VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D595/2013

DOMESTIC BUILDING LIST

CATCHWORDS

Claim for damages for defective domestic building works brought by a subsequent owner of a home constructed by builder pursuant to a building contract with previous owners of the home. Claim brought against the builder and the relevant building surveyor. Claim as against the surveyor settled prior to hearing. Applicant's claim not time barred. Claim as against the builder succeeds. Sections 8 and 9 of the Domestic Building Contracts Act 1995. No breach of duty of care owed by the surveyor. No apportionment of liability under Part IVAA of the Wrongs Act 1958. Settlement payment made by the surveyor to the Applicant taken into account, per the principle against double recovery, in assessing the damages payable by the builder.

APPLICANT	Ms Kylie White
FIRST RESPONDENT	Mr William Noble T/A WR & EM Noble
SECOND RESPONDENT	Ms Emelda Noble T/A WR & EM Noble
THIRD RESPONDENT	Mr Denis Donohue
FOURTH RESPONDENT	Denis Donohue & Co Pty Ltd (ACN: 062 590 916)
WHERE HELD	Melbourne
BEFORE	Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	10, 11, 12 and 13 February 2014, 4 April 2014
DATE OF ORDER	11 April 2014
CITATION	White v Noble trading as WR and EM Noble (Domestic Building) [2014] VCAT 413

ORDER

1. The First and Second Respondents must pay the Applicant $85,195.46.
2. Costs reserved with liberty to apply. I direct the principal registrar to list any application for costs before Member M. Farrelly, allowing a hearing time of a half day.

MEMBER M. FARRELLY

APPEARANCES:

For the Applicant	Mr B. Reid of Counsel
For the First and Second Respondents	Mr P. Hayes of Counsel
For the Third and Fourth Respondents:	No appearance. Excused from attendance per orders made 14 January 2014

REASONS

1 The Applicant, Ms White, has water leaking to her home in Phillip Island, particularly through and around windows.

2 The home was constructed in 2002/2003, on the property then owned by Mr and Mrs Failla, pursuant to a contract between Mr and Mrs Failla and the first and second respondents who then traded as "WR & EM Noble Builders" ("the builders"). The first respondent, Mr Noble, was at the time the home was constructed, a registered builder.

3 On 28 May 2003 the third respondent , Mr Donohue, a registered building surveyor and principal representative of the fourth Respondent, Dennis Donohue & Co Pty Ltd, (collectively "the surveyor") issued a certificate of occupancy in respect of the new home.

4 The Applicant purchased the home from Mr and Mrs Failla in June 2005. The Applicant says that, since purchasing her home, a number of building defects have emerged, in particular the leaking windows.

5 On 24 May 2013 the applicant commenced this proceeding seeking damages from the builders and the surveyor in respect of the alleged building defects. As against the builders, the applicant says that the builders have breached the statutory warranties applicable to the building works as prescribed in section 8 of the *Domestic Building Contracts Act* 1995 ("DBC Act"), and that pursuant to s9 of the DBC Act the Applicant, as the current owner of the home, is entitled to relief for the breach of the warranties. The Applicant says further, or alternatively, that the builders owed her a duty to take reasonable care in carrying out the works, and that the builders breached that duty.

6 As against the surveyor, the Applicant says that the surveyor owed her a duty to take reasonable care in performing his/its tasks to inspect the building works and to issue a certificate of occupancy, and that the surveyor did not meet that duty. In November 2013, the Applicant and the surveyor reached settlement agreement and sought a consent order that the proceeding as between them be withdrawn. The Tribunal declined to make the order because, in the builders' "Points of Defence" filed in August 2013, the builders assert that the claim brought against them is an "apportionable" claim within the meaning of Part IVAA of the *Wrongs Act* 1958, and that to the extent the builders are liable for damages as claimed by the applicant, the surveyor, as a *concurrent wrongdoer,* is liable for a proportion of the damages as considered just and fair by the Tribunal.

7 The applicant and the surveyor subsequently sought and obtained consent orders on 14 January 2014 to the effect that:

1. The Applicant's Points of Claim as against the Third and Fourth Respondents (the surveyor) was struck out.

2. The third and fourth respondents remain parties to the proceeding, but only for the purpose of the proportionate liability defence pleaded by the builders.

3. The third and fourth respondents were excused from any further attendance in the proceeding.

8 The builders say that any cause of action the applicant had, or might have had, against them accrued more than six years before the applicant commenced this proceeding, and accordingly, the proceeding is statute barred under s5 of the *Limitations of Actions Act* 1958. If the applicant's claim is not time barred, the builders deny liability in respect of the alleged defective works. The builders say that the water leaks and consequential damage are the result of a failure on the part of the applicant to adequately maintain the home.

9 The builders say also that the applicant failed to properly inspect the home prior to her purchase of it, and that the Applicant has no loss in respect of any building defects which ought to have been apparent on a proper inspection. The builders say also that the applicant has failed to mitigate her loss, that is, she has unreasonably delayed taking action to remedy the water leaks with the result that the water damage is more extensive than it would have been had timely remedial action been taken.

10 As noted above, the builders say that if they are found liable to pay damages to the applicant, their liability should be limited to a just and fair sum having regard to what they say is the surveyor's shared responsibility as a *concurrent wrongdoer* under Part IVAA of the *Wrongs Act*.

11 Finally, the builders say that if they are found liable, the settlement sum paid to the applicant by the surveyor pursuant to the November 2013 settlement agreement should be taken into account in assessing the sum of damages payable by the builders to the applicant.

12 For the reasons set out below I find that:

- The applicant's claim is not statute barred.
- The building works, in a number of respects, are defective and do not meet the statutory warranties under the DBC Act, and the builders are liable for the reasonable cost to rectify the defects.
- There is no shared or apportionment of liability as between the builders and the surveyor.

  The settlement payment made by the surveyor to the applicant should be taken into account when assessing the damages to be paid by the builders to the Applicant..

THE HEARING

13 The hearing commenced on 10 February 2014 with 5 days of hearing time allocated. Mr B. Reid of Counsel represented the applicant and Mr P. Hayes

of Counsel represented the builders. A view of the home was conducted on the first afternoon of the hearing. The hearing proceeded on 10, 11, 12 and 13 February. On 13 February, the fourth day of the hearing, Mr Hayes requested on behalf of the builders that the hearing be adjourned because Mr Noble had become ill and was unable to attend to give evidence on 13 or 14 February. The adjournment was granted and the hearing resumed on 4 April 2014.

14 The applicant gave evidence. The applicant also called evidence from Mr C. Winder, a builder who carried out some rectification works to the home in around May 2013. Mr Noble gave evidence for the builders.

