborne's assessment.

(d) Hire items \$8,863.00

Mr Osborne has allowed for the hire of a portable toilet, a bin, a Bob cat, jack hammer, demolition saw and acrow props, all of which total \$8,863.00. Ms McKay does not mention the hiring of any equipment. Obviously equipment will be required but the cost is possibly taken up in her other assessments. I will allow Mr Osborne's assessment

(e) Disconnection of services \$1,920.00

Mr Osborne has allowed total of \$1,800.00 for the disconnection and reconnection of the electricity, gas, water, drainage and sewerage to the ground floor. Ms McKay seems to have split this amongst a number of items. I think for consistency I should adopt Mr Osborne's approach and allow his figure. However in the breakdown of his costing he has not allowed for a certificate of electrical safety or a plumbing certificate, both of which are included in Ms McKay's



costing. Since the plumbing and the electrical wiring is to be substantially altered I think I should accept Ms McKay's evidence that these will be necessary. That increases his assessment by \$120.00, being \$60.00 for each certificate.

(f) Label for demolition - apart from the slab \$2,600.00

Mr Osborne was allowed \$1,760.00 for four days work for a labourer to remove the internal fixtures and linings and the external linings and frame. In his assessment he does not mention the deck at the western end as part of the construction to be removed or the strip paling fence in-fill

Ms McKay assessed 8 hours to strip out all fittings including joinery, 40 hours to strip out the wall and ceiling linings, architraves and skirting boards, an hour to remove the in-fill fence, 5 hours to remove the deck, 8 hours to remove all the plumbing, pipe-work and the drains in the ground, 4 hours to strip out electrical wiring, 6 hours to remove and reinstate downpipes, 8 hours to strip out windows doors and frames and 16 hours to strip external wall linings.

The times allowed in Ms McKay's report are considerably more than those allowed by Mr Osborne. However Mr Osborne was not questioned on his assessment of the time to be taken and Ms McKay was not present to explain why the additional time was needed. Nevertheless, looking at the photographs and bearing in mind the care that Mr Osborne said would have to be taken in the demolition I find it hard to believe that it would take as little as 24 working hours if that were to include everything.

I think that I should add to Mr Osborne's assessment the time taken to remove the western deck and the infill fence and the fittings and joinery which are not mentioned in his report and which he does not appear to have allowed for. That would increase his assessment to \$2,600.00.

(g) Removal of the slab \$11,284.00

Mr Osborne has allowed 80 hours for labourers at \$55.00 an hour to cut and jackhammer the slab, being a total of \$4,400.00. His costing did not include the beams. Ms McKay has costed the saw cutting of the slab on a lineal metre basis and has allowed \$4,800.00 for the removal of the slab including the beams. She has also allowed for six bins of 6 m<sup>3</sup> each to remove the cut concrete and 5 days hire of jackhammer.

On this matter I prefer Miss McKay's opinion because she has assessed the cost of removing the whole of the slab and not just part of it. However I will adjust her figure by deleting the jackhammer hire, which Mr Osborne has already allowed for and I will allow only half the bin hire figure because Mr Osborne has already allowed for bins to

remove the top part of the slab. That reduces her assessment to \$11,284.00.

(h) Floor bracing \$1,596.80

Mr Osborne allowed \$1,040.00 to install bracing “as per engineer design”, being 16 hours labour for a carpenter, and \$556.80 for materials, being 16 lineal metres of timber with clips, bolts and washers, making a total of \$1,596.80. Miss McKay’s figure was similar. I allow Mr Osborne’s assessment.

(i) Plinth boards \$5,082.00

Mr Osborne assessed the cost of supplying, installing and painting plinth boards at \$5,082.00. Miss McKay’s figure was similar. I will allow Mr Osborne’s assessment.

(j) Levelling and laying rock \$1,171.70

Mr Osborne estimated \$1,720.00 to level the ground under the House and install rock. Ms McKay’s figure was \$1,171.70 for the supply of the rock and 20 hours for a labourer to lay it at a cost of \$1,200.00 to lay it. The difference appears to be the amount of rock allowed for. As I have been generally adopting Mr Osborne’s figures where there is not much difference I will allow his figure in order to be consistent.

(k) Termite protection \$2,304.00

There is little difference between the experts as to the cost. I will allow Mr Osborne’s assessment \$2,304.00 for termite treatment to the subfloor area.

