



Supreme Court
New South Wales

Case Name: The Owners – Strata Plan No 87265 v Saaib; The Owners – Strata Plan No 87265 v Alexandrova

Medium Neutral Citation: [2021] NSWSC 150

Hearing Date(s): 3–7 February 2020, 11, 12 March 2020

Date of Orders: 01 March 2021

Decision Date: 1 March 2021

Jurisdiction: Equity - Technology and Construction List

Before: Henry J

Decision: In proceeding 2016/382268:
(1) The Plaintiff’s summons filed 20 December 2016 be dismissed.
(2) The Plaintiff pay the First Defendant’s costs of the proceedings as agreed or assessed.

In proceeding 2019/235463:
(1) There be judgment in favour of the Plaintiff against the Defendant in the sum of \$3,425,583.54.
(2) The Defendant pay the Plaintiff’s costs of the proceedings as agreed or assessed.

Catchwords: AGENCY – whether implied actual authority to enter building contract – where builder did not sign contract – where numerous documents signed in name of builder – whether builder authorised nephew to enter into contract on his behalf – no authority found from the circumstances

BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – statutory warranties – whether defects part of lot property or common property

CONSUMER LAW – misleading or deceptive conduct – causation or reliance – where home warranty insurance issued due to misleading representations made by insurance broker – whether representations sufficiently causative of loss to Owners Corporation

EVIDENCE – tendency evidence – conduct – whether evidence of builder performing favours for friends characterised as tendency evidence of conduct regarding commercial development

Legislation Cited:

Civil Liability Act 2002 (NSW), s 35
Civil Procedure Act 2005 (NSW), ss 56, 57, 100
Competition and Consumer Act 2010 (Cth), ss 87CB, 87CD; Sch 2 – Australian Consumer Law, ss 18, 236
Environmental Planning and Assessment Act 1979 (NSW), s 109E(3)(b)
Evidence Act 1995 (NSW), ss 38, 95, 97, 128, 140(2)
Fair Trading Act 1987 (NSW), ss 42, 68
Home Building Act 1989 (NSW), ss 18B, 92, 99
Strata Schemes (Freehold Development) Act 1973 (NSW), s 5
Strata Schemes Management Act 2015 (NSW), s 106
Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited:

ABN AMRO Bank NV v Bathurst Regional Council (2014) 224 FCR 1; [2014] FCAFC 65
Anthony v Morton [2018] NSWSC 1884
Arktos Pty Ltd v Idyllic Nominees Pty Ltd [2004] FCAFC 119; ATPR 42-005
Atanaskovic v Birketu Pty Ltd [2019] NSWSC 1006
Australian Competition and Consumer Commission v Birubi Art Pty Ltd [2018] FCA 1595
Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640; [2013] HCA 54
Bective Station Pty Ltd v AWB (Australia) Ltd [2006] FCA 1596
Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36
Bonette v Woolworths Ltd (1937) 37 SR (NSW) 142
Borzi Smythe Pty Ltd v Campbell Holdings (NSW) Pty Ltd [2008] NSWCA 233
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938]

HCA 34

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; [2004] HCA 60

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25

Carr v Miller [2018] NSWSC 1424

CH Real Estate Pty Ltd v Jainran Pty Ltd; Boyana Pty Ltd v Jainran Pty Ltd [2010] NSWCA 37; 14 BPR 27,361

Chapman v Taylor; Vero Insurance Ltd v Taylor [2004] NSWCA 456

Commonwealth v Amann (1991) 174 CLR 64

Downer EDI Rail Pty Ltd v John Holland Pty Ltd (No 4) [2018] NSWSC 326

Dynamic Lifter Pty Ltd v Incitec Ltd (1994) 30 IPR 198

Elomar v R (2014) 300 FLR 323; [2014] NSWCCA 303

Equuscorp Pty Ltd v Glengallen Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55

Fabre v Arenales (1992) 27 NSWLR 437

Field v Shoalhaven Transport Pty Ltd [1970] 3 NSW 96

Finishing Services Pty Ltd v Lactos Fresh Pty Ltd [2006] FCAFC 177

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22

Google Inc v Australian Competition and Consumer Commission (2013) 249 CLR 435; [2013] HCA 1

Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 75

H S D Co Pty Limited v Masu Financial Management Pty Limited [2008] NSWSC 1279

Hanave Pty Ltd v LFOT Pty Ltd [1999] FCA 357; 43 IPR 545

Henville v Walker (2001) 206 CLR 459; [2001] HCA 52

Houghton v Arms (2006) 225 CLR 553; [2006] HCA 59

I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41

Jacara Pty Ltd v Perpetual Trustees WA Ltd (2000) 106 FCR 51; [2000] FCA 1886

Janssen-Cilag Pty Ltd v Pfizer Pty Ltd (1992) 37 FCR 526

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8

Junker v Hepburn [2010] NSWSC 88

Manly Council v Byrne [2004] NSWCA 123

March v E & MH Stramare Pty Ltd (1991) 171 CLR 506;

[1991] HCA 12
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494; [1998] HCA 69
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd as trustee for the G & M Geldard Family Trust [2013] 1 Qd R 319; [2012] QCA 315
Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd [2020] NSWCA 223
Nominal Defendant v McLennan [2012] NSWCA 148
Painter v Hutchison [2007] EWHC 758 (Ch)
Pola v Commonwealth Bank of Australia (Federal Court, Sundberg J, 19 December 1997, unrep)
Rail Corp New South Wales v Donald; Staff Innovations Pty Ltd [2018] NSWCA 82
Re HIH Insurance Ltd (In Liq) [2016] NSWSC 482; 335 ALR 320
RHG Mortgage Corporation Ltd v Iaani [2016] NSWCA 270
RHG Mortgage Ltd v Rosario Ianni [2015] NSWCA 56
Royal Guardian Mortgage Management Pty Ltd v Nguyen [2016] NSWCA 88
Seven Network Ltd v News Ltd [2007] FCA 1062
Smouha v Fleming (1997) 8 BPR 15,419
Symes v The Proprietor Strata Plan No. 31731 [2001] NSWSC 527
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) (2009) 236 CLR 272; [2009] HCA 8
Tonna v Mendonca [2019] NSWSC 1849
Twynam Pastoral Co Pty Limited v AWB (Australia) Limited [2008] FCA 1922
Ucak v Avante Developments Pty Ltd [2007] NSWSC 367
Volonakis v Erceg [2019] NSWSC 1875
Vukmirica v Betyounan [2008] NSWCA 16
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55
Warner v Hung, In the matter of Bellpac Pty Limited (Receivers and Managers appointed) (In Liq) No 2 (2011) 297 ALR 56; [2011] FCA 1123
Watson v Foxman (1995) 49 NSWLR 315
Westpac Banking Corporation v Velingos [2011] NSWSC 607
Wheeler v Ecroplot Pty Ltd [2010] NSWCA 61

White v Johnston (2015) 87 NSWLR 779; [2015]
NSWCA 18
Yorke v Lucas (1985) 158 CLR 661

Texts Cited:

G E Dal Pont, Law of Agency (4th ed, 2020,
LexisNexis)
Neville Moses, Ross Tzannes and Diane Skapinker,
Strata Titles NSW (2017, Thomson Reuters)
Peter Butt, Land Law (7th ed, 2017, Thomson Reuters)
Philip Bambagiotti, Building Disputes & The Home
Building Act 1989 (NSW) (2012, Thomson Reuters)
Sydney Jacobs, Commercial Damages (Westlaw AU)

Category:

Principal judgment

Parties:

Proceedings 2016/382268

The Owners – Strata Plan No 87265 (Plaintiff)
Tony Saaib (First Defendant)

Proceedings 2019/235463

The Owners – Strata Plan No 87265 (Plaintiff)
Irena Alexandrova (also known as Irina Alexandrova)
(Defendant)

Representation:

Counsel:
N Kidd SC with S Ahmed (Plaintiff 2016/382268 and
2019/235463)
S Lawrance with M Fernandes (First Defendant
2016/382268)

Solicitors:
Mills Oakley (Plaintiff 2016/382268 and 2019/235463)
Centurion Lawyers (First Defendant 2016/382268)

Self-represented:
Irena Alexandrova (Defendant 2019/235463)

File Number(s):

2016/382268; 2019/235463

Publication Restriction:

Nil

Judgment

- 1 These reasons deal with two proceedings, which were heard together with evidence in the one being evidence in the other, involving disputes arising from the construction of 11 townhouses located at Livingstone Road, Marrickville, New South Wales (**Marrickville property**) in 2011 and 2012.
- 2 The Plaintiff in both proceedings is the Owners Corporation of the strata scheme relating to the Marrickville property, the successor in title to the previous owner of the land and developer of the Marrickville property, Transformer Group Pty Ltd (**Transformer Group**).

Saib proceedings

- 3 The first proceedings (2016/382268) are against Tony Saaib, the builder named in a residential building contract with Transformer Group dated 4 October 2010 relating to the construction of the Marrickville property (**4 October Contract**).
- 4 The Owners Corporation alleges that, by the 4 October Contract, Mr Saaib contracted to do residential building work on the common property, that the work has been done in breach of the warranties implied by the *Home Building Act 1989* (NSW) (**HBA**) and that it has suffered loss as a result. The Owners Corporation seeks damages for the total costs of rectifying the common property defects, which are estimated to be around \$3,677,491.
- 5 The dispute in the proceedings is whether Mr Saaib entered into the 4 October Contract and is the builder of the Marrickville property. It is common ground that the signatures on the 4 October Contract purporting to be Mr Saaib's are not his.
- 6 The Owners Corporation's case is that Mr Saaib authorised his nephew, William Zaatini, to enter into the 4 October Contract on his behalf. It also contends that Mr Saaib authorised Mr Zaatini to deal with his insurance broker, Irena Alexandrova, to arrange home warranty insurance for the construction of the Marrickville property.
- 7 Mr Saaib denies authorising Mr Zaatini to enter into the 4 October Contract on his behalf or authorising Ms Alexandrova (or Mr Zaatini) to arrange home warranty insurance in his name. On Mr Saaib's case, the 4 October Contract

and the home warranty insurance application are some of the many forged documents that were brought into existence without his knowledge by Mr Zaatini and/or Joe Antoun and Nemer Antoun (who are associated with Transformer Group) in order to obtain home warranty insurance and bank finance for the development.

- 8 Mr Saaib also raises by way of defence that he did not undertake or supervise any building works on the Marrickville property and takes issue with the Owners Corporation's contention that Transformer Group also assented to the 4 October Contract.
- 9 It is common ground that there are defects to the common property and there is substantial agreement between the Owners Corporation and Mr Saaib on the extent of the defects and quantum. The remaining disputes are whether some of the defects relate to lot or common property and the total quantum of the claim.

Alexandrova proceedings

- 10 The second proceedings (2019/235463) are against Ms Alexandrova. They are brought against the possibility that the Owners Corporation's claim against Mr Saaib does not succeed and his contentions that he did not enter into the 4 October Contract, authorise anyone to enter into that contract on his behalf or authorise Ms Alexandrova to lodge documents with the insurer are correct.
- 11 The Owners Corporation claims that if Mr Saaib's contentions are correct, Ms Alexandrova is liable for the costs of rectifying the defects on the basis that she engaged in misleading and deceptive conduct in contravention of s 18 of the *Competition and Consumer Act 2010* (Cth), Sch 2 – *Australian Consumer Law (ACL)* or s 42 of the *Fair Trading Act 1987* (NSW) in force at the relevant time (**FTA**). The conduct that is alleged to be misleading or deceptive is an implied representation that Ms Alexandrova was authorised by Mr Saaib (as the builder) to submit documents to obtain home warranty insurance for the Marrickville property, when she was in fact not so authorised, and the submission of documents to the insurer that were not signed by Mr Saaib.
- 12 The Owners Corporation claims that Ms Alexandrova's misleading or deceptive conduct was a material cause of the issuance of the home warranty insurance

and construction of the defective Marrickville property and seeks damages from her for the amount that would have been recoverable from a licensed builder or under a valid home warranty insurance policy in respect of the common property defects.

- 13 Ms Alexandrova was self-represented at the hearing and has not filed a response to the technology and construction list statement filed by the Owners Corporation. At the hearing, the Owners Corporation proceeded on the basis that the allegations it makes against her are denied.
- 14 In essence, Ms Alexandrova contends that Mr Saaib authorised her to send documents relating to the Marrickville project to the insurer, she had no duty to verify the signatures on the documents submitted to her and she is not liable for any claims made in respect of the defects to the Marrickville property.
- 15 Other than on one aspect, Ms Alexandrova did not challenge the defects and quantum evidence relied on by the Owners Corporation on the issues of damages.

The evidence and witnesses

- 16 The Owners Corporation and Ms Alexandrova rely upon two affidavits sworn by her. The first is dated 14 August 2019 (**Alexandrova I**). The second is undated and filed on 17 December 2019 (**Alexandrova II**). Ms Alexandrova was cross-examined.
- 17 Mr Saaib swore three affidavits dated 28 February 2019 (**Saaib I**), 10 September 2019 (**Saaib II**) and 15 January 2020 (**Saaib III**) and was cross-examined. He read affidavits from five other lay witnesses, none of whom were cross-examined, and subpoenaed one lay witness, Noel Dona, to give evidence who gave evidence orally and was cross-examined.
- 18 As will appear, there is a significant conflict in parts of the evidence given by Ms Alexandrova and Mr Saaib about whether Mr Saaib told Ms Alexandrova that he was to be the builder of the Marrickville property and whether he authorised her to lodge documents with the insurer (which Mr Saaib denies). The parties made submissions concerning the credit and reliability of their evidence which I deal with later in these reasons. In summary, I did not find Ms

Alexandrova or Mr Saaib to be reliable witnesses and have approached their conflicting evidence on the basis that the contemporaneous records provide a more accurate reflection of what happened than their recollections of what was said (or not said) more than nine years ago.

- 19 Mr Zaatini was not called to give evidence and a submission was made by the Owners Corporation that an adverse inference of the kind made in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 (**Jones v Dunkel**) should be drawn from Mr Saaib's failure to call him as a witness. Mr Saaib also takes a tendency evidence objection in relation to his evidence in cross-examination about a building project at Mount Hay Road, Leura (**Leura project**).

Expert evidence

- 20 The Owners Corporation tendered ten expert reports in relation to defects and quantum. None of the Owners Corporation's experts were cross-examined. Ms Alexandrova was informed that she had a right to question them and chose not to do so.¹ Ms Saaib tendered four expert reports from Steve Dubedat, a forensic document examiner, who opined on whether the signatures attributable to Mr Saaib on 13 documents, including the 4 October Contract, were signed by him. In Mr Dubedat's opinion they were not.
- 21 Mr Dubedat was cross-examined. He was asked whether being limited to a pictorial representation of the questioned signatures impacted his opinion. He gave evidence that, in this case, there were such significant differences and no significant similarities that the pictorial features were enough to form a positive opinion.
- 22 During his cross-examination, Mr Dubedat was shown another questioned signature (Exhibit I) and asked whether, using the methodology that he applied in his reports, he would have concluded that it was not the genuine signature of the writer of the specimen signatures. Mr Dubedat's evidence was that, before coming to any conclusion, he would have to be satisfied that the other questioned signature was written within the same timeframe as the sample signatures and, if he was satisfied of that, then he would agree that the other

¹ The transcript does not record part of Ms Alexandrova's response (T324:29–44) but my notes of 7 February 2020 record that Ms Alexandrova did not wish to cross-examine any of the expert witnesses.

questioned signature was not the normal or genuine signature of the sample signature writer in that particular time frame. His evidence was that the appropriate timeframe will vary from person to person as some people will change signatures over many years, while others may change their signature overnight. The other questioned signature shown to Mr Dubedat was from a declaration of wages document signed by Mr Saaib in March 2006 (Exhibit F). Mr Saaib's evidence is that he changed his signature after his divorce in around 2005.