15 Concurrent expert evidence was given by:

- Mr A. Zoanetti, a building consultant and a registered building surveyor. Mr Zoanetti was called by the applicant.
- Mr A. Mitchell, a building consultant and structural engineer. Mr Mitchell was called by the builders.
- Mr S. Leonard, a registered building surveyor. Mr Leonard, originally engaged by the surveyor to provide an expert report, was called by the builders.

Each of the experts produced written reports.

THE DOMESTIC BUILDING CONTRACTS ACT 1995

16 Section 8 of the DBC Act mandates certain warranties in respect of domestic building works ("the statutory warranties"):

> **8 Implied warranties concerning all domestic building work**
>
> The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—
>
> (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
>
> (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
>
> (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act;
>
> (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed

by the date (or within the period) specified by the contract;

(e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

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

17 Section 9 of the DBC Act provides:

> **9 Warranties to run with the building**
>
> In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract.

18 Subject to the builders' contention that the Applicant's claim is statute barred under s5 of the *Limitations of Actions Act* 1958, the builders concede that the building works forming the subject matter of the applicant's claim attract the operation of the statutory warranties, and that the Applicant is an *"owner for the time being*" for the purpose of s9 of the DBC Act**.** The builders deny that they have breached the statutory warranties.

CHRONOLOGY AND EVIDENCE

19 On 28 May 2003 the surveyor issued the certificate of occupancy for the newly constructed two storey home. The rear, north, portion of the home is clad with "weathertex" weatherboards, a manufactured timber product. The front, south, portion of the home is clad with rendered foamboard.

20 On 30 June 2005, the Applicant and her then partner executed a sale contract for the purchase of the home from Mr and Mrs Failla. The applicant did not obtain a professional inspection report or expert opinion on the condition of the home prior to entering the sale contract. Shortly after signing the sale contract, the applicant and her partner moved into the home under a licence granted by the vendors. Settlement of the sale contract was finalised on 23 September 2005. The applicant says that, prior to and at the time of entering the sale contract, and during the period she occupied

the home before settlement of the sale contract, she did not notice any building defects or signs that there might be any problems with the building works.

21 The applicant says that in November 2005 she first noticed that a number of the joins between the weathertex boards were opening up. She contacted Mr Noble and, within a few days, he inspected the home. A few days after his inspection, Mr Noble again attended the home and applied a flexible silicon sealant to approximately 40 joints between abutting weathertex boards.

22 Mr Noble says that, because of a shoulder injury, he retired from his occupation (as a builder) in 2005, although he retained his registration as a builder until 2012.

23 In 2006 the applicant became the sole registered proprietor of the home.

24 The windows in the home are blue coated aluminium, most of which are "awning" type windows which wind open outwards from the bottom. A couple of windows in the home are sliding windows. The sliding windows have stickers identifying their brand as "Capeview". There is no brand identification information on the awning windows. The windows which have leaked are the awning windows, most of which are installed in the west facing wall of the home.

25 The applicant first noticed a water leak to a window in December 2011 when, during a particularly heavy rain storm, she noticed water droplets forming on the top and bottom timber reveals of a west facing ground floor window in the rumpus room at the rear of the home. She took a couple of photographs at the time and those photographs were produced in evidence. The photographs show the water droplets on the reveals but otherwise show no obvious signs of water damage to the windows.

26 In January 2012 the applicant rang the insurance company which provided house and contents insurance for the home. The applicant says that she was advised by the insurer that the leaking window was not an insurable event under the insurance policy.

27 In around January 2012 the applicant purchased a tube of silicon and applied the silicon to the exterior of the leaking window where it abutted the surrounding weathertex boards.

28 The applicant says that in around February 2013, some damaged/swelling to the window reveals to ground floor rumpus room window and the upper level kitchen window first became noticeable. The applicant says she did not contact Mr Noble to inspect the damage because the two of them had become antagonistic following an unrelated "planning" dispute in 2011 relating to building works Mr Noble was involved with on a neighbouring property. Mr Noble recalls the matter but does not recall any antagonism.

29 In April 2013 the applicant engaged a builder, Mr Winder, to inspect and rectify the leaking windows and the emerging water damage. After removing the rumpus room window to replace the water damaged reveals,

Mr Winder discovered that the base plates, nearby wall studs, plaster and the flooring and carpet adjacent to the window were severely water damaged and in need of replacement. Mr Window produced photographs he took of the water damage. It is apparent from the photographs that the damage was severe. Mr Winder found a similar state of affairs in respect of the window in the study adjacent to the rumpus room. He also found a similar, although not as severe, problem emerging in the upper level bedroom above the study.

30 Mr Winder says that in the course of attending to rectification works to the leaking windows, he discovered that the windows had no side flashings. He reinstalled the windows with flashings but found that the windows still leaked, albeit not as much. He believes the leaks may be attributable to a design fault in the windows themselves.

31 As part of the rectification works, Mr Winder also removed and replaced a number of weathertex boards surrounding the windows. He says that he noticed signs of water leaks on the sizalation paper and timber framing behind opened up joins in the weathertex boards.

32 In around April 2013, the applicant lodged an insurance claim with her home and contents insurer in respect of the emerging water leaks and associated damage. An assessor appointed by the insurer inspected and assessed the damage. By letter to the applicant dated 20 May 2013, the insurer denied liability for the claim on the ground that the damage was not the result of an insurable event under the insurance policy.

33 In May 2013, the applicant sought legal advice and instructed Mr Winder to cease carrying out rectification works. The applicant has paid Mr Winder $6729.70 for the works he carried out. The applicant also engaged Mr Zoanetti to inspect and report on the home. The applicant's application commencing this proceeding was filed at the Tribunal on 24 May 2013. Mr Zoanetti inspected the home on 30 May 2013 and provided his report dated 6 June 2013.

34 Mr Leonard, engaged by the lawyers for the surveyor, inspected the home on 6 August 2013 and provided his report which is also dated 6 August 2013.

35 The builder engaged Mr Mitchell to inspect the home and comment on the matters raised in Mr Zoanetti's report. Mr Mitchell inspected the home on 27 August 2013 and provided a report also dated 27 August 2013. Mr Mitchell carried out a further inspection on 17 December 2013 following which he added a supplementary section to his report.

36 The surveyor and the applicant reached settlement agreement in November 2013, pursuant to which the surveyor paid the applicant $17,500.

IS THE APPLICANT TIME BARRED ?

37 Section 5 of the *Limitation of Actions Act* 1958 provides that, save for a few specified exceptions, an action founded on simple contract (including contract implied in law) or actions founded in tort cannot be brought after the expiration of six years from the date on which the cause of action accrued. The builders submit that any cause of action the applicant has against them accrued more than six years before the commencement of the proceeding and, accordingly, the Applicant's claim is statute barred. I do not accept the submission.

38 Section 134 of the *Building Act* 1993 provides:

> **Limitation on time when building action may be brought**
>
> Despite any thing to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

39 "*Building action*", for the purpose of s134 above, is defined in s129 of the Building Act to mean an action *for damages for loss or damage arising out of or concerning defective building work*.