(l) Site clean \$480.00

Mr Osborne has allowed \$110 for two hours work to clean up the site. Ms McKay has allowed \$480 for eight hours work. In view of the extent of the work, the acknowledged difficulties of access and the necessity to take up the beams as well, I think Ms McKay’s figure is more likely to reflect the actual cost.

91. Ms McKay has also made allowance for the following matters that do not appear in Mr Osborne’s costing:

(a) Architectural draughtsperson \$1,200.00

Ms McKay allowed \$1,200.00 for the preparation of plans for the building permit. It was acknowledged that a permit is required and indeed, that is set out in the notice that was served by the Council. I accept her opinion that some allowance should be made for the preparation of plans to accompany the permit application.

(b) Building consultant Nil

Ms McKay has allowed \$4,800.00 for 20 hours work by a building consultant to review quotes, negotiate and liaise with builders, review

a proposed contract and engage a builder. It seems to me that, if plans are prepared, the Applicant will be able to find a suitable builder without having to engage a building consultant to carry out that task.

(c) Site supervision Nil

Ms McKay has allowed \$10,000 for site supervision over four weeks and \$2,500.00 per week. Again, I did not have the advantage of hearing her evidence as to why this was justified. It is not a particularly large project and a builder's margin is being added to all of the costs. In the absence of some expert evidence to justify a charge for supervision as well, I think the builder's margin that is to be allowed would cover supervision of the work.

92. Other matters

(a) Contingency 15%

Mr Osborne allowed a contingency figure of 10% whereas Ms McKay allowed a contingency of 30%.

There is real uncertainty concerning what will be found when the Apartment, and particularly the slab, is removed. Mr Osborne acknowledged that he had not allowed to replace any stumps and said that he had allowed a contingency.

The evidence of Mr Khoban is that he has removed the pads that support the stumps. The implications of that are unknown. I have not had sworn evidence from Ms McKay to justify a contingency figure of 30% but I think that in the light of Mr Osborne's evidence and Mr Khoban's evidence, I should increase the contingency figure to 15%.

(b) Margin 30%

Mr Osborne allowed a builder's margin of 30%. Ms McKay allowed 25% but she also made provision for an extra charge for supervision. Mr Osborne's figure is the rate commonly adopted in this Tribunal when assessing rectification work and that is the rate that will be allowed.

93. For the foregoing reasons, the cost of complying with the Council's notice is assessed at \$73,342.23, calculated as follows:

Base costs as detailed above	\$44,598.50
Contingency 15%	<u>\$ 6,689.75</u>
	\$51,288.25
Margin 30%	<u>\$15,386.50</u>
	\$66,674.75
GST 10%	<u>\$ 6,667.48</u>
Total	<u>\$73,342.23</u>

### **Pain and suffering – non-pecuniary loss**

94. An amount of \$65,000.00 is claimed for “personal cost and time, pain and suffering”. Generally, non-pecuniary damages in contract are awarded only in limited types of cases. (see *Baltic Shipping Co. v. Dillon* [1993] HCA 4 at para. 36 et seq. per Mason CJ).
95. This was a contract to provide a building permit and act as building surveyor. It was not a contract for the provision of leisure facilities or enjoyment. General damages have been occasionally awarded by this Tribunal in building cases but only in circumstances where the party seeking the damages had suffered some substantial physical inconvenience or discomfort. (See *Anderson & anor v. Wilkie* [2012] VCAT 432). That was not established in present case. Although the necessity to demolish the apartment has been very upsetting to the applicant, the financial loss that she has suffered is to be compensated. No doubt the preparation for the hearing and the conduct of this litigation has been very stressful for her that is not something for which she is legally entitled to damages.

### **Legal costs**

96. The claim for legal costs is premature. Both sides having foreshadowed an application for costs and that question may be dealt with by separate application following the publication of these reasons.

### **Conclusion**

97. Damages are assessed at \$251,942.23, calculated as follows:

Cost of construction	\$175,000.00
Loss of rental	\$ 1,600.00
Loss of personal property from flood	\$ 2,000.00
Cost of complying with the Council notice	<u>\$ 73,342.23</u>
Total	<u>\$251,942.23</u>

### **Orders to be made**

98. There will be an order that the Respondent pay to the Applicant \$251,942.23. Costs and the claim for interest are reserved for further argument.

**SENIOR MEMBER R. WALKER**