- 23 Overall, I am persuaded by and accept Mr Dubedat's evidence that, on the balance of probabilities, the 13 documents Mr Dubedat reviewed with signatures attributable to Mr Saaib were not signed by Mr Saaib. I identify each of those documents in the factual summary below.

FACTS

- 24 The following is a narrative of the facts and summary of the evidence relating to the Marrickville project, the events leading to the Saaib and Alexandrova proceedings and the Leura project. Unless indicated otherwise, I am satisfied of the following matters.

The principal players and their relationships

- 25 The Owners Corporation was created and became the successor in title to Transformer Group and owner of the common property on 10 July 2013, when Strata Plan 87265 for the Marrickville property was registered.
- 26 Transformer Group obtained development consent for the construction of the Marrickville property on 6 August 2008 (**Marrickville project**). It was deregistered on 17 December 2017. From 2008 to June 2013, Nemer Antoun was Transformer Group's sole director. Nemer Antoun is the brother of Joe Antoun (now deceased) who had been the sole director of a building company, Award Build Pty Ltd, between September 2008 and February 2012. Award Build was deregistered on 27 January 2013.
- 27 Mr Saaib migrated to Australia in 1986 and has worked in the building industry since that time, primarily as a formworker. He obtained his builder's licence on 18 October 2001. Between August 2004 and 31 March 2012, Mr Saaib was licensed to carry out building work that required home warranty insurance.

- 28 Mr Saaib is a director and secretary of Australian Metropolic Developments Pty Ltd (previously known as Australian Metropolic Formwork Pty Ltd) (**AMD**), a building company that has held various contractor and builder's licences. He has also been a shareholder and director of Saaib Construction Pty Ltd, a building company involving his brother, and is listed as the nominated supervisor on the builder's licence held by Everlasting Developments Pty Ltd, a company associated with Mr Saaib's brother-in-law.
- 29 Mr Saaib does not know how to use a computer, has difficulties with written English and typically communicates by telephone.
- 30 Mr Saaib's nephew, William (Wajih) Zaatini, is also known as William Mowad.
- 31 During the period from 2009 to at least 2012, Mr Saaib had a very close relationship with Mr Zaatini. They spoke regularly, almost daily during some periods, and Mr Saaib often spent time at Mr Zaatini's office in Kingswood from which a business called "Joe'n'Sons" operated. On many occasions, Mr Zaatini helped Mr Saaib with paperwork as a favour to Mr Saaib. Mr Saaib's evidence is that Mr Zaatini's sister, Barbara, worked as a bookkeeper from Mr Zaatini's Kingswood office, did Mr Saaib's books and liaised with his accountant, Kamel Jabour. He also gives evidence that copies of his tax returns and other paperwork were held at Mr Zaatini's Kingswood office.
- 32 Ms Alexandrova is a self-employed insurance and finance broker. She assists clients with applications for construction, residential and commercial finance, as well as obtaining home warranty insurance for building projects.
- 33 During the period 2000 to 2012, Ms Alexandrova operated her brokering business through Shima Properties Pty Limited (**Shima**), a company she was a director of until it was deregistered in July 2012. Between 2004 and 2013, Ms Alexandrova had a referral agreement with OAMPS Insurance Brokers Limited (**OAMPS**) pursuant to which she earned commission for introducing licensed builders to OAMPS.
- 34 Ms Alexandrova met Mr Saaib in around 2005. She has assisted him with obtaining finance for properties and insurance services relating to his work as a builder. In 2009, Ms Alexandrova assisted him to obtain a loan to purchase his

home at Mulgoa and, in March or April 2010, she assisted him to obtain home warranty insurance for the Leura project. Mr Saaib deposed that, in 2010, he spoke to Ms Alexandrova regularly.

- 35 Ms Alexandrova has also assisted Award Build with insurance for building projects since at least February 2010. She spoke to Joe Antoun once or twice and otherwise liaised with Mr Zaatini in relation to Award Build matters.
- 36 Mr Saaib introduced Ms Alexandrova to Mr Zaatini. There was a dispute as to when this occurred and when she became aware that Mr Zaatini was Mr Saaib's nephew. I accept Ms Alexandrova's evidence that she knew Mr Zaatini was Mr Saaib's nephew by February 2010. Her evidence is corroborated by Mr Saaib's evidence in cross-examination that Mr Zaatini got to know Ms Alexandrova "through him" and he introduced Mr Zaatini to Ms Alexandrova as his nephew.
- 37 During the second half of 2010 and in early 2011, Ms Alexandrova dealt with Mr Zaatini in relation to home warranty and other insurances for the Marrickville project. It is common ground that Mr Zaatini sent Ms Alexandrova the 4 October Contract, the application(s) for home warranty insurance naming Mr Saaib as the builder of the Marrickville property and other documents relating to Mr Saaib, including a Builder Eligibility Profile Change Application which Mr Saaib says he signed when it was blank on 12 October 2010.

Phone records

- 38 There are phone records in evidence of outgoing calls and text messages from a mobile telephone number XXXX XXX 090 registered in Mr Saaib's name for the period 1 August 2010 to 30 November 2010 and from a mobile telephone number XXXX XXX 703 registered in Award Build's name (with invoices issued to Nemer Antoun) for the period 1 July 2010 to 14 January 2011.
- 39 The phone records identify calls made to the mobile telephone number XXXX XXX 503 registered in Ms Alexandrova's name and the mobile telephone number XXXX XXX 545 registered in Mr Zaatini's name. There are no phone records of outgoing calls and text messages from Ms Alexandrova's number or Mr Zaatini's 545 number.

40 There are records of two calls and eight text messages from Award Build's 703 to Mr Zaatini's 545 number in September and October 2010. While this suggests that someone other than Mr Zaatini was using the 703 number, the coincidence of the timing of calls from Award Build's 703 number to Ms Alexandrova's number and references in emails to discussions with Mr Zaatini, together with Ms Alexandrova's evidence that she only spoke to Joe Antoun once or twice and dealt with Mr Zaatini on Award Build matters and the Marrickville project, satisfy me that Mr Zaatini used Award Build's 703 number to make calls to Ms Alexandrova and Mr Saaib during the second half of 2010 and early 2011.

The Marrickville project

First Contract

- 41 On 4 November 2009, Nemer Antoun, on behalf of Transformer Group, appointed Capital One Funds Management Pty Ltd to arrange finance for the Marrickville project. A condition of finance was a "[t]ripartite agreement between the Builder, Lender/(s) and Borrower".
- 42 In evidence is a document dated 24 November 2009 described as a residential building contract between Nemer Antoun as the Owner and Mr Saaib as the Builder for works at the site of the Marrickville property, with a contract price of \$2.4 million and a commencement date for construction of 11 January 2010 (**First Contract**) (Exhibit C). The First Contract purports to be signed by the Owner (Nemer Antoun) and the Builder (Mr Saaib) on each page, with one exception; on page 9, the Owner's signature appears twice. The execution block is not signed by the Builder but is stated to be witnessed by "William Mowad", who is also listed as the witness of the Owner's signature.
- 43 The First Contract includes Mr Saaib's builder's licence number, the ABN for Saaib Construction Pty Ltd and contact details for Mr Saaib that refer to his Mulgoa address, Award Build's 703 number and a fax number that does not belong to him. It contains the standard form BC4 residential building contract terms and includes clause 3 of Schedule 1, which states that the Builder must provide the Owner with a certificate of home warranty insurance (for work over

\$12,000) before the commencement of work and the demand or receipt of any payment.

- 44 Mr Saaib's evidence, which I accept, is that he did not sign the First Contract. He also denies authorising anyone to sign it on his behalf (Saaib II at [8]).

Early 2010: dealings between Ms Alexandrova, Mr Zaatini and Award Build

- 45 Ms Alexandrova gives evidence that, in early 2010, she had a conversation with Mr Saaib in which he asked her to help his nephew, Mr Zaatini, with obtaining home warranty insurance in relation to Award Build (Alexandrova II at [15]; T175:38–176:21). Mr Saaib denies asking Ms Alexandrova to help Mr Zaatini on some construction projects and gave evidence that Mr Zaatini already knew Ms Alexandrova and, if he needed help, could call her directly.
- 46 Ms Alexandrova deposes that she spoke to Mr Zaatini in February 2010, at which time he introduced himself as Mr Saaib's nephew, told her he was in the building industry and asked her to assist him with home warranty insurance, which she agreed to do (Alexandrova II at [16]).
- 47 Ms Alexandrova says that, from February 2010, she assisted Mr Zaatini to obtain eligibility for home warranty insurance and project specific home warranty insurance for Award Build (Alexandrova II at [17]). She annexes three documents relating to those matters: a home warranty insurance eligibility application by Award Build to Calliden Insurance signed by Joe Antoun on 18 February 2010; an undated "[t]o whom it may concern" letter from "Mr Joseph Antoun" with an "AWARD BUILD PTY LTD" letterhead listing a number of building jobs "we are active in" (but not referring to the Marrickville project) ("**to whom it may concern" letter**"); and two certificates of insurance relating to home building work to be carried out by Award Build at Ewell Street, Balmain dated 12 March 2010.
- 48 Ms Alexandrova's evidence in cross-examination was that she received the "to whom it may concern" letter by email from Mr Zaatini and it was prepared because Award Build was intending to lodge an application to increase its eligibility for home warranty insurance so it could undertake the Marrickville project.

49 Pausing here, pursuant to ss 92 and 99 of the *Home Building Act 1989* (NSW), a builder is required to obtain home warranty insurance in relation to work to be done under a residential building contract before the building work is undertaken. In order to obtain home warranty insurance, a builder must first be licensed to undertake building work that requires home warranty insurance and be eligible to obtain home warranty insurance from an insurer to cover the value of the contract works or in respect of the type of building works to be undertaken. A builder's eligibility for home warranty insurance on building projects may be limited by dollar value and by type of works and a builder may apply to an insurer to obtain an increase in eligibility limits.

Second Contract, 13 September letter, Builder's Side Deed and ANZ offer of finance

50 On 15 April 2010, Australia and New Zealand Banking Group (**ANZ**), the bank that provided construction finance to Transformer Group, appointed Newton Fisher & Associates Pty Ltd as the quantity surveyor for the Marrickville project. The next day, Newton Fisher wrote to Transformer Group with a list of required information for the Marrickville project that included the following: a signed building contract; the builder's licence details; home warranty insurance certificates; certificates of currency for "Contract Works Insurance", "Public Liability Insurance" and "Workers Compensation Insurance"; and a pro forma statutory declaration from a director of the builder that all wages and amounts due to sub-contractors and suppliers have been paid.

51 On 5 May 2010, Mr Zaatini emailed Community Mortgage Corporation Pty Limited (who forwarded Mr Zaatini's email to Capital One) about items on Newton Fisher's list, noting that there was already a signed building contract (presumably a reference to the First Contract) and that the owner/builder requirements were not applicable. Mr Zaatini's email is sent from "@awardbuild.com" and refers to Award Build's 703 number as Mr Zaatini's contact number. I infer from this that Mr Zaatini was working with and/or for Award Build in relation to the Marrickville project at this time.

52 Sometime between 17 June and 6 September 2010, another building contract for the Marrickville project came into existence (**Second Contract**). It is not clear on the evidence who was responsible for the Second Contract but it

appears to have been created because Newton Fisher had identified that the Owner referred to in the First Contract was Nemer Antoun and the borrower (of the construction finance from ANZ) was Transformer Group. In a report issued to ANZ on 17 June 2010, Newton Fisher advised that the executed building contract (the First Contract) was to be amended to replace the Owner's name with Transformer Group and that home warranty insurance was a precondition to payment. The Second Contract was sent to ANZ on 6 September 2010, provided to Newton Fisher on 7 September 2010 and referred to in an email from Newton Fisher to ANZ on 10 September 2010.

- 53 The Second Contract is a residential building contract dated 24 November 2009 and is in almost identical terms to the First Contract. The key differences which the Second Contract has with the First Contract are as follows: it identifies Transformer Group (not Nemer Antoun) as the Owner; it includes a signature for the Builder (Tony Saaib) on the execution page; "2.65m" is written above the \$2.4 million Contract Price and then crossed out; and delay costs, payment of contract price and the method of payment have been included in Schedule 2.
- 54 Mr Saaib denies signing the Second Contract or authorising anyone to sign it on his behalf (Saaib II at [6]). Mr Dubedat's evidence, which I accept, is that the "T Saaib" signatures on the Second Contract are not genuine signatures of Mr Saaib.
- 55 Around this time, a letter dated 13 September 2010 purporting to be signed by Mr Saaib appears to have been created (**13 September letter**). The 13 September letter refers to "TONY SAAIB PTY LTD", a company that does not exist, and the same Silverwater PO Box address as that referred to in the "to whom it may concern" letter. The 13 September letter states:

I, Mr. Tony Saaib, have agreed with, The Transformer group Pty Ltd, for the construction of the 11 townhouses at... Livingston rd, Marrickville NSW. As set out with in [sic] the contract, the retention of 10% and up to a maximum of 5% of the contract sumare [sic] to be withheld and payable 50% on completion ie upon issue of the Occupation Certificate and the balance after defects liability period.

If you have any other questions please feel free to call me at any time on ... 703.

- 56 Mr Saaib denies signing the 13 September letter or authorising its preparation. Mr Dubedat's evidence, which I accept, is that the "T Saaib" signature on the 13 September letter is not a genuine signature of Mr Saaib.
- 57 The 13 September letter was sent to ANZ.² It seems likely to have been created in response to the 10 September 2010 report to ANZ in which Newton Fisher identified that cash retention was not included in the "amended contract" and recommended that it be withheld from drawdown payments.
- 58 On 28 September 2010, ANZ issued a letter of offer to Transformer Group for the Marrickville project for \$4.61 million of finance, with a construction funding component of \$2.65 million (**ANZ finance offer**). The offer was subject to conditions requiring the following: a fixed price (\$2.4 million) contract to be executed with an acceptable builder; a tripartite agreement between ANZ, Transformer Group and the builder, "Tony Saaib Pty Limited", to be executed prior to drawdown; contractors all risk insurance at a minimum of \$3,165,450 to be taken out; and, in advance of drawdowns, evidence of home owners warranty insurance and the provision of statutory declarations. Transformer Group accepted ANZ's offer of finance on 1 October 2010.
- 59 Around this time, a document described as a "Building Contract Side Deed" between ANZ, Transformer Group and Mr Saaib was created (**Builder's Side Deed**). The Builder's Side Deed defines "Building Contract" as the contract between Mr Saaib and Transformer Group dated 24 November 2009 (the Second Contract), includes Mr Saaib's purported signature and records Mr Zaatini as the witness to the signature.
- 60 Mr Saaib denies signing the Builder's Side Deed or authorising anyone to sign it on his behalf. Mr Dubedat's evidence, which I accept, is that the "T Saaib" signature on Builder's Side Deed is not a genuine signature of Mr Saaib.

29 and 30 September 2010: emails between Ms Alexandrova and Mr Zaatini and alleged conversations between Mr Saaib and Ms Alexandrova

- 61 Ms Alexandrova deposes (Alexandrova II at [20]) that, in or about mid-2010, she had a telephone conversation with Mr Saaib in the following terms:

² The 13 September letter was produced on subpoena by ANZ.

Mr Saaib: I have a new project which I will be doing with my nephew William. It's on Livingstone Road in Marrickville. It will be 11 residential units. William will give you the details and other information you need. He will act on my behalf.

Ms Alexandrova: Why are you doing this? You don't need a business partner. Don't you remember what happened to you and your last business partner? He got into trouble and it ended up in Court and it cost you.