40 There are two views as to the effect of s134 of the *Building Act*. On one view, often referred to as the "replacement" view, the section has the effect of creating a special ten year limitation period for building actions. On the other view, often referred to as the "long stop" view, the section does not displace the six year limitation prescribed in the *Limitation of Actions Act*, but supplements it by imposing an outer limit of ten years from the date of the occupancy permit (or the certificate of final inspection as the case may be) for the bringing of a building action.

41 The replacement view has been preferred in previous decisions in this Tribunal[1]. I too prefer the replacement view. As I noted in *Martinov v Extension Builders Australia Pty Ltd and Anor* (2013) VCAT 409 at [27], in my view s134 of the *Building Act* provides a clear cut, special limitation period for building actions, intentionally free of the uncertainty that may arise in identifying a date of accrual of a cause of action.

42 This proceeding was issued prior to the expiry of 10 years after the issue of the occupancy permit and, accordingly, in my view the action is not statute barred.

[1] See *Hardiman v Dory* (2008) VCAT 267, *Thurston v Campbell* (2007) VCAT 340, *Jacobi and Anor v Wilson and Ors* (2012) VCAT 659

DEFECTIVE WORKS

Leaking windows

43 There is no dispute that the awning windows in the ground floor rumpus room, the ground floor bedroom, the study, the master bedroom, bedroom number 2 and the kitchen have leaked causing water damage. Mr Zoanetti says that the windows were poorly flashed and sealed.

44 The builders say that the cause of the leaking is the failure of the applicant to carry out adequate and regular maintenance works. Mr Mitchell says that the windows have not been properly cleaned resulting in the blockage of "weepholes" in the window frames and the deterioration of seals. He says also that window seals ought be replaced regularly every few years as part of a homeowner's normal home maintenance obligations, particularly when the home is located near the sea.

45 I do not accept the builders' submissions.

46 The issue of alleged blocked weepholes is a "red herring". At the view, Mr Mitchell was able to identify weepholes in a sliding window, but not in any of the awning windows. Mr Noble conceded in evidence that there are no weepholes in the awning windows. I accept Mr Zoanetti's evidence that there are no weepholes in the awning windows, and there is no need for weepholes. The windows are designed such that water tracks to the window sill from where it should be expelled to the exterior wall of the home. I accept Mr Zoanetti's evidence that some window sills appear to have inadequate fall to adequately dispel water.

47 I accept Mr Winder's evidence that side flashings were not installed to the awning windows. Mr Mitchell says that side flashings are not required provided sizalation within the walls abuts the window frame, and provided the areas where the exterior cladding abuts the window are adequately sealed. Mr Mitchell's opinion in this regard may have merit, however I also accept Mr Winder's evidence, as confirmed in a number of photographs he took, that the sizalation he inspected when he attended to rectification works to windows did not abut the window frame in a neat and unbroken manner. The photographs produced by Mr Winder depict crimpled sizalation paper which does not form a continuous "seal" against window frames. I find that, if proper installation of sizalation might, as Mr Mitchell suggests, obviate the need for side flashings to the windows, the sizalation was not installed in a satisfactory manner.

48 Having viewed the house generally, and the windows in particular, and having heard evidence from the applicant, I do not accept the builders' contention that the cause of the leaking windows is the failure of the applicant to carry out adequate routine maintenance works.

49 I accept the applicant's evidence that she regularly cleans the home and that, once a year, she thoroughly cleans the exterior of the home, including

windows, using a high pressure hose. It was apparent at the view that the Applicant maintains a clean and tidy home.

50 I do not accept Mr Mitchell's opinion that ordinary home maintenance, even when a home is close to the sea, includes the routine replacement of window seals every few years. The warranties required the builders to install, in a proper and workmanlike manner, windows which were good and suitable for their purpose. Home windows which routinely require new seals every few years would not, in my view, meet the warranty requirement that they be good and suitable for their purpose.

51 On all the evidence, I am satisfied that the windows leaked because they were inadequately flashed and poorly installed. In supplying and installing the windows, the builders have failed to meet the warranties.

52 Having viewed the home, and having heard evidence from Mr Mitchell and Mr Zoanetti, I am satisfied that the rectification of the leaking windows will require the works set out in Mr Zoanetti revised cost estimate report which was produced, without objection, on the third day of the hearing. The works for all of the leaking windows, save for the kitchen window, include the following:

- removal and reinstatement of windows;
- install new flashing;
- replace any rotted/water damaged bottom plates, reveals, architraves around windows, plaster, flooring, skirting and carpet; and
- repainting to match existing joinery.

53 In respect of the leaking window in bedroom 2, which is located on the eastern side of the home within the area where the exterior walls are clad with the rendered foamboard, I accept Mr Zoanetti's evidence that rectification works will include the removal and replacement of approximately five square metres of the exterior foamboard cladding surrounding the window, and repainting the new foamboard to match, as close as practicable, the existing foamboard cladding.

54 In respect of the kitchen window, I accept Mr Zoanetti's evidence that the window should be replaced because the sealing of the panes of glass appear compromised in that water was found behind the seal and there was a gap between the extrusions of the centre mullions that would allow penetration of wind driven rain. The rectification of the kitchen window will include

- remove existing window and replace with a new window
- install flashings
- remove and replace architraves and paint to match
- replace kitchen tiles likely to be damaged in the process of replacing the window.

55 I assess the cost of all required rectification works, including rectification of the windows, later in these reasons.

Weathertex cladding

56 The rear, north, portion of the home is clad with the weathertex boards. At the view I observed that numerous joins, where boards abut, are opening up. It was also apparent that, at some time in the past, some type of elastic sealant has been applied to many of the joints in an attempt to re-seal them.

57 As noted above, Mr Noble attempted to reseal the joints using an elastic sealant in November 2005. Save for the recent replacement of several sections of the weathertex boards by Mr Winder in 2013, no other rectification works have been carried out to the weathertex boards.

58 As part of the rectification works he carried out, Mr Winder removed and replaced several sections of the weathertex cladding surrounding leaking windows. I accept Mr Winder's uncontested evidence that, where he removed sections of the cladding, he saw signs of water leaks on sizalation and wall framing.

59 Mr Zoanetti, Mr Mitchell and Mr Leonard agree that the joints between abutting weathertex boards must be properly sealed so as to prevent water ingress behind the boards.

60 Mr Noble says he installed the weathertex boards in accordance with a document provided by the supplier of the boards. He was unable to produce that document in evidence. Mr Leonard, in his report, produced an extract from a Weathertex Installation Guide dated September 1999 which provides instructions for the installation of *joint trimmers* between abutting boards. A joint trimmer is a simple device that provides a small sleeve within which the ends of abutting boards are inserted, thus creating a seal at the join. All three experts agree that the September 1999 Weathertex Installation Guide was applicable at the time the home was constructed, and that the weathertex boards ought to have been installed in accordance with the instructions in the guide. Mr Noble says that the installation of joint trimmers would make no difference, but I prefer the evidence of the three experts who agree that joint trimmers should have been installed in accordance with the guide in order to create a seal at the joins between the boards.

61 Mr Zoanetti says that it is not practical, if possible at all, to install the joint trimmers "ín situ", that is, without removing and replacing the boards. He says that because of the nailing pattern for the installation of the boards (the boards overlap where nails are installed), and because of the nature of the weathertex product, it is extremely difficult, if possible, to remove the boards without damaging them to the extent they become unsuitable for re-installation.

62 Mr Zoanetti's evidence in this regard is supported by Mr Winder. Mr Winder says that it is not possible to install joint trimmers "in situ" because

of the nailing pattern and the need to bend or flex the boards in order to insert their ends into the joint trimmers. He says also that, when he removed boards surrounding windows, it was not possible to remove them without damaging them to the extent that they became unsuitable for re–installation.

63 Mr Mitchell and Mr Leonard opine that the joint trimmers can be replaced in situ, however neither of them have any direct experience in carrying out the task and neither of them address the practical difficulty in so doing as attested to by Mr Winder. Mr Noble says that joint trimmers can be slipped into place with the boards in situ, but he gave no evidence that he has in fact ever performed such task. I prefer the evidence of Mr Winder who has first hand experience in attending to the task.

64 Having viewed the home and observed the numerous locations where joints between the weathertex boards have opened up, I am satisfied that almost all of the boards will need to be removed and replaced, as recommended by Mr Zoanetti.

65 On all the evidence, I am satisfied that:

(a) By installing the weathertex cladding without joint trimmers, the builders breached the warranty requiring that the works be carried out in a proper and workmanlike manner; and

(b) It is not practical, if possible at all, to retrofit joint trimmers "in situ"; and

(c) Because of the numerous locations of opened up joints between boards, most of the weathertex cladding will need to be removed and replaced; and

(d) Because the boards will be damaged during the process of removal, it will be necessary to replace removed boards with new boards.

Rear deck and water damage to garage

66 The garage sits immediately below a tiled deck on the first level at the rear of the home. Some of the fascia edge tiles on the west and east faces of the deck have fallen off. There is water damage, and noticeable mould, to the garage plaster at the north west corner, the north east corner and the middle of the north facing wall.

67 Mr Zoanetti, Mr Leonard and Mr Mitchell agree that the water damage at the two corners of the garage has likely been caused by water ingress where the fascia deck tiles have fallen off.

68 Mr Noble confirms that he installed particleboard (chipboard) over the deck joists, and then installed tile underlay and two coats of waterproofing before laying and grouting the tiles. Mr Zoanetti, Mr Leonard and Mr Mitchell agree that particle board is not suitable to be used as the substrate for an exterior tiled deck even where, as is the case here, the deck is partly protected by a roof. Mr Zoanetti also produced Australian Standard

AS1860-1998, covering the installation of particleboard flooring, which notes under clause 2 that *"Particleboard flooring is not suitable for external decking"*. All three experts also agree that, perhaps surprisingly, the tiled deck appears to be in sound condition, save for the perimeter fascia tiles that have fallen off.

69 Mr Zoanetti says that, even though the deck appears sound, he has concerns as to its long term performance and, having regard to the Australian Standard AS1860-1998, and having regard to the fact that some fascia tiles have fallen off thus exposing the deck to water ingress, the entire deck should be stripped and retiled using suitable substrate material. Mr Zoanetti says that, when such works are completed, it would then be appropriate to replace the water damaged plaster in the garage below.

70 Mr Mitchell considers that, because the deck is sound after 10 years performance, the only rectification works called for are the replacement of the perimeter fascia tiles which have fallen off and the rectification of the water damaged plaster in the garage.

71 I prefer the opinion of Mr Zoanetti. Although the deck appears sound, in circumstances where perimeter fascia tiles have fallen off and water damage has emerged in the garage below, I consider that there should be no short steps taken to rectify the deck. I am satisfied that the deck has not been constructed in a proper and workmanlike manner using materials that are good and suitable for the intended purpose.

72 I accept Mr Zoanetti's evidence that the rectification works will include include stripping and retiling the entire deck, replacing the water damaged plasterboard in the garage and re-painting works as required.

Plaster damage above stairwell

73 The plasterboard above the stairwell leading up from the ground floor rumpus room has a noticeable, but not large, crack. There are also signs of a water leak on the face of the plasterboard. Mr Zoanetti inspected the roof above the affected area and says that the flashings appear satisfactory. He believes that the crack in the plaster is the result of water ingress through several unsealed joints between weathertex boards. For rectification of the damage, Mr Zoanetti allows for removal and replacement of the weathertex boards above the area of the damage, followed by the repair of the crack in the plaster and painting the area repaired.

74 In his report, Mr Mitchell says that the crack to the plasterboard may be attributed to a number of causes: *"It may be that the roof has had unseasonable weather from a different direction and moisture has penetrated the capping. There has been some damage sustained. The cracking of the plaster may also be attributed to ground movement."*

75 Having regard to the fact that Mr Zoanetti inspected the roof whereas Mr Mitchell did not, and having regard to my findings above in respect of the joints between the weathertex boards, I accept Mr Zoanetti's evidence and

find that the crack to the plasterboard has resulted from water ingress through unsealed joints in the weathertex boards.

76 On all the evidence I find that the leak is the result of a failure of the builders to carry out works, the installation of the weathertex boards, in a proper and workmanlike manner, and I accept Mr Zoanetti's recommendation as to the appropriate rectification works.

Water damage to bedroom 2

77 There is significant water ingress, and consequential damage to plaster, wall framing, flooring and the carpet, in the north west corner of the bedroom.

78 Mr Zoanetti and Mr Mitchell agree that water has entered at the point where the exterior weathertex cladding on the rear portion of the home meets the exterior rendered foamboard cladding on the front portion of the home. Caulking compound has been applied to the area of the join, however with some timber shrinkage and slight movement at the point of the join, the join has opened up. Having viewed the home, I am satisfied that the degree of movement at the join is minimal, and that the damage could have been avoided had the builders provided a suitable flexible joint, as suggested by Mr Zoanetti. The builders' failure to do so amounts to a failure to carry out works in a proper and workmanlike manner and with reasonable care and skill.

79 I accept Mr Zoanetti's evidence that rectification works will include re-caulking the joint between the exterior weathertex boards and foamboard cladding with a suitable flexible sealant, replacing the water damaged wall framing, flooring and plaster, repainting the affected areas and replacing the carpet in the room.

80 As noted earlier, I also accept also Mr Zoanetti's evidence as to the rectification work required to fix the leaking window in the east facing wall in this bedroom.