Mr Saaib: William is my nephew. I trust him. It's going to be OK. Can you give an estimate of the cost for the insurance for this new Marrickville project. William will give you all the details.

62 Mr Saaib denies this conversation. His evidence in cross-examination was that he had no knowledge of the Marrickville project at that time (indeed, his evidence is that he did not know about it until 2014), he did not tell Ms Alexandrova that Mr Zaatini would give her details and other information she needed, and he never had a job in Marrickville.

63 At 12:32pm on 29 September 2010, Ms Alexandrova emailed to Mr Zaatini a certificate of home warranty insurance for Award Build for a building project at Belemba Ave, Roselands.

64 Later that day, five emails were exchanged between Mr Zaatini and Ms Alexandrova relating to the Marrickville project, some of which refer to Mr Saaib.

65 At 4:08 pm, Mr Zaatini sent an email from "@joensons.com" to Ms Alexandrova that states:

Irena we are ready for the site at Marrickville now the details are ...
Livingston rd, Marrickville.

We will be building 11 townhouse you already have the details as you did quote us under Tony Saaib.

Can you please revisit that quote and make the policy ready so I can arrange the payment for it.

66 There is no document in evidence of a "quote...under Tony Saaib". Ms Alexandrova's evidence is that she "didn't quote" but may have given an estimate of the likely insurance cost (Alexandrova II at [24]; T181:11–13). She also gave evidence in cross-examination that she understood the references to "we" in the first and second paragraphs of the email to be to Award Build.

67 At 5:21pm, Ms Alexandrova sent an email to Mr Zaatini that states:

Tony Saaib was with different Insurer. We have to do new application (attached).

Please fill out and email/fax with the following documents required for multi unit development:

Council Rates to confirm the ownership,

Finance Approval,

Particular of Fixed Price Contract,

Status of Project in Balmain (which stage you are up to)

I also have to request your limit increase.

68 The “new application (attached)” is not in evidence, but I consider it most likely that Ms Alexandrova was referring to an application for home warranty insurance for a multi-unit development that needed to be prepared in order for Award Build to obtain home warranty insurance for the Marrickville project. Ms Alexandrova’s evidence is that the “Project in Balmain” refers to an Award Build project and the reference to “request your limit increase” relates to an increase in Award Build’s eligibility for home warranty insurance for building projects.

69 In the next email, sent at 5:31pm, Mr Zaatini asks:

Can I put it under AWARD BUILD?

70 At 5:37pm, Ms Alexandrova replied, stating:

We are doing under Award Build – you have your own eligibility now, you do not need Tony Saaib.

71 In the next email, sent by Mr Zaatini at 6:40pm, he says:

Would it matter if the contract was under another name?

And using AWARD BUILD’s home owner warranty?

72 When Mr Zaatini wrote this email, presumably he was aware that the Second Contract named Mr Saaib as the builder. I also infer from this email, the earlier emails (for example at [65], [67] and [71]), Ms Alexandrova’s evidence (at [49]) and Mr Zaatini’s use of the Award Build 703 number that Mr Zaatini was either employed by or acting on behalf of and with the consent of Award Build.

73 On 30 September 2010, at 2:07pm, Ms Alexandrova sent an email to Mr Zaatini which does not directly answer Mr Zaatini's question in his 6:40pm email but says:

Tony Saaib has eligibility with QBE. He has to complete the QBE application attached. The contract has to be under his name as well.

74 In cross-examination, Ms Alexandrova accepted that "something had happened" between sending the email at 5:37pm on 29 September 2010 and the email 2:07 pm on 30 September 2010 to cause her to think that the Marrickville project had to be in Mr Saaib's name and not in the name of Award Build. Her evidence in cross-examination included the following: that the initial intention was for Award Build to be the builder of the Marrickville project; that she had been assisting Award Build to obtain an increase to its home warranty insurance eligibility limit and the "to whom it may concern" letter was prepared for that purpose; that she became aware from speaking to Joe Antoun that Award Build would not be able to qualify for an increase as a tribunal claim had been made against his licence; that Award Build approached Mr Saaib and introduced him to the project as a "partner"; and that she then heard from Tony that "he might be doing Marrickville".

75 Ms Alexandrova deposes (Alexandrova II at [29]) that, "shortly after", she had a telephone conversation with Mr Saaib in the following terms:

Ms Alexandrova: William has been emailing me about the Marrickville project. He is asking whether the building contract can be in another name, using Award Build's home warranty insurance.

Mr Saaib: I told you it's fine. Both the building contract and the home warranty insurance will be in my name.

Ms Alexandrova: Do you really want to go ahead with this?

Mr Saaib: Yes.

76 Mr Saaib denies having the "shortly after" conversation with Ms Alexandrova (Saaib III at [4]). His evidence in cross-examination was that he thought he may have had a conversation with Ms Alexandrova in about late September 2010 and, although he could not remember what he said, it was wrong to suggest it was about Marrickville as they only talked about finance or home warranty insurance if that was needed at the time, and he had never heard about the Marrickville project.

- 77 Ms Alexandrova was cross-examined about the “shortly after” conversation. Her evidence was that “there is no date when that conversation happened” and that it was impossible to clarify exactly when she had the conversation with Mr Saaib.
- 78 On 30 September 2010, two calls were made from Award Build’s 703 number to Ms Alexandrova’s number which I infer were from Mr Zaatini; the first at 10:02am lasting 10 seconds and the second at 12:18pm lasting 262 seconds (4.36 minutes). Ms Alexandrova does not give evidence of what was discussed on those calls.

The 4 October Contract

- 79 At 5:29pm on 5 October 2010, Mr Zaatini sent an email to Ms Alexandrova referring to a phone call that afternoon. There is a record of a call at 3:14pm from Award Build’s 703 number to Ms Alexandrova’s number lasting 186 seconds (3.1 minutes), which I infer is a call from Mr Zaatini to Ms Alexandrova.
- 80 Mr Zaatini’s 5 October email attaches “the application as 4 pages and the contract as 5 pages” and states that he will email the “rates and letter from the bank soon”. The attachments to the email are:
- (a) the 4 October Contract; and
 - (b) a completed version of a 4-page QBE Builder’s Warranty Insurance application (**QBE Application**).
- 81 The 4 October Contract is five pages long. Mr Dubedat’s evidence, which I accept, is that most of the 4 October Contract, including the signatures, is superimposable with the corresponding parts of the Second Contract (Affidavit of Steve Dubedat dated 22 August 2019 at [5]–[7]).
- 82 There are several differences between the 4 October Contract and the Second Contract: the 4 October Contract does not include “2.65m” written above the \$2.4 million Contract Price and then crossed out; 4 October 2010 (not 24 November 2009) is stated to be the date that the parties signed on page 3 and the owner signed the acknowledgement on page 6; and the 4 October Contract does not include Schedules 2, 3 and 4 or the terms and conditions after Schedule 4, or state any commencement date for the works. I infer from this

and from Mr Dubedat's evidence that the 4 October Contract was not signed by any party on 4 October 2010 and that it was created from the first page of the First Contract and pages 2, 3, 4 and 6 of the Second Contract with only the dates changed.

- 83 The Owners Corporation accepts that Mr Saaib did not sign the 4 October Contract. Mr Saaib also denies authorising anyone to sign the 4 October Contract on his behalf or that he authorised anyone to enter into it on his behalf (Saaib I at [9]).
- 84 It is not apparent from the evidence why the 4 October Contract, with a different date, was created or who created it.
- 85 The QBE Application attached to Mr Zaatini's 5 October email is an application described as "QBE Application for Job Specific Policy Multi-Unit Developments". It refers to Mr Saaib as the Builder Entity, gives Award Build's 703 number, lists the Silverwater PO Box referred to in the "to whom it may concern" letter as the office address and identifies Transformer Group (with Nemer Antoun as the contact) as the Owner/Developer. It refers to a signed contract date of "1/10/10" with a fixed price contract of \$3,165,450 and describes the development as "11 Townhouses". Section 9 on page 4, "Builder Declaration and Acknowledgement", identifies William Zaatini, Construction Manager, as having signed the application "for and on behalf of" Mr Saaib.
- 86 Mr Saaib denies authorising Mr Zaatini to sign the QBE Application on his behalf (Saaib I at [52](c)).
- 87 At 11:02pm on 5 October 2010, Mr Zaatini sent another email to Ms Alexandrova attaching a rates notice for the Marrickville property addressed to Transformer Group, advising that the "letter of offer will follow" and asking her to call him in the morning when she has a rough idea of the costs for the "HOW and... the Contractors all risk insurance...in relation to the project". Based on the wording of that email, it seems that Mr Zaatini had access to ANZ's finance offer.
- 88 Ms Alexandrova's deposes (Alexandrova II at [32]) that, shortly after receiving the 5 October email from Mr Zaatini (she does not say which one; presumably

it was the email at 5:29pm), she telephoned Mr Saaib and they had a conversation as follows:

Ms Alexandrova: I have received the QBE application form and the building contract for the Marrickville project. Do you want me to now proceed with submitting these documents to QBE?

Mr Saaib: Yes. And please obtain anything else you need from William.

89 Ms Alexandrova's evidence in cross-examination was that, at the time of this call, it was her understanding that the construction of Marrickville would be done by a partnership between Award Build and Mr Saaib, although she accepted that this was her "presumption" and that "maybe [Mr Saaib] was just helping them as a family member. Maybe he was a partner".

90 Mr Saaib denies the conversation with Ms Alexandrova referred to at [88]. When asked in cross-examination whether he recalled Ms Alexandrova calling him on or about 5 October 2010, he said, "Maybe she do, maybe she not. I'm not remember she call me". He rejected telling Ms Alexandrova that she should proceed with submitting the home warranty insurance application form and building contract for the Marrickville project to the insurer or that she should obtain anything else she needed from Mr Zaatini.

6 October 2010: Ms Alexandrova sends the 4 October Contract and QBE application to OAMPS

91 On 6 October 2010 at 12:47pm, Ms Alexandrova sent an email to Tyron Marais, a broker at OAMPS, with the subject "TONY SAAIB – QBE Application – Marrickville 11 t/houses" attaching copies of the 4 October Contract and the QBE application. The email states:

Please find the application and Fixed price Contract for TONY SAAIB attached. His eligibility is with QBE.

Council Rates are following by next email. Letter of finance approval will be emailed tomorrow morning.

Can you please quote the premium subject to finance approval so I could organise the payment.

92 At 1:34pm that day, Ms Alexandrova emailed Mr Zaatini and told him that QBE would get the premium soon, that there was a short delay and that she would escalate and advise shortly.

- 93 At 1:46pm, a call was made from Award Build's 703 number to Ms Alexandrova's number (which I infer to be from Mr Zaatini) lasting 214 seconds (3.57 minutes). Shortly after, at 1:57pm, Mr Zaatini sent an email to Ms Alexandrova attaching, as requested, the drawings for the Marrickville project.
- 94 Later that day, at 3:58pm, Ms Alexandrova faxed to Mr Marais a copy of Mr Saaib's Certificate of Eligibility from Calliden Insurance Ltd (dated 20 January 2010) which identified that Mr Saaib was eligible to obtain home warranty insurance in relation to building contracts not exceeding \$500,000. The fax is marked to the attention of "Tyron" with the subject "Re: SAAIB" in handwriting.

7–12 October 2010: Start of eligibility review application process

- 95 On 8 October 2010, at 2:28pm, Ms Alexandrova emailed Mr Zaatini. The email has a subject line, "Home Warranty Eligibility Review", and states:

As discussed, please send over the weekend the following docs so I could finish the proposal by Mon and send it to the Insurer for the approval:

1. Amended architect letter as per my email of yesterday;
2. A letter from the Builder re 2009 and 2010 trading – draft emailed
3. A letter from engineers or certifiers saying Tony build in the past (until July 2008) multi unit projects;
4. Application for review of his eligibility – emailed on Thur

- 96 There are records of four calls made on 7 October 2010 from Award Build's 703 number to Ms Alexandrova's number, the last of which was at 3:40pm for 582 seconds (9.7 minutes). Based on Ms Alexandrova's 8 October email, I infer that these calls were from Mr Zaatini to Ms Alexandrova and they discussed what was required for her to complete a proposal for an application to be made to increase Mr Saaib's eligibility for home warranty insurance from \$500,000 to cover the \$2.4 million Marrickville project, which involved, amongst other things, completing a Builder Eligibility Profile Change Application (**Eligibility Application**).

- 97 The "email of yesterday" regarding the architect's letter (point 1), the letter from the builder "draft emailed" (point 2), and the application for review of eligibility "emailed on Thur" (point 4) referred to in Ms Alexandrova's 8 October email are not in evidence.

- 98 At 8:05pm on 11 October 2010, Mr Zaatini sent an email to Ms Alexandrova referring to what he “emailed [her] this morning” (which is not in evidence) and attaching the “art ref letter amended as you requested”, which is presumably a reference to an amended architect letter. Mr Zaatini asks Ms Alexandrova to send the forms “to fill out” which he will get signed and emailed back, noting that he had faxed a form on 7 October at 3pm which is also not in evidence.
- 99 At 8:56pm on 11 October 2010, Ms Alexandrova sent an email to Mr Zaatini stating the following: that different forms for “Construction Insurance and Home Warranty Policies” had been faxed; the “Urban Link reference [the architect ref] – pls include address, year, units number and contact volume”; that she needed one more reference from engineers or certifiers; that the “Builder’s letter is ok”; and that she hoped to “get it [eligibility increase] done with old Financials” she had. Ms Alexandrova’s evidence in cross-examination was that the references to the “old financials” are to financials that she had received by fax from Mr Zaatini.
- 100 At 2:55pm on 12 October 2010, Ms Alexandrova sent a follow up email asking Mr Zaatini to send through the documents per her email of the night before, noting that she had been trying to call and there was no answer.

13 October 2010: Eligibility Application

- 101 At 6:47am on 13 October 2010, Mr Zaatini sent an email to Ms Alexandrova attaching “builders eligibility forms”, asking her to let him know if anything needed to be amended and that “the guys have gone over them and they said that they are fine”. Mr Zaatini’s email also states that he would email the letter from the engineer “this afternoon” and that he is ready to make payment for both insurances.
- 102 There was some debate at the hearing about what “builders eligibility forms” were attached to Mr Zaatini’s email as the email records produced by Ms Alexandrova are incomplete and do not make it clear. Based on the description of “builders eligibility forms” and the emails that followed, I infer that what was attached to Mr Zaatini’s email was a partially completed Eligibility Application dated 12 October 2010 that Mr Saaib accepts he signed and dated when it was a blank form.

103 The partially completed Eligibility Application in evidence includes Award Build's 703 number, the ABN for Saaib Construction Pty Ltd, the Silverwater PO Box for a postal address, and identifies "William" at the Joe'n'Sons email address as the key contact. Section 3 ("Builder Profile Change Request") is incomplete with "N/A" written on it. Under section 2 ("Builder History"), the partially completed Eligibility Application states that Mr Saaib acted as the project manager for a "multi-level unit" at Hillcrest Street, Homebush for \$15 million in 2009, a project at Imoyes Street, Marrickville for \$1.5 million in 2008, and for the construction of 50 units at Watt Street, Gosford for \$25 million in 2006. It is common ground that Mr Saaib did not work on these projects. There is no mention anywhere of Livingstone Road or the Marrickville project on the partially completed Eligibility Application.