Rendered foamboard cladding generally

81 Mr Zoanetti opines that the rendered foam board to the front section of the home appears to have been installed *not* in accordance with any approved method or as per the manufacturer's guidelines. He appears to draw this conclusion from the fact that the supplier of the product is unknown, and also because he has not been provided with a manufacturer's manual confirming the correct method of installing the foamboard. Mr Zoanetti says that the entire rendered foamboard cladding should be removed and replaced with a suitable proprietary product.

82 I do not accept Mr Zoanetti's opinion in this regard. At the view I noticed that the rendered foamboard cladding appeared to be in good condition with only a few minor hairline cracks. Having regard to the good condition of the cladding, and the age of the building, I do not accept that there is any need for rectification works to the foamboard cladding, other than the

works associated with repairing the leaking window to bedroom 2 as referred to above.

Laundry door

83 Mr Zoanetti says that the architrave above the laundry door has split and swelled and the head of the door jamb has swelled and pulled away from the join. At the view I observed this to be the case. Mr Zoanetti says that the damage has been caused by poorly installed flashing above the door.

84 Mr Mitchell opines that ground movement may have caused or contributed to the opening of gaps within which the water ingress has occurred.

85 Having viewed the door, I prefer Mr Zoanetti's opinion.

86 Mr Zoanetti and Mr Mitchell agree that the door itself is of a type suitable for internal use, not external use. Although the door appears in reasonable condition given its age, Mr Zoanetti and Mr Mitchell agree that a door suitable for external use should be installed.

87 On the evidence before me, and my observations at the view, I find that the water damage around the laundry door has resulted from a failure on the part of the builders to install the door and the associated flashing with reasonable care and skill. I find also that the builders have supplied a door not suitable for its intended use as an external door, and that the door should be replaced with a suitable external use door.

88 Mr Zoanetti recommends rectification works including the removal and replacement of the door jamb and the water damaged architraves and skirting, re-flashing works, replacement of the door with a door suitable for external use and general painting of all the new works. Having viewed the home, I find that Mr Zoanetti's scope of proposed rectification works is reasonable.

FAILURE TO PROPERLY INSPECT AND/OR OBTAIN A PRE-PURCHASE INSPECTION REPORT ?

89 The builders submit that the applicant failed to properly inspect the home and/or failed to obtain a pre-purchase inspection report before purchasing the home, and that for those reasons the applicant has caused or contributed to her loss. I do not accept the submission.

90 Whether, before purchasing a home, a purchaser obtains a pre-purchase inspection report on the condition of the home is a matter for the purchaser. While it might be prudent to obtain such a report, there is no obligation on a purchaser to do so. There is no evidence before me that, had the applicant obtained such a report, the applicant would have been alerted to any of the defective works forming the subject matter of her claim.

91 In *Meier v Balbin* [2013] VCAT 57 at paragraph 17 I commented:

> It is reasonable, in my view, to presume that a purchaser of a home makes allowance for known or patent defects when negotiating the

> purchase price and, as such, the purchaser can have no "loss" arising from a breach of the warranties in respect of such defects. By "patent" I mean a defect which ought reasonably have been observable on inspection and the significance of which, in terms of a likely need for rectifications, ought reasonably have been appreciated.
>
> The same cannot be said in respect of a defect which first becomes known or patent after a sale contract is entered but before settlement has occurred. In that situation it cannot be presumed that a purchaser has made allowance for the defect when negotiating the purchase price.

92 I do not accept that the defective building works, referred to above in these reasons, are defects which ought to have been apparent to the Applicant before she entered the sale contract for the purchase of the home.

93 There is no evidence that any water damage existed, or was apparent, at the time the Applicant purchased the home. Such evidence as there is, is that the water damage first became apparent approximately 7 years after the purchase. That the windows were inadequately flashed first became apparent when Mr Kirby, a builder, removed windows in 2013.

94 There is no evidence, and it is not suggested, that the applicant knew or ought to have known that particleboard was used in the construction of the rear deck.

95 Although the weathertex cladding was, by reason of the builders' failure to install joint trimmers, defective from the outset, I do not accept that a reasonably prudent purchaser would possess the requisite knowledge to recognise such defect. It might have been apparent to a trained eye such as Mr Zoanetti, but in my view it is not something an ordinary purchaser, not qualified or experienced in building homes, would recognise. As noted above, I accept the Applicant's evidence that she first became aware of an issue in respect of the weathertex cladding when she noticed, in November 2005, that some of the joins between the weathertex boards were opening up.

96 For the above reasons, I find that the applicant has not caused or contributed to, or is in any way responsible for, her loss in respect of the defective building works by reason of any failure to properly inspect the home or to obtain a professional inspection report before she purchased the home.

DUTY TO MITIGATE LOSS

97 A party seeking damages for loss arising from another party's breach of contract (in this case the breach of the warranties) cannot stand idly by as the loss accrues. The party suffering the loss has a duty to take reasonable steps to mitigate the loss.

98 I do not accept the builders' submission that the applicant has failed to mitigate her loss in respect of the leaking windows. I accept the applicant's

evidence that she first noticed a leak to windows when she saw droplets forming on the window reveals in the rumpus room during a particularly heavy rain storm in December 2011. The photographs taken by the applicant at that time do not depict any obvious signs of significant water damage. I also accept the Applicant's evidence that it was not until early 2013 that noticeable signs of damage, swelling reveals to several windows, became apparent. I accept Mr Zoanetti's evidence that the water damage to base plates, studs and flooring has occurred over quite some period of time and that this would not have been apparent without investigative works including removal of plaster and windows.

99 On all the evidence I am satisfied that the applicant has not stood idly by in the knowledge that significant water damage to the windows was occurring. In my view, once it became apparent that water damage was occurring, the applicant took reasonable steps to mitigate her loss and damage. In April 2013 the applicant engaged Mr Winder to rectify and repair windows which were showing signs of water damage, and it was only during the course of those rectification works that the full extent of the water damage became apparent.

100 In respect of the weathertex boards, as I find that the only practical means of rectification is to remove and replace the weathertex boards with the inclusion of joint trimmers, and there being no evidence as to what other steps the applicant might reasonably have taken to mitigate her loss, I am satisfied that the applicant has not failed to mitigate her loss.

101 In respect of the deck and the related water damaged garage plaster, the plaster crack above the stairwell and the water damaged laundry door, there is no evidence as to what, if any, reasonable steps the applicant might have taken to mitigate her loss, and as such, I find that the applicant has not failed to mitigate her loss.

COST OF RECTIFICATION WORKS

102 It is not submitted by the builders that they now be given the opportunity to attend to any rectification works which I find are required. The builders submit, rather, that any allowance I make for the cost of required rectification works be based on the cost estimates provided by Mr Mitchell, in preference to the cost estimates provided by Mr Zoanetti.

103 Mr Mitchell and Mr Zoanetti each provided written cost estimates, with differing scopes of rectification works, for the cost of engaging a new builder to undertake rectification works. Mr Mitchell's total cost estimate, excluding GST and a builder's margin for profit and overheads, is $27,937. Mr Zoanetti's estimate, set out in his revised cost estimate report, is $75,740.18 excluding GST and builder's margin for profit and overheads. For a number of reasons, I prefer Mr Zoanetti's cost estimates:

(a) Mr Mitchell's allowances for trade labour rates are, in my view, unrealistically low. He allows a rate of $27 per hour for painters and

plasterers, $50 per hour for plumbers and $30 per hour for carpenters and general labourers. He says that, from his experience, these are the rates attainable for tradesmen working in the Phillip Island region. Mr Zoanetti, who allows the trades rates specified in *Rawlinsons Construction Cost Guide*, a published reference guide that is well known within the building industry, allows $75 per hour for painters, plasterers and carpenters, $95 per hour for plumbers and $55 per hour for general labourers. I find Mr Zoanetti's allowances to be more realistic and commensurate with the rates that are frequently cited and relied upon in hearings in the Domestic Building List in the Tribunal. I also do not accept that damages assessed as the reasonable cost the Applicant will incur in engaging a new builder to carry out rectification works should be founded on the cheapest trade rates that might be attainable.

(b) Mr Mitchell's cost estimate in respect of rectifying the weathertex boards allows for installing joint trimmers to the boards "in situ". He makes no allowance for the rectification works which I have found will be necessary, and which are included in Mr Zoanetti's cost estimate, namely the removal of the existing boards and installation of new boards.

(c) Mr Mitchell's cost estimate in respect of repair of the water damaged plaster in the garage allows for the cleaning of mould and re-painting, whereas I find that the damaged plaster should, as Mr Zoanetti recommends, be replaced.

(d) In my view, Mr Mitchell's allowance for supply and installation of replacement carpet, at $32 per metre, is unrealistic and unreasonable. Even if it is possible to have carpet supplied and installed at that rate, which I doubt, I do not accept that the applicant must accept cheap, low quality carpet. In my view, Mr Zoanetti's allowance for replacement of carpet, at $120 per metre, is reasonable.

(e) Mr Mitchell's description of the items of work for which he provides a cost estimate is very brief so that it is difficult to understand exactly what works he has allowed for. Mr Zoanetti's costing, on the other hand, provides a far clearer explanation of the rectification works he has costed. The rectification works which I have found will be necessary, referred to in my reasons above, are the rectification works set out in Mr Zoanetti's revised cost estimate report.

(f) Generally, I have some doubt as to the reliability of Mr Mitchell's evidence. His raising of the issue of blocked weepholes in the awning windows, when it became apparent at the view that windows did not in fact have any such weepholes, indicates a preparedness on his part to form his opinion on assumptions in preference to thorough inspection.

104 Overall, I find Mr Mitchell's evidence as to rectification costs unhelpful and unreliable and I prefer Mr Zoanetti's evidence. I am satisfied that, save

for two deductions referred to below, Mr Zoanetti's cost estimate represents the reasonable cost that the applicant will incur in engaging a builder to carry out the rectification works which I have found are required. The two deductions I make are:

(a) As noted above, I accept that the rectification of the window in bedroom 2 will include the removal and replacement of approximately five square metres of exterior foam board cladding. In his revised cost estimate report, Mr Zoanetti allows 2 painters 2 days, at a cost of $2,400, and paint cost of $500 to repaint the replaced foamboard. It may be that, in providing his revised cost estimate, Mr Zoanetti neglected to adjust his previous estimate which allowed for the cost of repainting *all* of the exterior foamboard cladding. In any event, I find that the allowance is excessive and I will allow a total sum of $400 as the reasonable cost to repaint the replaced foamboard cladding. Accordingly I deduct $2500 from Mr Zoanetti's estimate.

(b) As part of the cost to remove and replace the weathertex boards with joint trimmers, Mr Zoanetti allows 2 carpenters 2 weeks at a cost of $6,000. I consider this to be reasonable. However, as part of the rectification of the leak above the stairwell, Mr Zoanetti makes a further allowance for carpenters, 2 carpenters for 6 hours at a cost of $900, to remove and replace the weathertex boards above the stairwell. In my view, the additional charge is unjustified and the cost to replace the weathertex boards above the stairwell should be included within the first allowance of $6,000. Accordingly I deduct $900 from Mr Zoanetti's estimate.

105 After making the above deductions, the total cost of the required rectification works, not including builder's margin and GST, is $72,340.18. Mr Zoanetti allows a 35% builder's margin for preliminaries, overheads and profit. Mr Mitchell allows for a builder's margin of 30%. In my view, having regard to the nature of the works to be carried out and the fact that a new builder will be engaged to rectify defects in another builder's works, a 35% margin is reasonable. Accordingly, after allowing a builder's margin of 35% and then GST, I arrive at a figure of $107,425.16.

106 I accept the applicant's submission that it is appropriate to deduct $6,729.70, being the payment made by the Applicant to Mr Winder for the rectification works he carried out in April and May 2013, because, as Mr Zoanetti confirmed, his rectification cost estimate makes no allowance for such works. After deducting that sum, I arrive at a figure of $100,695.46 which I am satisfied is the reasonable cost the applicant will now incur in engaging a builder to carry out the works which I have found are required to rectify the defective works carried out by the builders.

LOST RENTAL INCOME CLAIM

107 The applicant became pregnant in 2013. She says that she was concerned that the moisture and mould in her home might cause harm to her developing foetus, and that in late June 2013 she discussed her concern with her obstetrician Dr Arora. She says that Dr Arora advised her that the mould in her home might harm her developing foetus and that she should consider vacating the home until the mould was removed. The applicant produced a letter from Dr Arora dated 8 July 2013 addressed to *"To whom it may concern"* which states in part:

> Kylie White is a patient of my clinic and she informs me that extensive instances of mould are present at [her] current residence, and that significant restoration and construction works are required to remove the mould which has been caused by extensive water damage inside her home.
>
> In my professional opinion the existence of mould may be harmful to her developing foetus (currently at 21 weeks gestation). I strongly recommend that if the opportunity is available to her she should change residence immediately and only return when all mould is removed and construction work is completed.

108 The applicant says that her partner, Mr Holmes, owns a home in Phillip Island which was, until 26 June 2013, tenanted. She says that her partner's home was not re-tenanted so that it would be available as a temporary residence for Mr Holmes and her. She says that she and Mr Holmes moved into Mr Holmes' home on 2 November 2013 and reside their still. The applicant gave no explanation as to why it took until November 2013 to make the move.