Mr Saaib's evidence about signing the Eligibility Application

104 Mr Saaib's evidence is that, on or about 12 October 2010, he signed and dated pages 3 and 5 of a blank Eligibility Application when he was at Mr Zaatini's office. He says that he signed the pages after Mr Zaatini told Mr Saaib that there were lots of construction jobs around, that he may be able to get Mr Saaib some of the jobs, that Mr Saaib would need home warranty eligibility to do the jobs, and that he would organise the eligibility for him. Mr Saaib says that after Mr Zaatini printed the form from the computer, he signed and dated the two pages and handed them back to Mr Zaatini who told him he would ask Ms Alexandrova to deal with the application (Saaib I at [54]). Mr Saaib also deposes that, when he signed the blank form, he assumed he would need to pay something if the application was approved, but that Mr Zaatini did not ask him to pay anything or mention the application again and Mr Saaib thought nothing more about it (Saaib I at [56]).

105 Mr Saaib was challenged in cross-examination about the circumstances in which he signed the blank Eligibility Application, his understanding of why it was needed, who would complete the form and what information would be needed to progress the application, and his evidence that he thought nothing more about it.

- 106 Mr Saaib's evidence in cross-examination was that Mr Zaatini had a bundle of plans in his office and told Mr Saaib that he needed to get "high eligibility" for home warranty insurance and that he got him to sign the form (T302:41–5). Mr Saaib also gave evidence that Mr Zaatini showed Mr Saaib how many plans "he got" and that he needed to check how much eligibility he had, but it was not for any job or for Marrickville (T303:5–11). He stated that he knew Mr Zaatini would fill in the Eligibility Application form and send it by email to Irena (T304:33–38, T327:35–38), that he knew when he saw the bundle of plans that he needed high eligibility and that Mr Zaatini showed him the plans and said, "look how much plan I've got from builder, I can get you job. You need to make high eligibility and to get home insurance and higher eligibility" (T306:11–17).
- 107 In cross-examination, Mr Saaib accepted he knew that information was required to be added to the form showing he had experience with large home building projects to get an increase in eligibility (T327:44–47) and agreed that, in 2010, he did not have experience in large home building projects (T328:3–12, T328:19–29). Mr Saaib did not accept that he knew Mr Zaatini would be putting information on the form which would falsely state that Mr Saaib had experience with large home building projects (T328:40–43, T333:23–T334:41).
- 108 Mr Saaib said he relied on Mr Zaatini to "complete the form right, but not bullshit information" (T330:10–15), knew Mr Zaatini would deal with Ms Alexandrova (T330:16–19) but did not know Mr Zaatini was providing emails and other information to Ms Alexandrova without his knowledge (T331:11–25, T333:23–T334:21). He gave evidence that it was his mistake to sign a blank form, that he didn't know what happened or how Mr Zaatini planned it (T333:23–27). He also gave evidence that he spoke to Ms Alexandrova about eligibility and requested she let him know if there was anything he needed to provide (T330:26–40).
- 109 Submissions were made that Mr Saaib's evidence in relation to the Eligibility Application reflects adversely on his credit. I deal with those submissions later in these reasons. At this point, I simply note that I do not accept Mr Saaib's evidence that he thought nothing more about his Eligibility Application after he

signed the blank form on 12 October 2010 and that I find that Mr Saaib spoke to Ms Alexandrova about the Eligibility Application in the days that followed.

13 October 2010: Home Warranty Application

- 110 At 11:01am on 13 October 2010, Ms Alexandrova sent an email to Mr Zaatini raising four items to be dealt with before lodgement that afternoon.
- 111 The first item relates to the “Application for HW policies (attached)”. In her email, Ms Alexandrova says it “must be the same signature as on Application for Review” but notes that Mr Zaatini sent the application with a different signature and asks him to get “Tony to sign Page 4 Sec 6 (one page only)”.
- 112 There was some debate at the hearing and cross-examination of Ms Alexandrova about the references to the “Application for HW policies” and “different signature” in the 13 October email; the attachments to Ms Alexandrova’s email are not in evidence. Based on the wording of that email, the previous emails that refer to “eligibility” and Ms Alexandrova’s evidence, I accept the Owners Corporation’s submission that the attachment was likely a blank application for multiple dwelling projects home warranty insurance and that Ms Alexandrova’s email is to be read as asking Mr Zaatini to ensure that page 4 (of the blank form) was signed by Mr Saaib in his personal capacity, not like the QBE Application that had been signed by Mr Zaatini on Mr Saaib’s behalf (T422:23–42315).
- 113 The second item of Ms Alexandrova’s 13 October email raises a query as to whether the price of the contract is \$2.4 million as per the contract, noting that “the application is for \$3,165,450” (presumably a reference to the price referred to in the QBE application). The third item notes that the architect’s reference does not say that Mr Saaib was a project manager. The fourth item states that the Builder’s letter is not signed. As to this last point, when Ms Alexandrova approved the “Builder’s letter” in her email of 11 October 2010, presumably she was referring to an unsigned version that is not in evidence.
- 114 At 11:27am on 13 October 2010, Mr Zaatini replied to Ms Alexandrova’s email, indicating that the construction cost is \$2.4 million and that he will get the home warranty application re-signed by Mr Saaib, the architect’s letter amended and the Builder’s letter signed as soon as possible.

- 115 At 11:41am on 13 October 2010, Ms Alexandrova replied asking for a call as “[t]his will not be accepted by the Insurer”, referring to the difference between the \$2.4 million contract price and the \$3,165,450 amount.
- 116 At 11:47am on 13 October 2010, a call was made from Award Build’s 703 number to Ms Alexandrova’s number for 1096 seconds (18.26 mins), which I infer to be a call from Mr Zaatini. Ms Alexandrova does not give evidence about what was discussed during this call.
- 117 At 1:05pm on 13 October 2010, Mr Zaatini sent an email to Ms Alexandrova that attaches “the application” and asks whether she is “happy with it”. I infer that this was a NSW Home Warranty Insurance Fund Application for Multiple Dwelling Projects specific to the Marrickville project dated 12 October 2010 which is purportedly signed by Mr Saaib and gives Award Build’s 703 number as Mr Saaib’s contact number and the fax number for Joe’n’Sons.
- 118 Mr Saaib denies signing the 12 October 2010 home warranty application or authorising anyone else to sign it on his behalf. Mr Dubedat’s evidence, which I accept, is that the “T Saaib” (Builder) signature on the home warranty application is not a genuine signature of Mr Saaib.
- 119 At 3:46pm on 13 October 2010, Ms Alexandrova sent an email Mr Zaatini, stating:

William,

The amended HW Policies application for \$ 2,4 mil you emailed just now, has different signatures. Its [sic] not Tony’s signature.

Attached is the last page of Review application with Tony’s signature.

- 120 Ms Alexandrova’s evidence is that she believes that her email attached a copy of the last page of the Eligibility Application. The attachment is not in evidence.

13 October 2010: calls between Mr Saaib, Mr Zaatini and Ms Alexandrova

- 121 At 8:40pm on 13 October 2010, a call was made from Mr Saaib’s number to Mr Zaatini’s 545 number lasting [160] seconds (2.67 minutes). At 8.44pm that night, a call was made from Mr Saaib’s number to Ms Alexandrova’s number lasting 21 seconds.

122 Ms Alexandrova deposes (Alexandrova II at [47]) that, on 13 October 2010, she and Mr Saaib had a discussion, which may have been after he left her a message, in the following terms:

Mr Saaib: How are we going with the Marrickville project insurance application?

Ms Alexandrova: William has been sending me documents for the application for home warranty insurance for the Marrickville project. You need to sign the documents because you are the builder. William sent me a document signed in your name, but it's not your signature. I asked William to get you to sign it.

Mr Saaib: Don't worry, William has been helping me complete the documents. It's no problem. I will sign whatever needs to be signed.

Ms Alexandrova: Also, do you have your 2009 and 2010 financial statements? I don't know whether your letter will be sufficient. The insurer might want to see the financial statements for your business.

Mr Saaib: I'll talk to my accountant about it and see what he can do.

123 Mr Saaib denies that conversation although, based on the call record, he accepted in cross-examination that he spoke to Ms Alexandrova after he spoke to Mr Zaatini. His evidence was that he did not remember what they talked about, that maybe she asked, "do you sign the document," and he told her yes, but that he never knew anything about the Marrickville project and rejected that it was discussed.

14 October 2010: call between Mr Saaib and Ms Alexandrova

124 At 11:49am on 14 October 2010, a call was made from Mr Saaib's number to Ms Alexandrova's number lasting 41 seconds. Ms Alexandrova deposes (Alexandrova II at [49]) that she and Mr Saaib had a discussion, which may have been after he left her a message, in the following terms:

Mr Saaib: I have spoken to my accountant. My 2009 financials do not have trading income. My 2010 financials haven't been completed.

Ms Alexandrova: OK let's just wait and see what the insurer requires.

125 Mr Saaib accepted in cross-examination that he spoke to Ms Alexandrova on 14 October 2010 and had a further conversation with her, but he "never remember what [he] said to her or what she say to [him]" (T340:03-13, 41-44).

126 Ms Alexandrova's evidence in cross-examination was that her discussions with Mr Saaib on 13 and 14 October 2010 were about his eligibility upgrade for the

purposes of the Marrickville project. She explained that the wording of her affidavit evidence which did not refer to Marrickville being mentioned (Alexandrova I at [12]) was “incorrect” and not what she meant and that Mr Saaib “applied for upgrade of his eligibility” because he joined the Marrickville project (T195:39–43, T196:16–24).

15 October 2010: Lodgement of Eligibility and Home Warranty Applications

127 At 6:27am on 15 October 2010, Mr Zaatini sent Ms Alexandrova an email stating the he waited for her to call last night, but didn’t hear back from her and asked her to call him that morning.

128 At 11:11am that day, Ms Alexandrova sent an email to Mr Zaatini which states:

I have asked Tony about 2009 and 2010 Financial Statements. He has only 09 which does not have trading income.

The Insurer might still require to [sic] provide 09 and 10 Statements for his business if his letter is not sufficient.

Please note there might be further delay as we have to wait for the accountant to prepare the statements.

If I receive today all docs as per my previous email, I will submit the proposal today. The ball is in your court.

129 At 11:31am, Mr Saaib sent Ms Alexandrova a text message. Ms Alexandrova no longer has a copy of that text message. Initially, she deposed that the text message from Mr Saaib was to the following effect (Alexandrova II at [53]):

I’m meeting William this afternoon. Please lodge the insurance application for Marrickville today or William says we will lose contract.

130 In cross-examination, Ms Alexandrova’s evidence was that the text message said “Please call me”. She accepted that, in 2010, Mr Saaib wasn’t proficient in writing English, that he sent “Please call, Irena” because he couldn’t properly ask for anything else in a text message and that normally she would contact him because she was trying to be a good broker (T197:13–24).

131 Mr Saaib gave evidence in cross-examination that he does not know how to send text messages himself and that family members or workers help him to send them instead (T341:47–T342:10). He accepted that he was trying to get in contact with Ms Alexandrova that day, that maybe he contacted her about the eligibility application to see how it was going and if there was anything he

needed to provide her, but he wasn't sure what they spoke about after 10 years (T343:6–14). He also gave evidence in cross-examination that he was pouring concrete on 15 October 2010, which he remembered because he had done a tax invoice for the job that day but didn't get paid for the work as it had been done late (T342:12–16, T342:26–50).

132 There is a tax invoice in evidence dated 15 October 2010 from Australian Metropolic Formwork Pty Ltd (the previous name of AMD) to Dream Constructions for \$7,700.

133 At 2:36pm on 15 October 2010, Mr Zaatini sent an email to Ms Alexandrova which states:

Im [sic] here with the man him self [sic] Tony.

I have just informed him that as soon as this is over the line its his shout for drinks.(after all this I know you need it as much I a [sic] do haha).

I have attached the letter from tony explaining that he has not worked during 09 10 and you can also compare the signatures as well.

134 As noted above, Mr Saab's evidence is that he was pouring concrete that day. He also gave evidence in cross-examination that he did not think he visited Mr Zaatini at his Kingswood office during the day, but that it was possible he did so (T345:8–10).

135 At 2:40pm, a call was made from Award Build's 703 number to Ms Alexandrova's number lasting 29 seconds, which I infer was from Mr Zaatini.

136 At 2:56pm, Ms Alexandrova sent an email to Mr Zaatini listing three outstanding issues. First, she states that the "[r]eference must be signed and on letter head". This appears to relate to the "engineer" reference, last mentioned by Mr Zaatini in his 1:05pm 13 October email ("I am still awaiting the engineer for his letter"). Second, Ms Alexandrova states that the progress payment schedule "must be signed by the builder and the owner". Third, she notes that the signature on the application is still different. This seems to be a reference to the signature on the 12 October home warranty application.

137 At 3:15pm on 15 October 2010, Mr Zaatini sent an email dealing with the first two issues which attached an engineer reference and a signed progress payment sheet.

138 There is no email in evidence attaching another signed home warranty application, although it seems that another signed version dated 15 October 2010 was sent to Ms Alexandrova that day.

139 Ms Alexandrova deposes (Alexandrova I at [58]) that once the documentation was complete and ready to be sent to the insurer, to the best of her recollection, she rang Mr Saaib and they had a discussion in the following terms:

Ms Alexandrova: I have now received all the completed documentation that needs to be sent to the insurer for the Marrickville project. Are you happy for me to now submit these?

Mr Saaib: Yes. Please send them off.

140 In cross-examination, Ms Alexandrova gave evidence that she called Mr Saaib to make sure that he was happy for her to proceed and submit the documents for the eligibility increase and that he hadn't changed his mind (T197:30–41).

141 Mr Saaib denies the conversation in the terms at [139]. His evidence in cross-examination was that he thought he had a call with her that day and that it was possible it was about the eligibility application (T312:37–T313.9, T344:31–40).

142 At 4:18pm on 15 October 2010, Ms Alexandrova sent an 18-page fax to Mr Marais at OAMPS that is marked (in handwriting) "ATTN: TYRON FM: IRENA / RE: SAAIB / PAGES: 18". The fax comprises seven documents.

143 The first document is a completed Eligibility Application dated 12 October 2010 and signed by Mr Saaib (which Mr Saaib accepts is his signature). The completed Eligibility Application includes details that were missing on the version referred to at [103]; section 3 (on page two) relating to the Builder Profile Change Request is completed and identifies that it is a request to increase the multi dwelling construction limit from \$500,000 to \$3.2 million and refers, under part (D) "Reasons for Profile change sought", to an attached cover letter which is not in evidence.

144 The second document is a letter dated 7 October 2010 from United Consulting Engineers Pty Ltd "Re: Mr. Tony Saaib" purportedly signed by Mark Anthony Boudib, Director, that states that Mr Boudib had been involved as a structural engineer on a number of multi residential and commercial developments where

Mr Saaib had been engaged for the project management, including a \$13 million development in Homebush (**Engineer Reference**). I am satisfied that Mr Boudib did not create this reference and it is forged. Mr Boudib produced nothing in response to a subpoena seeking documents relating to Mr Saaib and a copy of the Engineer Reference. Further, Mr Saaib's evidence is that, as at 7 October 2010, he did not know Mr Boudib (Saaib I, [20]).

145 The third document is a letter from Urban Link Pty Ltd dated 7 October 2010 "Re: Mr. Tony Saaib" purportedly signed by Tony Jreige, Managing Director, that states that he has been involved on a number of sites with Mr Saaib where his role had been "the project management" (**Architect Reference**). I am satisfied, on the balance of probabilities, that Mr Jreige's reference was not created by him and is forged. I am also satisfied that the information contained in the reference is false for the following reasons: Mr Saaib's evidence is that he does not know Mr Jreige (Saaib I at [21]); there is a striking similarity between the terms of the Architect Reference and the Engineer Reference; and the fact that Mr Zaatini seems to have been able to send to Ms Alexandrova an "amended architect reference" within a day of it being requested suggests it was likely prepared by Mr Zaatini.

146 The fourth document is a letter dated 5 October 2010 that is purportedly signed by Mr Saaib, addressed to Calliden Insurance Group, and titled "Re: Tony Saaib Eligibility Review" with a letterhead referring to "TONY SAAIB", Award Build's 703 number, and the Silverwater PO Box (**Builder's Letter**). The letter reads as follows:

This letter is to advise that I have not traded in 2009 and the most [sic] 2010 financial years, not as a sole trader, nor through my company Saaib Construction Pty Ltd, as I have been mostly residing in 2009 and 2010 overseas, taking a long service leave after 25 years of hard work.

147 Mr Saaib denies signing the Builder's Letter or authorising anyone to sign it on his behalf (Saaib I at [19]). Mr Dubedat's evidence, which I accept, is that the "T Saaib" (Builder) signature on the Builder's letter is not a genuine signature of Mr Saaib.

- 148 The fifth document comprises financial statements for Saaib Construction Pty Ltd as at 30 June 2008. Presumably, these are the “old financials” referred to in Ms Alexandrova’s email at [99].
- 149 The sixth document is a home warranty application dated 15 October 2010 purportedly signed by Mr Saaib (**Home Warranty Application**). This document appears to have rectified the signature issue raised by Ms Alexandrova in her email earlier that day; the signature for Mr Saaib on this version is clearly different (being shorter) than the signature on the version dated 12 October 2010. Mr Saaib denies signing the 15 October Home Warranty Application or authorising anyone to sign it on his behalf. Mr Dubedat’s evidence, which I accept, is that the “T Saaib” signature on the 15 October Home Warranty Application is not a genuine signature of Mr Saaib.
- 150 The final document is a progress payment sheet dated 15 October 2010 that sets out the expected progress payments for the Marrickville project works (**Payment Sheet**). It is purportedly signed by Mr Saaib and Nemer Antoun. Mr Saaib denies signing the Payment Sheet or authorising anyone to sign it on his behalf. Mr Dubedat’s evidence, which I accept, is that the “T Saaib” signature on the Payment Sheet is not a genuine signature of Mr Saaib.

October to December 2010: Eligibility and Home Warranty Applications progressed

- 151 On 20 October 2010, Ms Alexandrova emailed Troy Williams of OAMPS with the subject line “TONY SAAIB – URGENT”, asking him to contact Calliden and advise if anything else was required. Her email refers to needing to “establish this builder a multi-unit profile and get approved his eligibility review”. She notes that several documents had already been faxed to Mr Marais in addition to those contained in her 18-page, referring to “loans, fixed price contract, Rates, Finance Approval – all was faxed to Tyron”. Ms Alexandrova’s fax attaching the loans, rates and finance approval is not in evidence.
- 152 By email dated 26 October 2010, Mr Marias advised Ms Alexandrova that the application had been submitted to NSW Self Insurance Corporation and requested further documents in relation to eligibility, including a copy of the rates notice for Mr Saaib’s Mulgoa property, his personal tax returns for 2008 and 2009, and further information regarding Saaib Construction Pty Ltd.

- 153 On 17 November 2010, Ms Alexandrova and Mr Marais exchanged emails regarding Mr Saaib's Eligibility Application, including QBE's request for a letter of appointment because Mr Saaib's home warranty insurance was "with another broker", and a deed of indemnity.
- 154 On 2 December 2010, Ms Alexandrova sent a fax of seven pages to Mr Marais that was marked (in handwriting) to the attention of "TYRON" and "FM: IRENA". The fax consists of two documents.
- 155 The first document is Mr Saaib's personal tax return for the financial year ending 2009. According to the header, the tax return was faxed to Ms Alexandrova from the "Joe'n'Sons Constructions" fax number at 11:30am on 2 December 2010. I infer that the document was faxed to Ms Alexandrova by Mr Zaatini.
- 156 The second document is a letter dated 2 December 2010 purportedly signed by Mr Saaib which states that Mr Saaib has appointed OAMPS to act for him regarding his eligibility for home warranty insurance with QBE (**Appointment Letter**). Mr Saaib denies signing the Appointment Letter or authorising anyone to sign it on his behalf. Mr Dubedat's evidence, which I accept, is that the "T Saaib" signature on the appointment letter is not a genuine signature of Mr Saaib.
- 157 Ms Alexandrova does not give evidence about who she emailed or spoke to about the Appointment Letter or when or from whom it was received it. Based on their prior dealings, I infer that Ms Alexandrova spoke to Mr Zaatini about the Appointment Letter and that he sent it to her on or around 2 December 2010.
- 158 On 15 December 2010, QBE emailed Mr Marais to confirm that Mr Saaib's Eligibility Application had been approved, attaching the certificate of eligibility for Mr Saaib and advising that the home warranty insurance for the multi-unit had been approved and that he could process the job, with the premium being \$23,952.54. Mr Marais forwarded QBE's email to Ms Alexandrova.
- 159 Ms Alexandrova deposes (Alexandrova II at [75]) that, shortly after receiving the email from Mr Marais on 15 December 2010, she telephoned Mr Saaib to

advise him that his eligibility was approved and they had a discussion in the following terms:

Ms Alexandrova: I have just been advised by QBE that your eligibility for multiunit projects has been approved up to \$2.5 million.

Mr Saaib: Ok, that's great.

Ms Alexandrova: But we are still waiting for the project specific insurance for the Marrickville project to be approved, and we may still need to submit more information and documents for that.

- 160 Ms Alexandrova's evidence in cross-examination is that she remembers calling Mr Saaib to tell him that his eligibility had been approved and that it was her "normal regular practice" to immediately notify builders of their eligibility approval (T198:45–199:2, T199:13–17).
- 161 Mr Saaib denies that he had any discussion about Marrickville with Ms Alexandrova. In cross-examination, he accepted that he called Ms Alexandrova in December 2010 but did not know whether she told him that the eligibility application had been approved (T353:19–30).
- 162 At 5:01pm on 15 December 2010, Ms Alexandrova sent an email to Mr Zaatini headed "Premium" advising that the QBE system was still down and asked him to advise the date of construction commencement.
- 163 On 16 December 2010, Mr Zaatini emailed Ms Alexandrova and supplied the commencement date. Later that day, Ms Alexandrova emailed Mr Marais seeking confirmation of the premium. Mr Marais replied that day noting that the premium would be \$27,582.54 excluding fees.
- 164 The phone records show that, in November and December 2010, eight calls were made from Award Build's 703 number to Ms Alexandrova's number and 11 calls were made from Award Build's 703 number to Mr Saaib's number. They also show that, in November 2010, 15 calls were made from Mr Saaib's number to Mr Zaatini's 545 number and that no calls or texts were made from Mr Saaib's number to Ms Alexandrova's number.

January 2011: Home Warranty Certificates issued

- 165 On 17 January 2011, Mr Zaatini emailed Ms Alexandrova attaching receipts relating to the payment of the home warranty and public liability insurance

premiums and Ms Alexandrova's broker fees for the Marrickville project and asked whether he could get the policy so that he could submit it to the "PCA" and the "bank". It is common ground that the home warranty and public liability insurance premiums and Ms Alexandrova's fees were paid by the Antoun family.

- 166 On 18 January 2011, QBE issued home warranty certificates of insurance in respect of each of the 11 Marrickville units. The home warranty certificates of insurance identify Mr Saaib as the builder of the works and the contract date as 4 October 2010 and are addressed to Transformer Group at Pile St, Marrickville. On 18 January 2011, QBE also issued a certificate of currency for contract works and public liability identifying Mr Saaib as the insured and ANZ as the interested party.
- 167 Ms Alexandrova deposes (Alexandrova II at [82]) that, on 19 January 2011, after receiving the 11 home warranty certificates of insurance, she called Mr Saaib to tell him that she had received them and asked him whether she should send them to him or Mr Zaatini, and that Mr Saaib told her not to do anything until he called her. When it was put to her that she had no recollection of the call, she gave evidence that "Of course there was a conversation. It's general practice inform builder that home building certificates are available" (T204:22–27).
- 168 Ms Alexandrova also gives evidence that, on or about 21 January 2011, Mr Saaib called her and asked her to email the certificates to Mr Zaatini with copies sent to him by mail, which she says she did that day to his home address at Mulgoa (Alexandrova I at [83]–[84]). In cross-examination, she gave evidence that the certificates were also posted to Mr Saaib by OAMPS to his home address (T205:31–34).
- 169 In cross-examination, Mr Saaib said that it is possible he spoke with Ms Alexandrova on the phone in January 2011 and, while he does not remember what was said, she did not tell him the certificates had been issued (Saaib III at [4]; T355:24–33).
- 170 There are no documents evidencing that the home warranty certificates were posted to Mr Saaib's home address by Ms Alexandrova or OAMPS.

171 The phone records show that, in January 2011, one call was made from Award Build's 703 number to Ms Alexandrova's number and no calls or texts were made from Award Build's 703 number to Mr Saaib's number.

February 2011 to December 2012: Construction of Marrickville property

172 On 15 February 2011, the construction certificate for the Marrickville project was issued by the Certifying Authority identifying "Nemer Anton" as the applicant. The documents accompanying the application are stated to include the "Home Warranty Insurance - QBE". It appears that work on the Marrickville project commenced soon after.

173 Between April 2011 and August 2012, Transformer Group sought drawdowns under the ANZ construction facility, purportedly to pay claims by the builder. The evidence indicates that Mr Zaatini and his son, Peter Zaatini, were involved in arranging site inspections for (see, for example, CB1777, CB2224) and providing documents to Newton Fisher, including statutory declarations and updated construction programs (see, for example, CB2037ff, CB1816), that were required in order to for Newton Fisher to recommend payment of the drawdowns to ANZ.

174 On 8 April 2011, Newton Fisher emailed Peter Zaatini requesting further information in respect of the first drawdown, including "Worker compensation insurance". In response, Peter Zaatini emailed a document to Newton Fisher purporting to be a GIO Workers Compensation Certificate, with policy number WC409802157, in the name of Tony Saaib Pty Ltd, with the ABN for AMD, and identifying the period of the insurance as 11 February 2011 to 11 February 2012 (**TSaaib P/L GIO Certificate**).

175 Mr Saaib submits, and I accept, that the TSaaib P/L GIO Certificate is not an authentic GIO Workers Compensation Certificate. Documents produced on subpoena by AAI Limited include documents relating to GIO workers compensation policies held by Australian Metropolic Formwork Pty Limited for periods commencing from 11 February 2009 that have the same policy number as the TSaaib P/L GIO Certificate. The declaration of wages forms produced on subpoena are signed by Mr Saaib as the director of AMD. No documents were produced in the name of Tony Saaib Pty Ltd.

- 176 On 13 April 2011, Newton Fisher issued a site inspection report to ANZ and recommended the first drawdown of \$475,115. Newton Fisher's report to ANZ enclosed the 11 home warranty certificates of insurance, the T Saaib P/L GIO Certificate and a statutory declaration dated 5 April 2011 that all employees, subcontractors, suppliers and insurance had been paid that was purportedly signed by Mr Saaib.
- 177 A similar process was followed in June 2011, July 2011, October 2011, December 2011 (twice), February 2012, March 2012 (twice), May 2012, June 2012, July 2012 and August 2012. In each of those months, one or sometimes two statutory declarations were purportedly made by Mr Saaib and Newton Fisher would issue one or two site inspection reports, send them to ANZ and recommend drawdowns.
- 178 Mr Saaib denies signing the 5 April statutory declaration and the other 14 statutory declarations that were made in connection with the drawdowns on the Marrickville project or authorising anyone to sign them on his behalf.³
- 179 Eleven of the statutory declarations are purportedly witnessed by Steve Valtas. Mr Valtas' unchallenged evidence is that he does not know Mr Saaib and did not witness, or authorise anyone to put his name on, any of the seven statutory declarations which had been provided to him.⁴
- 180 There are four other statutory declarations purportedly witnessed by Noel Dona, Justice of the Peace. Mr Dona's evidence, in respect of which he was issued a certificate under s 128 of the *Evidence Act 1995* (NSW), is that he had not witnessed any of these four statutory declarations by Mr Saaib, had no recollection of signing them and did not meet Mr Saaib until 2017 (T85:23–T89.7).
- 181 Mr Dubedat's evidence, which I accept, is that the "T Saaib" signatures on the statutory declarations that were purportedly witnessed by Mr Dona are not genuine signatures of Mr Saaib.

³ One of the statutory declarations dated 3 August 2012 which is witnessed by Mr Dona does not correspond with a Newton Fisher report date and so may not have been used for recommending drawdowns. Thus, while there are 16 falsified statutory declarations in evidence, only 15 were likely used in connection with the drawdowns.

⁴ Mr Valtas was not provided with the statutory declarations purportedly witnessed by him dated 5 April 2011, 13 July 2011, 10 October 2011, 2 December 2011.

- 182 Based on the above, I accept Mr Saaib's evidence that he did not sign any of the 15 statutory declarations made in connection with the Marrickville project.
- 183 On 20 December 2012, the final occupation certificate for the Marrickville property was issued by Greenfield Certifiers Pty Ltd. Around that date, various subcontractors issued final trade certificates. Many of those trade certificates refer to "Mr Joe Anton" or Transformer Group as the client. None refer to Mr Saaib.
- 184 Mr Saaib gives evidence that he did not build the Marrickville property (Saaib I at [4]). In cross-examination, Mr Saaib denied that he knew Mr Zaatini was working as a construction manager on the Marrickville project, that Mr Zaatini kept him updated as to the progress of work at the Marrickville site in 2011 and 2012, and that he knew that his builder's licence was being used in connection with the Marrickville job (T358:22–32).
- 185 There is no evidence of any subcontracts between Mr Saaib and tradespersons who worked on the Marrickville project, purchase orders signed by Mr Saaib, invoices issued by subcontractors to Mr Saaib or receipts issued by Mr Saaib to subcontractors relating to the construction of the Marrickville property.
- 186 Mr Saaib also gives evidence that he has never been to the Marrickville property and that he received no benefit, monetary or otherwise, from the construction of the Marrickville property (Saaib I at [5] and [11]). Mr Saaib's evidence on these matters was not challenged by the Owners Corporation in cross-examination.

Tracing of Marrickville project funds

- 187 Mr Saaib has gone to significant effort, by reference to bank statements, to trace where the ANZ construction drawdown advances were paid and to show that they were not received by Mr Saaib. The tracing exercise identifies that the drawdown advances were paid into a Transformer Group ANZ transaction account and sometimes, but not always, moneys were then transferred into a Transformer Group bank account with Commonwealth Bank of Australia (CBA).

- 188 The first construction facility drawdown advance of \$1,250,000, described as a 'land funding component' in the ANZ Letter of Offer, was used to acquire land for the Marrickville project over which a mortgage in favour of ANZ was granted. The second construction facility drawdown advance of \$18,905 was transferred into the Transformer Group ANZ transaction account which had been used to pay the construction facility fee of \$20,168.75 three days earlier.
- 189 The tracing exercise identifies that, of the remaining \$2,565,865 in construction facility drawdown advances that was transferred into the Transformer Group transaction ANZ account:
- (a) \$227,000 was paid out by cash cheque, of which \$169,000 was paid to Nemer Antoun and \$58,000 had no details;
 - (b) \$401,419.37 was paid out to Marrickville Council and other named third parties, including third parties who appear to be related to trades in the building industry, such as "Fix All Plumbing" and "Kwikspark Electrical";
 - (c) \$56,000 was paid out to Award Build; and
 - (d) \$1,819,500 was paid out to the Transformer Group CBA account
- 190 Of the \$1,819,500 paid into the Transformer Group CBA account, Mr Saaib's submissions identify that at least \$474,620.58 was paid out to named third parties, including:
- (a) \$331,709.22 paid out to a range of third parties who appear by their names to have been tradespersons or contractors relating to the construction of the Marrickville property; see for example payments to "excavation liv", "pest cont livingst", "ausfab windows" and "kwikspark elec";
 - (b) \$118,531.36 paid out apparently in relation to Award Build, with transaction descriptions such as "award living" and "award build"; and
 - (c) \$24,380 paid out apparently in relation to Mr Zaatini, with transaction descriptions such as "william4week", "william contractor" and "william".
- 191 The tracing exercise did not identify any payments from either the ANZ or CBA Transformer Group accounts to an account in the name of Mr Saaib. There are no other documents in evidence which identify, or suggest, that Mr Saaib received any money or other benefit from the construction of the Marrickville property.