109 The applicant claims lost rental income in respect of Mr Holmes' home which she says that she and Mr Holmes have forgone because of them taking up residence in the home. The applicant produced a letter from Sarah Burke of Ray White real estate agents addressed to Mr Holmes dated 26 June 2013 in which Ms Burke opines that Mr Holmes' home would attract rental of $300 to $320 per week.

110 This claim for lost rental income does not appear in the applicant's filed and served pleadings, and it appears to have been raised for the first time in the applicant's witness statement dated 20 January 2014. Although I understand the applicant's concern for her unborn (now baby) child, the claim fails for several reasons.

111 First, there is merit in the builders' submission that it ought not be required to defend a recent claim that is not included in the applicant's pleadings.

112 Second, the claim rests largely on hearsay evidence. None of Dr Arora, Mr Holmes or Ms Burke were called to give evidence at the hearing. Although hearsay evidence is not inadmissible in this tribunal, I find the evidence presented in support of the claim to be of little probative weight.

113 It is apparent that the opinion of Dr Arora, as set out in her letter, is founded, not on the doctor's inspection of the applicant's home, but on the description of the home provided to her by the Applicant. The respondent has no opportunity to cross-examine Dr Arora.

114 Finally, there is no evidence at all from Mr Holmes. On the evidence before me, I can do little more than speculate as to Mr Holmes' actions and intentions in respect of, and the income derived from, a property he apparently owns. There is insufficient evidence to find that the applicant has forgone rental income in respect of a property she does not own.

APPORTIONMENT OF LIABILITY TO SURVEYOR ?

115 Part IVAA of the *Wrongs Act* 1958 makes provision for the apportionment of liability between *concurrent wrongdoers* in respect of certain claims. The builders say that, to the extent they are liable to pay damages, the claim brought against them is an *apportionable* claim within the meaning of Part IVAA of the Wrongs Act and that the surveyor, as a *concurrent wrongdoer*, is liable for a proportion of the damages as considered just and fair by the Tribunal.

116 Section 24AF(1)(a) of the Wrongs Act provides that Part IVAA applies to:

> a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care;

117 A *concurrent wrongdoer*, under s24AH of the Wrongs Act, is:

> "… A person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim".

118 The statutory warranties under s8 of the DBC Act formed part of the building contract for the construction of the home between the builders and the previous owners of the home, Mr and Mrs Failla. Pursuant to section 9 of the DBC Act, the Applicant, as the current owner of the home, is entitled to bring the proceeding against the builders for damages arising as a result of the builders' breach of the statutory warranties. I have found that, in a number of respects, the building works are defective and do not meet the standard required by statutory warranties, and for that reason, the Applicant is entitled to damages measured as the reasonable cost to rectify the defective building works.

119 In my view, there remains uncertainty in the law as to whether a claim, founded on a builder's breach of the statutory warranties forming part of a building contract, is capable of being characterised as an *apportionable claim* under Part IVAA of the *Wrongs Act*. However, I need not enter the debate here because, even if the claim against the builders could be characterised as an *apportionable claim*, I am satisfied, for the reasons that follow, that the surveyor is not a *concurrent wrongdoer*.

120 In my view, it is a prerequisite to a finding that a person is a *concurrent wrongdoer* under s24AH of the *Wrongs Act* that the person is, without reference to s24AH, legally liable to the Applicant. That is, if the person was the only defendant against whom the proceeding was brought, the person would be found liable[2].

121 That a surveyor, performing his statutory functions under the *Building Act* 1993 in relation to the construction of a home, owes a duty of care to a subsequent owner of the home (that is, an owner such as the Applicant who purchases a home some time after the home has been constructed and the surveyor has completed his duties) was confirmed by the Court of Appeal in *Moorabool Shire Council v Taitapanui* (2006) 14 VSCA 30.

122 There is no evidence to suggest that the surveyor performed any tasks other than those required under the *Building Act* in respect of the construction of the home. In short, those tasks include the issue of a building permit, the carrying out of mandatory stage inspections and the issue of an occupancy permit. The occupancy permit was issued on 28 May 2003.

123 The builders say that, assuming I find (as I have) that there are defects in the building works, then the surveyor ought not to have issued the occupancy permit until the defective works were rectified, and that by issuing the occupancy permit before the defective works were rectified, the surveyor breached his/its duty of care owed to the Applicant. In closing submissions, the builders concede that the only item of defective works which might attract a finding of a breach of duty of care by the surveyor is the installation of the weathertex cladding. The concession is made because there is no evidence to suggest that any of the other items of alleged defective building work ought to have been identified by the surveyor. For example, there is no evidence that the surveyor was aware or ought to have been aware, by his inspection of the construction works or otherwise, that particle board was used as substrate in the rear tiled deck. The substrate need not have been installed for the surveyor to have been satisfied upon his *frame stage* inspection that the framing was satisfactory, and at the surveyor's next, final, inspection, the substrate would not have been observable because the tiling of the deck would have been completed.

124 The builders submit that if the weathetex cladding is defective (as I have found it is because it was installed without *joint trimmers*) then it is something the surveyor ought to have identified and the surveyor ought not to have issued the occupancy permit unless and until the defect was rectified.

125 Pursuant to s44 of the *Building Act*, a surveyor must not issue an occupancy permit unless the building is "*suitable for occupation*". Pursuant to s46, an occupancy permit "*is evidence that the building … is suitable for occupation"*

[2] See St. George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245, Nettle JA at [58] to [64]

but it *"is not evidence that the building …complies with this Act or the building regulations"*.

126 Mr Zoanetti, himself a qualified surveyor, says that the surveyor ought to have recognised the defect in the weathertex cladding installation.

127 Mr Leonard says that, although joint trimmers were not installed, the joints were caulked and that *"a reasonably competent building surveyor would have determined the wall as appropriately waterproof at the time of completion of the dwelling … which would have allowed the building surveyor to draw a conclusion that the dwelling was fit for occupation"*.

128 I accept Mr Leonard's evidence

129 In my view, the standard of care required of the surveyor in performing his statutory functions does not extend to ensuring or certifying that *all* of the building works carried out by the builder are compliant with *all* applicable building regulations and standards.

130 There is no evidence to suggest that, at the time the surveyor carried out his final inspection, the home was not waterproof and not suitable for occupation. Such evidence as there is in relation to the opening of the joins between weathertex boards is that the Applicant first noticed that some joins were opening up in November 2005, some two and a half years after the occupancy permit was issued.

131 On all the evidence, I am not satisfied that the surveyor has breached a duty of care to the Applicant. Accordingly, the surveyor is not a concurrent wrongdoer under part IVAA of the *Wrongs Act* and there will be no apportionment of liability to the surveyor.

THE SETTLEMENT BETWEEN THE APPLICANT AND THE SURVEYOR

132 The settlement between the applicant and the surveyor is set out in a "Terms of Settlement" document dated 19 November 2013. The document was, by consent, produced at the hearing, however no witnesses gave evidence in respect of the settlement. It is not disputed that, pursuant to the settlement, the applicant received payment of $17,500 from the surveyor.