Events leading to the Saaib and Alexandrova proceedings

- 192 On 15 October 2014, Mr Dona, in his capacity as strata manager for the Owners Corporation at the Marrickville property, sent a letter from Trinity Realty to Mr Saaib notifying him that the Marrickville property has a serious defect issue for which the Owners Corporation holds Mr Saaib responsible. The letter states that Nemer Antoun of Transformer Group had advised Mr Dona that Mr Saaib was the licensed builder of the development, and that Mr Antoun dealt with Mr Zaatini on site during construction and believed Mr Zaatini was related to Mr Saaib.
- 193 Mr Saaib's evidence is that he heard about the Marrickville property for the first time when he received Trinity Realty's 15 October 2014 letter (Saaib I at [12]; T236.11–12).
- 194 On 24 October 2014, Mr Dona sent an email to Mr Zaatini asking him to "let me know how you go please". The next day, Mr Zaatini replied, advising that he had spoken to Nemer Antoun regarding the matter and that they would be asking some metal roofers to go to the site and inspect the roof and box gutters. The email goes on to state:
- Again this matter is not the issue of Mr Tony Saaib, as Mr Tony Saaib was never the builder on the site for the Transformer Group, I appreciate the fact that all you want is for the place to be repaired. I will do what I can to assist you in this. I will attend to this as a matter of urgency.
- 195 Mr Saaib deposes that, in late 2014, he spoke to Mr Zaatini about Trinity Realty's letter and that Mr Zaatini stated, "remember we priced the job, but we didn't get it," which Mr Saaib rejected. He also deposes that Mr Zaatini then told him not to worry because "you didn't do the job, I didn't do the job" (Saaib I at [14])
- 196 On 24 December 2014, LAC Lawyers, acting on behalf of the Owners Corporation, sent a letter to Mr Saaib advising that they intended to make a claim relating to defects in the building under the home warranty insurance policy and asking him to notify his insurer. On 29 January 2015, Mr Saaib's previous lawyers responded stating that Mr Saaib had no knowledge of or any involvement with the building of the Marrickville property.

197 On 2 March 2015, QBE sent a letter to Mr Saaib notifying him of the potential claim in respect of the Marrickville property and requested that he enter into negotiations with the owner with a view to resolving the listed issues as amicably as possible.

198 By summons filed on 20 December 2016, the Owners Corporation commenced these proceedings against Mr Saaib and two other defendants. On 16 April 2019, consent judgment was entered for the second and third defendants.

6 February 2017: Mr Saaib meets with Mr Zaatini

199 Mr Saaib's evidence is that, on or about 6 February 2017, he had a meeting with his solicitor, Mr Zaatini, and Mr Zaatini's father, Joe Zaatini. Mr Saaib says that, at that meeting, Mr Zaatini handed him documents which appeared to be the statutory declarations to which reference has already been made (Saaib I at [25]). Mr Saaib's evidence is that he had never seen the statutory declarations until Mr Zaatini provided them to him at the meeting (Saaib I at [27]).

200 Mr Saaib also gives evidence about what Mr Zaatini told him at that meeting, which was subject to objection and admitted on the limited basis of the fact that the conversation took place and the terms of the conversation but not as evidence of the truth of the matters asserted. According to Mr Saaib's evidence, Mr Zaatini told him the following: that the statutory declarations would help Mr Saaib with his case and he could use them; that Mr Zaatini was not involved in the Marrickville project but that he used to supervise and run "the jobs" for the Antouns who were the builders on those projects; and that Mr Zaatini thought Nemer Antoun had forged Mr Saaib's signature on the statutory declarations (Saaib I at [26]).

February 2017: Contact between Mr Saaib and Ms Alexandrova

201 Ms Alexandrova deposes (Alexandrova II at [86]) that, in early 2017, Mr Saaib called her and they had a conversation to the following effect:

Mr Saaib: I have just been served with a Summons from the Owners of the Marrickville project relating to defective building work. If anyone contacts you about this, don't say anything.

Ms Alexandrova: OK Tony, I'll do that.

202 Mr Saaib denies this conversation and, in his oral evidence in chief, said that he spoke to Ms Alexandrova on the phone before 22 February 2017 and asked her about home warranty insurance for a job that he was going to do (T234:14–24). In cross-examination, Mr Saaib said he never mentioned Marrickville to Ms Alexandrova during any discussion with her in 2017 and did not request that she not say anything about Marrickville if someone asked her about it.

203 In evidence is an email dated 22 February 2017 that was sent at 6:28pm by Ms Alexandrova to Kamel Jabour, Mr Saaib’s accountant, headed “Tony Saab - Australian Metropolitan Formwork P/L - Home Warranty Eligibility” (Exhibit 9). The email states:

Tony asked me to restore his Eligibility for Home Warranty, please kindly email 15, 16 Financial Statements for his company Australian Metropolitan Formwork P/L, with notes if applicable, must be signed by the accountants.

204 Ms Alexandrova’s evidence in cross-examination was that she could not recall the 22 February 2017 email and that she was “very curious... to see this letter” as she “absolutely can't recall why Mr Saaib asked [her] to restore his eligibility” (T211:1–34).

August 2017: Fraud report lodged

205 On 22 August 2017, Centurion Lawyers, acting for Mr Saaib, wrote to the New South Wales police at Parramatta Police Station requesting advice from them as to whether the original version of the alleged building contract dated 4 October 2010 was in their possession (Exhibit 15). The author of the letter, Mr Draybi, states in the letter that he was advised by Nemer Antoun that he no longer had any documents in his possession relating to the Marrickville project as the police raided his business premises and took many documents after the murder of his brother.

206 On the same day, Mr Draybi lodged a New South Wales Police Force Fraud Report Form that refers to Mr Zaatini as the suspect/person of interest/offender, Mr Saaib as the witness, the Owners Corporation as another interested party and the Saaib proceedings. In answer to the question on the form, “have you confronted the alleged offender? If so, what were the results?”,

it is written that “Mr Zaatini denied involvement and says that Mr Nemer Antoun was solely responsible (sic) for the fraud”.

2019: Events leading to the Alexandrova proceedings

207 On 12 April 2019, an email was sent to Ms Alexandrova from the “Secretary OC” email account:

Dear Irena,

Thanks for your time today. I really appreciate it.

As discussed, here is a draft document for you to cast your eye over. I think it is very important for the Court to understand your point of view and this document sets out what we have discussed in various conversations.

For your reference the document contains yellow highlight for questions to be answered by you and green highlight, for documents to be provided by you (if you have them).

I look forward to speaking to you on Monday.

208 Attached to the email is a draft affidavit of Ms Alexandrova which is not signed. The draft affidavit purports to, amongst other things, detail Ms Alexandrova’s initial contact with Mr Saaib and the assistance she says she gave to him in obtaining home warranty insurance in relation to the Marrickville property. The draft affidavit is similar but not identical to Alexandrova II. For example, the draft affidavit does not refer to the “don’t say anything” conversation Ms Alexandrova asserts she had with Mr Saaib in early 2017 (at [201]).

209 In June 2019, Ms Alexandrova met with a private investigator, Mr Creighton, who was assisting “[the Owners Corporation] in obtaining the finalisation of [Ms Alexandrova’s] affidavit that [she] had agreed to provide” (Exhibit 8). According to Mr Creighton’s report, Ms Alexandrova told him that she had no intention of attending the final hearing and that she will “be in Vietnam getting [her] teeth done if necessary.”

210 Ms Alexandrova’s evidence in cross-examination was that she was joking when she said she would go to Vietnam, asserting that she did not have to go to Vietnam because she had returned from there just prior to the meeting and had finished her dental procedures (T165:50–166:34). A submission was

made, which I do not accept, that Ms Alexandrova's evidence of her "joke" reflects adversely on her credit as a witness.

211 By summons and list statement filed on 30 July 2019 (**List Statement**), the Owners Corporation commenced the Alexandrova proceedings.

The Leura project

212 Mr Saaib deposes that he obtained home warranty insurance in his own name as a builder for the construction of a house at Mount Hay Road, Leura that belonged to one of his close friends, Youssef (Joseph) Boumelhem, and his wife, Therese Boumelhem. He says that he was happy to assist in the construction as a special favour to Mr Boumelhem, that he was the builder but never got paid for the job, that the works are incomplete and that no works had been undertaken for about five years (Saaib I at [36]; Saaib III at [11]).

213 Mr Saaib's evidence is that, other than the Leura project and a job in relation to a residential unit and retail shop he owns in Punchbowl, he never conducted construction works in his own personal capacity (Saaib I at [3] and [36])

214 Mr Saaib's evidence is that, in 2012, he asked Ms Alexandrova to assist him in obtaining home warranty insurance in relation to the Leura project (Saaib I at [36]). Ms Alexandrova's evidence, which I accept, is that she arranged home warranty insurance for Mr Saaib in relation to the Leura project in 2010 (Alexandrova II at [19]). This is consistent with the home warranty insurance certificate issued by Calliden Insurance Limited on 14 May 2010 which identifies that the building works were to be carried out by Mr Saaib for Mr and Mrs Boumelhem in the amount of \$200,000.

215 At the hearing, Mr Saaib took a tendency objection in advance of him being cross-examined about the Leura project. The parties were content for the cross-examination to proceed, for documents to be tendered (Exhibits E and H) and for the Court to determine the objection once it was known how the Owners Corporation intended to rely on the evidence. The following is a summary of the evidence relating to the Leura project from Mr Saaib's cross-examination and Exhibits E and H.

- 216 On 3 March 2010, Mr and Mrs Boumelhem received consent to construct a dwelling on the Leura property subject to receiving the builder's details (name, address and licence number) and a copy of the home warranty insurance certificate. According to a Construction Certificate dated 3 March 2010, the development consent was to lapse on 3 March 2012 (Exhibit H).
- 217 Mr Saaib's evidence in cross-examination is that Mrs Boumelhem told him she needed a building contract in writing to show to her bank to assist in obtaining construction finance and home warranty insurance for the project (T246:3–19). He says that he told Mrs Boumelhem that he would be the builder and obtain home warranty insurance in his name on the basis that she and her husband would engage and pay for all contractors and materials and he would not get paid. Mr Saaib's evidence is that he agreed to do this as a special favour because of the many favours that Mr Boumelhem had done for Mr Saaib (T244:31–T245:14).
- 218 On 25 March 2010, Mrs Boumelhem sent an email to Ms Alexandrova that sets out what appears to be a draft letter from Mr Saaib to Mr and Mrs Boumelhem that refers to "our agreement" for the construction of a house at Leura at a total cost of \$405,000 and asks Ms Alexandrova whether "it's enough". Presumably, this email was sent in relation to an application for home warranty insurance that Ms Alexandrova was assisting them to obtain.
- 219 In evidence is a letter dated 31 July 2010 and signed by Mr Saaib that is addressed to Mr and Mrs Boumelhem and indicates that Mr Saaib will be the builder of the house at a total cost of \$305,000 (Exhibit E). The 31 July letter was produced by Mr Saaib on the morning of the fifth day of the hearing following cross-examination the day before. On the fifth day of the hearing, Mr Saaib gave evidence that the letter was drafted by Mrs Boumelhem, that she wanted a quote for the bank or possibly others, and that \$305,000 is what it would have cost if he had done the work himself (T361:36–T362:40).
- 220 The previous day, Mr Saaib's evidence in cross-examination was that he told Mrs Boumelhem that if the building contract in relation to the Leura project was a regular building contract with a normal builder's margin, the contract price would be about \$400,000, but because they were not going to pay him

anything, the job would only cost \$200,000. He gave evidence that he knew that Mr and Mrs Boumelhem needed a building contract for the bank and home warranty insurer, which he says he wrote with Mrs Boumelhem and signed, but then said that he had “not done contract” but did a “letter” recording the cost of the job as \$200,000 (T246:32–T247:26, T249:05–T249:11, T249:28, T252:20, T252:34, T253:43)

- 221 On 9 August 2011, the Leura property was transferred by Mr and Mrs Boumelhem to their daughter and son-in-law, Ronza and George O’Beid. At the time of transfer, no construction work had been undertaken on the Leura project.
- 222 The 31 July letter has a handwritten and undated notation on it that states “Tony to take job up to lock up \$200K...owner to complete” and is signed by Mr O’Beid. Mr Saaib’s evidence in cross-examination is that, as a favour to Mr Boumelhem, he agreed to continue to be the builder of the Leura project (T259:17–33). He also says that he doesn’t recall when Mr O’Beid signed the 31 July letter but says it was after July 2010 (T364:9–14).
- 223 Mr O’Beid runs a business known as Granny Flat Builders. He is a director of Pace Equity Pty Ltd, a company that held a builder’s licence between 11 May 2010 and 10 May 2015 that identified Christopher Ayoub as the nominated supervisor.
- 224 In evidence is a project application for home warranty insurance for the Leura project that is completed in handwriting and dated 13 February 2012. It identifies Mr Saaib as the builder and Mr O’Beid as the owner and appears to have been signed by Mr Saaib and Mr O’Beid. It is not clear on the evidence what became of that application; the only home warranty insurance certificate in evidence is that issued by Calliden on 14 May 2010.
- 225 On 1 March 2012, the lapsing date of development consent for the Leura project was extended to 3 March 2015. The Notice of Commencement of Building Works is signed by Mr O’Beid, identifies Mr Saaib as the builder and notes that the works were scheduled to commence on 22 February 2012.

- 226 Works at the Leura property do not appear to have commenced until sometime in late 2012; an inspection of work relating to the piers took place on 6 November 2012. Further works appear to have been undertaken in 2016 and 2017, contrary to Mr Saaib's evidence that no works had been done for five years.
- 227 Mr Saaib was cross-examined about his role as the builder on the Leura project; his name is not referred to in any of the certification documents relating to the project. He accepted that he was not present during any of the certification inspections that took place on 6 November 2012, 11 December 2012 and 24 April 2018 (T267:16–27, T268:12–23, T270:17–19, T273:35–44). He described himself as the “supervisor there” and said he went on site “after hours” with Mr Boumelhem to check things, such as whether it was okay to “put concrete” and to check the “footing”, the “ground slab” and the “steel” (T260:1–4; T267:29–40; T268:19–20, T268:40–44, T270:17–19, T273:43–44). He gave evidence that he told Mr O'Beid that when the works started he would have to be there to check everything before it was done, such as when concrete was put in (T258:35–38), but that Mr O'Beid was the person who engaged and paid for all the subcontractors and materials and lodged documents which he did not know anything about (T259:41–7).
- 228 Mr Saaib was asked to explain how he could have undertaken any works when, from 31 March 2012, he was no longer licensed to do building works requiring home warranty insurance. Mr Saaib initially gave a non-responsive answer, stating that he had done the work as a favour and “that's all he could answer” (T262:44–50). He later gave evidence, which was subject to a certificate under s 128 of the *Evidence Act*, that he did not know when his licence expired and accepted that he should not have done any work when he was not licensed, stating that if he knew it had expired, he wouldn't have done the job as he would “not take responsibility on [his] licence if [he] knew that” (T266:8–31). Mr Saaib also accepted that he allowed his name to be used as the licensed builder by the Boumelhems but said that he did not know his licence had expired (T266:35–36).