133 The builders submit that, in the event that builders are found liable to pay damages to the owners (as is the case), then the settlement sum should be taken into account so that, in assessing the sum of damages payable by the builders, there is no doubling up, or partial doubling up, of compensation for the same loss.

134 The settlement document is a short, straightforward document. The recitals note that the third respondent, Mr Donohue, was the relevant building surveyor who, *"issued a building permit on 28 November 2002, undertook various inspections during the course of construction of the home, and issued an occupancy permit on 28 May 2003"*. The recitals then go on to say:

> "(d) By Victorian Civil and Administrative Tribunal D595/2013 ("the proceeding") White [the Applicant] has said the Donohue

respondents [the surveyor], alleging they breached duties to her to exercise reasonable care when undertaking those inspections.

(e) The parties have agreed to settle the dispute the subject of that proceeding on the basis set out herein, and without any admission of liability by the Donohue respondents

135 The operational sections of the settlement document then go on to state, amongst other things:

1. White agrees to accept $17,500 from the Donohue respondents in full and final settlement of the claim made against the Donohue respondents in the proceeding ("the Settlement Sum");

2. The Settlement Sum must be paid by way of cheque made payable and delivered to [the Applicant's lawyers] within 30 days after delivery to [the surveyor's lawyers] of these terms of settlement properly executed by White;

3. The parties agree to bear their own costs of and incidental to the proceeding

Releases

4. Subject to these terms of settlement, White hereby releases and forever discharges each of the Donohue respondents and (where applicable) their past, present and future directors, officers, employees, agents, sub-contractors, transferees, assigns, heirs, successors and insurers from all present and future claims (including claims for interest, taxation and costs) which are the subject of or in any way connected with the proceeding.

136 The principle in respect of double recovery provides, as a starting point, that where a claimant settles a claim against one or other of a number of parties against whom he is maintaining claims, he must generally bring into account the sums achieved from such a settlement if he is entitled to (and does) pursue to judgement any of the remaining parties to the action. In a case where a claimant has concurrent claims against more than one defendant, the whole amount recovered under a settlement with one must be brought into account in any claim against another.[3]

137 In *Boncristiano and Anor v Lohmann*, Winneke P commented:

> It is not to the point to argue … that the claims made against the various defendants proceed from different causes of action. The fundamental question is whether the claims against the various defendants are "concurrent" in the sense that the relief sought is the same[4].

[3] Townsend v Stone Toms and Partners (1984) 27 BLR 26
[4] Op sit at 89

138 In relation to the onus of proof when the issue of double recovery is raised, Vickery J states in *TCM Builders Pty Ltd v Nikou and Anor*[5]:

> To my mind, the question of the onus of proof where double compensation is raised as a defence is resolved in the case law in the following way: first, the defendant needs to establish that the plaintiff was paid or received sums of money or compensation in respect of concurrent claims, in the sense that they were claims made to recover the same damage. The initial evidentiary burden of bringing forward evidence that, at least prima facie, the claims are concurrent, in the sense that they are claims in respect of the same damage, resides with the defendant party who raises the defence. Second, the evidentiary burden then appropriately shifts to the plaintiff, who may displace the primary facie case by establishing that the money or compensation received was not in respect of the same damage, or only partially so, in which case evidence may be adduced as to the degree of the overlap (if any), the plaintiff being the only party who is realistically in a position to provide such evidence.

139 I am satisfied, on a plain reading of the settlement document, that the surveyor has settled the claims brought against him/it in the proceeding, inclusive of costs, for a payment of $17,500. There is no evidence before me upon which I might find that the settlement payment, or a part of it, is made in respect of some other claim outside the claims brought in the proceeding. Neither is there any evidence upon which I might find or identify a specific proportion of the settlement sum as constituting payment of, or contribution to, the Applicant's legal costs incurred in the proceeding. The terms of settlement provide that each party agrees to bear their own costs of and incidental to the proceeding.

140 In her Points of Claim, the Applicant pleads that the surveyor breached the duty of care owed to the Applicant, and that by reason of the breach, the Applicant claims that the surveyor is "*liable to compensate the applicant for her loss and damage in such proportion as the Tribunal determines"*. There is no distinction between the loss and damage claimed as against the surveyor from the loss and damage claimed as against the builders. The Applicant leaves it to the Tribunal to determine what proportion, if any, should be paid by the surveyor and what proportion to be paid by the builders.

141 The Applicant submits that as the builders have in their defence pleaded, in respect of the surveyor's alleged liability, only an apportionment of liability of the claim brought against the builders, then unless the Tribunal finds that the claim for apportionment succeeds, the settlement sum should not be taken into account in assessing the damages payable by the builder. The Applicant refers to *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott (Australia) Pty Ltd*[6] as authority in support of the submission.

142 I do not accept the Applicant's submission.

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[5] (2013) VSC 322 at paragraph 78
[6] 2008 VSC 90

143 *Godfrey Spowers* deals with the effect, in respect of claims as between *concurrent wrongdoer* defendants and the claims made by one of those defendants as against joined third parties, of a settlement reached between a Plaintiff and one of the concurrent defendants. It reinforces the principle that, under the apportionment of liability regime, a concurrent wrongdoer can not be liable for more than his fair proportion of damages as assessed by the Tribunal. In my view the decision is not instructive on the issue before me.

144 I have found that the surveyor is not a *concurrent wrongdoer*. It necessarily follows that the builders are also not *concurrent wrongdoers.* As such, a finding that the sum of damages payable by the builders be reduced by the sum of the settlement payment made by the surveyor, or a portion of it, does not offend the principle that a *concurrent wrongdoer* should be responsible for no more or less than his fair proportion of damages as assessed by the Tribunal. Having regard also to the fact that the Applicant has claimed the same damage as against the builders and the surveyor, I am satisfied that the principle against double recovery is enlivened.

145 There being no evidence upon which it might be found that the settlement sum has been paid to compromise claims other than the claims in the proceeding as against the surveyor, and there being no evidence that a portion of the settlement payment was made or applied as contribution to the Applicant's legal costs, I am satisfied that, in assessing the damages payable by the builder, allowance should be made for the whole settlement sum, $17,500.

146 Accordingly, after deducting a further $17,500 from the sum assessed earlier in these reasons ($100,695.46), I arrive at the sum of $83,195.46 as the sum of damages to be paid by the builders to the Applicant.

INTEREST

147 As the sum of damages assessed above is my assessment of the reasonable cost the applicant will now incur in engaging a new builder to carry out required rectification works, less the sum the applicant has already received through its settlement with the surveyor, I make no further allowance for interest on the assessed sum.

CONCLUSION

148 For the reasons set out above, I will order the builders to pay the applicant $85,195.46. I will reserve the question of costs with liberty to apply.

MEMBER M. FARRELLY