Assessment of Ms Alexandrova and Mr Saaib

229 The parties accept that the Saaib proceedings (and thus the Alexandrova proceedings) turn, in part, on the Court's assessment of the credibility of Ms Alexandrova and Mr Saaib and their competing evidence.

230 What follows is my assessment of Mr Saaib and Ms Alexandrova. My findings of fact relating to the alleged conversations are set out later in these reasons. I should record that, in coming to my views, I have had regard to my notes taken during the hearing and shortly after as well as my review of the transcript, Mr Saaib and Ms Alexandrova's evidence, and the other documents and call records in evidence.

Irena Alexandrova

231 Mr Saaib submits that Ms Alexandrova is an unreliable witness and the Court cannot have confidence in her version of conversations with Mr Saaib that occurred nearly 10 years ago. He submits that the Court would be left with the impression that her evidence is based on reconstruction, rather than actual recollection, which is affected by hindsight knowledge of what should have been done, wishful thinking, and her personal interest in the outcome of the litigation.

232 Mr Saaib places emphasis on the statement by McLelland CJ in Eq from *Watson v Foxman* (1995) 49 NSWLR 315 at 319:

...human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

233 It is also submitted that Ms Alexandrova's evidence is not based on actual recollection but on presumptions, is inconsistent and unreliable, and involves unsatisfactory witness evidence of evasive and argumentative answers, tangential speeches avoiding the question, disclosure and evidence shortcomings, self-contradiction, internal inconsistency and a shifting case:

Volonakis v Erceg [2019] NSWSC 1875 at [151], citing *Painter v Hutchison* [2007] EWHC 758 (Ch) at [3].

- 234 The Owners Corporation submits that Ms Alexandrova's evidence is supported by contemporaneous emails, telephone records and the logic of events and relies on the well-known statement of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [31]:

Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances [of witnesses]. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.

- 235 In her written submissions, Ms Alexandrova submitted that her evidence in her declarations (by which I understand her to mean her affidavits) is true. She also made assertions during the course of the hearing that she was being honest and truthful and trying to do her best (T118:4–5, T143:5, T156:42, T172:15, T210:14).

- 236 At this stage, I should record that Ms Alexandrova gave evidence wearing a mask due to health concerns (unrelated to COVID-19) and, at times, indicated that she was feeling tired and unwell, which the Court sought to accommodate by giving her breaks (see, for example, T152:6, T187:46, T200:10–21). It was also apparent that English is not Ms Alexandrova's first language. My overall impression is that her language skills did not significantly affect her evidence but the mask did make it difficult to hear on occasion and led to some ambiguities on the transcript.

- 237 I make no adverse credit finding of Ms Alexandrova. I accept she was trying to relay her honest recollections. However, for the reasons set out below, I have concluded that her evidence is not wholly reliable. This is primarily because of the recognised doubts regarding fading memory but also because aspects of her evidence were new and seemingly inconsistent with other parts of her

evidence, and some of her evidence appears to have been influenced by hindsight.

- 238 As the Owners Corporation submitted, there is no doubt Ms Alexandrova did not enjoy the experience of giving evidence. She accepted she was stressed by the proceedings and, on occasion, came across as an emotional witness (see, for example, T156:31–44, T168:28–34 and T200:30–36).
- 239 During cross-examination, Ms Alexandrova sought to emphasise that she had done no wrong and distance herself from criticism (see T156:38–44, T168:28–34 and T200:32–36). She was also, at times, prone to exaggeration. For example, Ms Alexandrova insisted that she did not check signatures (T149:46–47) and did not read the Builder’s letter (T145:29–32) although the contemporaneous emails referred to at [99] and [111] suggest otherwise.
- 240 Over the course of the cross-examination, there were also times when Ms Alexandrova was argumentative, tended to speech giving rather than direct answers and sought to debate propositions with the cross-examiner (see, for example, T199:19–26, T201:49–T202:36, T196:49–197:1, T161:14–19, T208:15–34). These aspects of Ms Alexandrova’s evidence made her come across as defensive and combative.
- 241 There were also aspects of Ms Alexandrova’s evidence that appear to have been influenced by hindsight and, perhaps, her own interests, which raise doubts about the reliability of her evidence more generally.
- 242 One example of this is her evidence in chief of the text message from Mr Saaib on 15 October 2010 which referred to “meeting William” and an instruction from Mr Saaib to lodge the insurance application for Marrickville (Alexandrova II at [53]). Given her proffer in cross-examination that the message simply read “please call me” as Mr Saaib does not write English well (T195:49–50; T197:13–24), it is difficult to consider her evidence in chief as anything but incorrect reconstruction. Her initial evidence that she had contact with Mr Saaib’s accountant, solicitor, wife and daughter in relation to the Marrickville project (Alexandrova I at [11]) is of a similar nature, although I accept it is of less significance given the correction she made in her later affidavit after reading the lay evidence served by Mr Saaib (Alexandrova II at [87]–[91]).

- 243 Ms Alexandrova’s concessions that she could not recall matters from ten years ago and had no recollection of many events even though “she was trying very hard to recollect” (T123:21–22, T123:41–2), that it was hard to remember details of dates and years with a “limited memory” (T156:41–42), and that she could not recall details of conversations she had with Ms Ahmed and Mr Creighton in 2017 and 2019 (T133:36–47, T148:6–12) were appropriately made, but stood in contrast to her evidence that she had a good memory in 2010, had actual recollections of the conversations with Mr Saaib in 2010 and 2011, and remembered “almost many conversations between [herself] and Mr Saaib” (T169:9–13, T169:23–25, T175:22–3, T175:38–42, T197:20–24, T197:46–198:12).
- 244 Ms Alexandrova had no recollection that she had discussed Mr Saaib’s eligibility for home warranty insurance with him in February 2017 despite the existence of a contemporaneous record (T210:18–24, T210:38–40, T211:40–44). Her evidence in cross-examination about that matter highlights the fallibility of her memory and raises doubts about the reliability of the “don’t say anything” conversation (Alexandrova II at [86], referred to at [201]) and her other evidence. This is particularly apparent from her response that she needed “time to recollect” and “come up some answer” and that she “[had] to remember” from her diary and phone records when challenged on her evidence about the conversation (T217:13–19).
- 245 Ms Alexandrova’s evidence that the initial intention was for Award Build to be the builder of the Marrickville project and that Mr Saaib was introduced as a “partner” because Award Build was unable to increase its eligibility limits due to a claim against Joe Antoun was ‘new’ and seemingly inconsistent with her evidence in chief that suggested she first heard about the Marrickville project from Mr Saaib. I did not find her explanation for why she did not mention this evidence in her affidavits, namely that she was “preparing an affidavit by [herself] without any legal help” and that she “could miss something” or “forget about it”, to be convincing. The evidence suggests Ms Alexandrova had some assistance with the preparation of a draft affidavit. She also asserted in cross-examination that she had been considering these matters since 2017, when

she had been first approached by the Owners Corporation, and accepted in cross-examination that the evidence was “important”.

- 246 Ms Alexandrova gave evidence about other matters by reference to her perception of the relationships and contact between Mr Saaib, Mr Zaatini and Award Build, which conclusions were not necessarily based on reliable facts. See, for example, her evidence regarding Award Build and its approach to Mr Saaib (at T183:25–28, T186:8–25), her evidence regarding Mr Saaib’s office (at T221:1–10), her evidence about what she presumed had happened regarding Award Build’s approach to Mr Saaib as a partner (at T182:11–25, T184:5–11, T188:48–49) and her evidence about the “obvious” communication between Mr Saaib and the directors of Award Build sometime between 6:40pm on 29 September 2010 and 2:07pm on 30 September 2010 (at T187:10–15).
- 247 Ms Alexandrova’s response to questions regarding the conversation she says she had with Mr Saaib “shortly after” the 29 September email from Mr Zaatini asking whether the building contract can be in another name using Award Build’s home warranty insurance (Alexandrova II at [29]) was also unconvincing. She sought to assert that her affidavit does not state a date when the conversation happened but just says “approximately September” and that she did not know at the hearing when it happened, but accepted that there may have been a discrepancy (T187:17–38).
- 248 It is also noticeable that Ms Alexandrova gave no evidence about the call from Award Build’s 703 number at 12:18pm on 30 September 2010 (which I infer to be from Mr Zaatini) that took place between the last of the 29 September emails referring to Award Build and the 30 September email but gave evidence of a conversation with Mr Saaib (which he denies) that is not referred to in any of the contemporaneous records. Ms Alexandrova gave very little evidence about her dealings with Mr Zaatini, yet the evidence indicates that she had multiple calls from him over the relevant period.
- 249 Ms Alexandrova’s evidence in cross-examination was also somewhat inconsistent and vague at times, for example, referring to multiple contacts and many conversations with Mr Saaib and then “not so many”, only dealing with Mr Zaatini and perhaps calling Mr Saaib’s accountant (T197:30–198:12).

250 Ms Alexandrova's evidence also suggested that she may have been somewhat self-selective in her approach to the production of documents. She referred to "some emails [she] could consider not essential, not important" and documents that "have no any relation to these proceedings" (T94:4–5, T208:20–24). She also could not download or locate relevant documents during the course of the hearing that should have been produced earlier, such as the cover email of the "to whom it may concern" letter. (T180:33–44, T206:40–42).

251 I accept that Ms Alexandrova's evidence of the conversations with Mr Saaib are not inconsistent with the contemporaneous records and are not implausible discussions to have had. The issue I have is how Ms Alexandrova arrived at the dates and details of each of the conversations about which she gives evidence. It seems most likely that, rather than a reliable recollection of any particular conversation, the details and dates have been based on the following: her review of a limited number of emails between herself and Mr Zaatini; her knowledge of the record of the calls and text messages on 13, 14 and 15 October 2010 and on 22 February 2017; her presumptions and understandings about the arrangements between Mr Saaib, Mr Zaatini and Award Build; and her belief that she would (and should) have contacted Mr Saaib on certain occasions in addition to the regular contact she had with and instructions she received from Mr Zaatini.

Tony Saaib

252 The Owners Corporation contends that Mr Saaib's evidence cannot be accepted unless it is corroborated by reliable evidence or against his interest as he is an unreliable and dishonest witness, pointing to a number of aspects of his evidence. In particular, it refers to his evidence regarding the Leura project, the circumstances in which he signed the Eligibility Application form on 12 October 2010 and what he knew about the outcome of the application which it submits shows him to be a wholly unsatisfactory witness and a dishonest person.

253 Mr Saaib accepts that his evidence was not without difficulties but says that the Court should be left with the impression that his denial of knowledge of the Marrickville project was truthful.

- 254 Mr Saaib's evidence in cross-examination that he was neither the builder of nor involved in the Marrickville project and knew nothing about it was given in an assertive manner. He was not moved from that position and came across as someone who believed he was not involved as the builder. He gave the appearance of someone who believed that Mr Zaatini had taken advantage of him, describing Mr Zaatini as a "liar" and a "bullshit person" (see T237:36–37, T354:23). He also accepted that it was "stupid" to trust Mr Zaatini when he signed the blank eligibility form on 12 October 2010 (see T294:32).
- 255 That said, I acknowledge that the appearance of a witness who has a fixed or strong view is not a reliable indicator of truthfulness. I also accept the force of some of the Owners Corporation's submissions. I have found aspects of Mr Saaib's evidence to be unsatisfactory and unreliable although I do not conclude that he deliberately gave false evidence and make no finding of dishonesty.
- 256 During the course of the hearing, it was apparent that Mr Saaib's English language skills impacted his evidence, English not being his first language. On occasion, he did not understand a question or the import of his answer and, at other times, his evidence was far from clear and difficult to follow (see for example, T236:25–30, T299:17–41). In assessing his evidence, I have taken this into account and have been cautious before attaching significant weight to evidence that may have involved a misunderstanding of what was asked and answered.
- 257 Mr Saaib's insistent evidence that he knew nothing about the Marrickville project led to him giving evidence that was, at times, clearly not correct. For example, he said he knew nothing about the Marrickville project when he spoke to Ms Alexandrova on 22 February 2017 before agreeing that "of course" he knew about it at that time. He then reverted to asserting "I don't know nothing about Marrickville" and denied that he knew that Ms Alexandrova had obtained home warranty insurance for Marrickville in his name, before then giving evidence saying that she did. While this was unsatisfactory, I do not consider Mr Saaib knowingly gave false evidence. Rather, I was left with the impression that Mr Saaib's answers may have been the result of his habit of answering questions before they had been fully put to him, some words being

'lost in translation' and his desire to emphasise his denial that he was involved in the Marrickville project.

- 258 There were other aspects of Mr Saaib's evidence which were shown to be clearly wrong, an example of which is his evidence that if he were to legitimately enter into a building contract as at October 2010 he would have contracted using AMD (Saaib I at [63],). In cross-examination, Mr Saaib accepted that his evidence about AMD was not true and AMD did not have a home building licence until July 2017 (T359:49–360:25). I found his explanation that he did not know the date that AMD obtained the licence at the time of making his affidavit unconvincing in circumstances where AMD's licence check was exhibited to his affidavit (T360:31–36).
- 259 I accept the Owners Corporation's submission that aspects of Mr Saaib's evidence regarding the Leura project were unsatisfactory. He was evasive when first asked about the change to his licence and the impact on the Leura project works and his evidence that he did not know when the change to his licence occurred was unconvincing. His evidence that no works had been carried out for five years was shown to be wrong and the objective evidence that others were carrying out the works and liaising with the certifying authorities undermined his evidence that he was the "supervisor" on site after hours when major works were scheduled to take place.
- 260 The Owners Corporation also pointed to Mr Saaib's evidence regarding the costs of the Leura works. He initially gave evidence that he signed a letter recording that the total costs would be \$200,000 (T249:0–11, T249:28, T252:19–21, T253:43–44) and yet the 31 July letter referred to \$305,000. I accept that his evidence was confused and inconsistent on this issue, although I do not consider that it showed him to be dishonest. His evidence that the works would cost \$200,000 (if he was not to be paid) reflects the handwritten notation on the 31 July letter and the cost of the works referred to on the home warranty insurance certificate and was produced the day after that evidence.
- 261 I accept that it may not be to Mr Saaib's credit that he signed the 31 July letter for the Leura project when he knew that Mr and Mrs Boumelhem needed a letter for the home warranty insurer and the bank, he was not going to get paid

anything and the cost to them would be \$200,000 and not \$305,000 as referred to in the letter. However, I do not consider that his evidence warrants a finding that he is a dishonest person. The letter was prepared by a friend and, according to Mr Saaib's evidence in cross-examination, was a quote for how much it would cost if he were to do the work (T362:27–363:45). That Mr Saaib left it to the Boumelhems as to how the letter was to be used suggests that he was indifferent and reckless, but does not lead me to draw any inference as to the truthfulness of Mr Saaib's evidence on the main issues in dispute in these proceedings.

262 The aspect of Mr Saaib's evidence that I found to be most implausible relates to the Eligibility Application and his evidence of the discussions he had with Ms Alexandrova on 13,14 and 15 October 2010.

263 Mr Saaib's acceptance that he discussed the Eligibility Application with Ms Alexandrova showed his evidence in chief that he "thought no more" of the blank Eligibility Application after signing and giving it to Mr Zaatini (Saaib I at [56]) to be incorrect. His evidence about the circumstances in which he signed the Eligibility Application and what he understood would happen with it was, in part, confused and inconsistent. For example, on the one hand he accepted that he left things for Mr Zaatini to complete on the form, but on the other hand he asserted that he had "not left anything" for him to do (T330:7–24, T334:16–21).

264 Mr Saaib's willingness to sign a blank form that needed information to be completed when he knew he did not have experience in large building projects is, I accept, not to his credit. Nor is it to his credit to seek to cast blame on Ms Alexandrova for failing to let him know that the information on the form was not correct (T333:25–28, T337:8–11). However, I do not consider that these matters warrant the finding that he is a dishonest person or that his evidence was knowingly false and should be rejected entirely. Mr Saaib's evidence that he signed the blank form and left it with Mr Zaatini to complete and liaise with Ms Alexandrova is not inconsistent with the facts that establish that Mr Saaib relied on others for help with documents because of his limited English, had a very close relationship with Mr Zaatini and had prior dealings with Ms

Alexandrova. It is not wholly implausible that he placed faith and trust in Mr Zaatini to progress the application with Ms Alexandrova and for them to come back to him as and when information was needed. I also note the distinction between a finding of the evidence of a witness to be implausible and a finding of actual dishonesty: *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 at [279].

- 265 Mr Saaib made some appropriate concessions during cross-examination, accepting that, on 13 October 2010, Ms Alexandrova may have asked him, “do you sign the document,” and that they spoke about the Eligibility Application on 14 and 15 October 2010. However, his evidence was, once again, internally inconsistent, for example, initially saying he called her on 15 October 2010, then saying he could no longer recall doing so, and then saying he talked to her that day (T344:9–T344:33).
- 266 Mr Saaib’s evidence that the Marrickville project was not mentioned by Ms Alexandrova during any of those calls and it was not possible that she did so because he knew nothing about it (T336:50–T337:2) is also unconvincing in circumstances where he accepted he could not remember what he was told 10 years ago or what was discussed during the calls and the very purpose of the Eligibility Application was to enable home warranty insurance to be obtained for the Marrickville project.
- 267 Like other parts of his evidence, Mr Saaib’s evidence in cross-examination regarding the outcome of the Eligibility Application was confusing and, at times, inconsistent. He said that, on 15 December 2010, he could not recall Ms Alexandrova telling him whether his “eligibility [had] been approved or not” as he “don’t know 10 years ago what we talk about”, then said he “spoke to her about the form we sign, everything all right”. He then gave evidence that he called her on 15 December but stated “[I] don’t know if she told me [the application] had been approved or she never told me that application was wrong...information on it” (T353:27–28) and maintained that he didn’t know the Eligibility Application had been approved (T354:15–17). Having accepted that he spoke to Ms Alexandrova about the Eligibility Application at that time, it is seemingly implausible that he did not seek to find out what happened to it.

268 The Owners Corporation also referred to Mr Saaib's evidence regarding the calls from Award Build's 703 number which, I accept, changed during cross-examination from saying he did not know who used the number, to Mr Zaatini using it, to then asserting that he just remembered Mr Zaatini used it and stating, "it's on my file. Because I call this number too" (T286:8). This evidence, and his evidence that he "remembered" he was pouring concrete on 15 October 2010, seems to reveal a willingness on the part of Mr Saaib to say things 'off the top of his head' that might be thought to assist his case.

269 I do not accept the Owners Corporation's submission that I should find Mr Saaib spoke regularly with Joe Antoun during the second half of 2010 based on the records of calls made from Award Build's 703 number to Mr Saaib's number and that Mr Saaib's denials that he spoke to or knew Mr Antoun were dishonest, false denials. I accept Mr Saaib's evidence that he did not speak to or know Joe Antoun.

SAAIB PROCEEDINGS

Issues for determination

270 In the Saaib proceedings, the issues are as follows:

- (a) Did Mr Saaib authorise Mr Zaatini to enter into the 4 October Contact on his behalf?
- (b) If so, did Transformer Group assent to the 4 October Contract?
- (c) Did Mr Saaib undertake building work in relation to the Marrickville property?
- (d) The extent and quantum of the common property defects.

271 Before turning to these issues, I first deal with the tendency objection relating to the Leura project evidence.

Leura project: tendency objection

272 Mr Saaib objects to the Leura project cross-examination and Exhibits E and H as tendency evidence as he says that the Owners Corporation is seeking to adduce that evidence to prove that Mr Saaib had a tendency to allow "his name [to] be used as the licensed builder for this building work, but on the basis that others would in fact do the building work and Mr Saaib wouldn't be paid" (T6:41-43; Mr Saaib's Outline of Closing Submissions at [33]).

- 273 Mr Saaib points to comments made by the Owners Corporation’s Senior Counsel during the hearing that “a very similar thing probably happened in relation to the Marrickville development” (T6:44–5) and that “the cases say that, when looking at whether authority has been given for someone to do something, you can look at the prior habits of the principal” (T262:5–6) to argue that the evidence is being adduced to provide a basis for the Court to infer, based on the alleged tendency, that Mr Saaib likely behaved “in conformity with that tendency” in relation to the Marrickville project.
- 274 Evidence is tendency evidence within s 97(1) of the *Evidence Act* if it is relevant to a fact in issue because it establishes that a person has or had a propensity to act in a particular way and that propensity is a link in the process of proving that the person behaved in the particular way on the occasion in question: *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCA 1886 (**Jacara**) at [61]. It is evidence that provides the foundation for an inference, namely that because a person had the relevant tendency, it is more likely that they acted in a way asserted on an occasion the subject of the proceedings: *Elomar v R* (2014) 300 FLR 323; [2014] NSWCCA 303 (**Elomar v R**) at [359].
- 275 Section 97 of the *Evidence Act* does not preclude the admissibility of the evidence but makes it inadmissible to prove that a person (in this case Mr Saaib) had a tendency to act in a particular way: *White v Johnston* (2015) 87 NSWLR 779; [2015] NSWCA 18 (**White v Johnston**) at [136]. If the evidence is inadmissible as tendency evidence but admissible for another purpose, it cannot be used for the tendency purpose referred to in s 97(1) of the *Evidence Act*: *Evidence Act*, s 95; *White v Johnson* at [139].
- 276 Tendency evidence is only admissible if it has significant probative value, whether by itself or with other evidence. When assessing the probative value of the evidence, the focus must be on the cogency of the evidence relating to the person’s conduct, the strength of the inference that can be drawn from that evidence as to the tendency of the person to act in a particular way and the extent to which that tendency increases the likelihood that a fact in issue did, or did not, occur: *Jacara* at [76].

- 277 The need to assess whether evidence is properly to be regarded as tendency evidence also makes it necessary to identify with some precision what the Owners Corporation proposes to establish by the evidence: *Elomar v R* at [348].
- 278 As was put in final submissions, in addition to attacking credit, the Owners Corporation wishes to rely on the Leura project cross-examination and Exhibits E and H to support the conclusion that Mr Saaib was willing to make the “same type of arrangement” for his very close friend and nephew, Mr Zaatini.
- 279 The Owners Corporation submitted that the cross-examination and Exhibits E and H evidence are not objectionable as tendency evidence because they are being adduced to seek to explain or contradict tendency evidence adduced by Mr Saaib. It argued that Mr Saaib’s evidence in chief (as outlined at [212]–[228]) is tendency evidence as it was adduced to prove that Mr Saaib has a tendency to act in a particular way, namely to construct works in his personal capacity without getting paid only as a personal favour for close friends, and to then submit “ergo I didn't do it for Marrickville”. The Owners Corporation contended that it was entitled to cross-examine Mr Saaib about that tendency without giving notice under s 97(1)(a) of the *Evidence Act*, relying on the exception in s 97(2)(b) that notice is not required if the evidence is being adduced to explain or contradict the tendency evidence adduced by Mr Saaib.
- 280 By that submission, the Owners Corporation seemingly accepted that Mr Saaib’s cross-examination about the Leura project and Exhibits E and H were being adduced by it as tendency evidence given s 97(2)(b) applies to tendency evidence adduced by a party (the Owners Corporation) in response to tendency evidence adduced by another party (Mr Saaib). If the evidence arising from the cross-examination and Exhibits E and H is tendency evidence, it will be inadmissible as such unless the evidence has significant probative value by itself or having regard to other evidence, irrespective of whether it is adduced by way of explanation or contradiction to tendency evidence adduced by Mr Saaib: *Bective Station Pty Ltd v AWB (Australia) Ltd* [2006] FCA 1596 at [85].

281 In my view, seeking to adduce the cross-examination and Exhibits E and H evidence to contend that Mr Saaib was willing to do the “same type of arrangement” for his very close friend and nephew, Mr Zaatini, is adducing the evidence for a tendency purpose. Implicit in the Owners Corporation’s submission is a reasoning process that is based on an inference that, because Mr Saaib acted in accordance with a particular arrangement on the Leura project, he is more likely to have acted in accordance with the same type of arrangement on the Marrickville project. Put another way, the Owners Corporation wishes to submit that the evidence proves that Mr Saaib put his name forward as the builder for close friends even though he did no (or little) work and did not get paid, and the Court can infer from that evidence that he was willing and more likely to have done the same thing on the Marrickville project for Mr Zaatini.

282 I am also of the view that the evidence comprising the cross-examination relating to the Leura project and Exhibits E and H does not have significant probative value to the factual issues in this case, whether assessed by itself or with the other evidence, and is thus not admissible as tendency evidence by the Owners Corporation.

283 Evidence relating to one transaction for personal friends at a cost of around \$200,000 where Mr Saaib signed the relevant “letter contract” is not, to my mind, significantly probative of what he would be likely to do in connection with a building contract that required the construction of a multi-unit development at a value of \$2.4 million for on-sale to third parties involving a corporate developer, Transformer Group, where there is no evidence of an ongoing or close association between Mr Saaib and the directors. As Ward CJ in Eq observed, a high level of similarity would seem to be called for in order to establish that a tendency on the part of a person to enter into particular types of contracts has significant probative value: *Anthony v Morton* [2018] NSWSC 1884 at [336]. There is also a lack of striking similarity in the cross-examination evidence relating to the Leura project and Exhibits E and H and the essential claim made in this case, which relates to the authority of Mr Zaatini to sign a contract on behalf of Mr Saaib: cf *Twynam Pastoral Co Pty Limited v AWB (Australia) Limited* [2008] FCA 1922 at [13].

284 In closing submissions, the Owners Corporation also argued that the evidence from cross-examination relating to the Leura project and Exhibits E and H is not tendency evidence but rebuttal evidence which counters Mr Saaib's assertion that he was not the builder in the Marrickville project because he did not get paid and did not enter into sub-contracts. As I understand that submission, the Owners Corporation wishes to adduce the evidence simply to prove the fact that Mr Saaib undertook to be the builder on the Leura project which involved Mr Saaib doing little or no building work himself and letting Mr O'Beid deal with sub-contractors, rather than adduce the evidence in order to have the Court infer that Mr Saaib likely acted in a particular way on the Marrickville project because of his tendency (based on the Leura project arrangement) to do so.

285 If that is the purpose of the tender, then I accept it may not involve inferential tendency reasoning although, as evidence of Mr Saaib's conduct, I consider the probative value to be limited. What work Mr Saaib did (or did not do) in relation to a contract that he signed for a \$305,000 (or \$200,000) build for close friends without getting paid is not, in my view, evidence that proves or makes it more probable that he gave authority to Mr Zaatini to enter into the 4 October Contract on his behalf or did (or did not) undertake work as the builder on the Marrickville project.

286 For these reasons, I uphold the objection to the cross-examination relating to the Leura project and Exhibits E and H and find that it is inadmissible to prove that Mr Saaib had a tendency to act in a particular way even though it is admitted for another purpose: *Evidence Act*, s 95.

Did Mr Saaib authorise Mr Zaatini to enter into the 4 October Contract on his behalf?

The Owners Corporation's submissions

287 The Owners Corporation contends that the Court should find that Mr Zaatini had implied actual authority from Mr Saaib to enter into the 4 October Contract on Mr Saaib's behalf.

288 It is submitted that the Court should reject Mr Saaib's evidence for reasons directed to his honesty and credibility as a witness and the implausibility of his

denials and accept Ms Alexandrova's evidence as being inherently more likely and consistent with the contemporaneous records.

289 Irrespective of whether the Court accepts Ms Alexandrova's testimony, the Owners Corporation contends that a close examination of the evidence and the logic of events gives rise to the following inferences: that Mr Zaatini and Mr Saaib had discussed and agreed that Mr Saaib would be named in the 4 October Contract as the builder of the Marrickville property; that Mr Zaatini had been authorised by Mr Saaib to provide to Ms Alexandrova the documents that he did, including the 4 October Contract; and, therefore, that Mr Saaib had authorised Mr Zaatini to enter into a building contract on his behalf relating to the Marrickville project.

290 In support of those inferences, the Owners Corporation emphasises the nature of the relationship between Ms Alexandrova and Mr Saaib (namely one of trusted agent and client), the lack of evidence that Ms Alexandrova was to keep what she was doing secret from Mr Saaib or any motive for her to do so, and the evidence that they spoke regularly in 2010.

291 The Owners Corporation also points to Mr Zaatini's engagement of Mr Saaib's trusted insurance agent and the absence of any evidence to suggest that she was asked to keep the project secret from Mr Saaib which it says cannot be reconciled with Mr Saaib's claim that Mr Zaatini never mentioned the Marrickville project to him and was dealing with Ms Alexandrova without Mr Saaib's knowledge or authority. It submits that the Court should infer that Mr Zaatini was not concerned about Ms Alexandrova speaking to Mr Saaib regarding his role as the builder on the Marrickville project and, in fact, expected her to speak to him about that matter.

292 The Owners Corporation argues that there is no apparent logic or rational reason for why Mr Zaatini would not disclose the Marrickville project to Mr Saaib in circumstances where Mr Saaib's evidence is that the purpose of signing the blank eligibility application was to obtain an increase in his eligibility for "bigger jobs". It contends that Mr Saaib's evidence that he and Ms Alexandrova did not discuss the Marrickville project and the home warranty insurance application when they spoke on 13, 14 and 15 October 2010 is

implausible, as is his evidence that having signed the blank eligibility application and discussed it with Ms Alexandrova, he took no steps to find out its fate. It submits that the Court should infer that Mr Saaib learned that his Eligibility Application was approved in December 2010 and, when he did, Ms Alexandrova told him that the Home Warranty Application for the Marrickville project had also been approved.

293 It is submitted that the proposition that Transformer Group and Mr Zaatini would pursue a building project of this size that involved bank lenders, insurers, certifying authorities, quantity surveyors and subcontractors with “*Tony Saaib*” named as the builder but without Mr Saaib’s agreement is fanciful and that it is unimaginable that they would expect the unauthorised use of Mr Saaib’s name to not come to Mr Saaib’s attention at an early point in time.

294 The Owners Corporation contends that, in this context, writing Mr Saaib’s signature on the Marrickville project documents was far more likely done because Mr Zaatini believed he was authorised by Mr Saaib to do so and Mr Saaib agreed to be named as the builder.

295 The Owners Corporation also points to the familial and close relationship between Mr Saaib and Mr Zaatini and the preponderance of calls between them, contending that it is irreconcilable for a supposed fraudster to be calling Mr Saaib so many times in the second half of 2010 while also making the decision to use Ms Alexandrova as the insurance agent and trying to conceal the Marrickville project from Mr Saaib.

296 Finally, it contends that Mr Saaib’s failure to call Mr Zaatini as a witness enables the Court to draw the necessary inferences with greater confidence and to infer that Mr Zaatini’s evidence would not have assisted Mr Saaib, relying on the following cases: *Jones v Dunkel* at 312, 320–321; *Field v Shoalhaven Transport Pty Ltd* [1970] 3 NSW 96 at 103; *Manly Council v Byrne* [2004] NSWCA 123 at [45]–[55].

Mr Saaib’s submissions

297 Mr Saaib submits that the Court would not feel an actual persuasion that Mr Saaib authorised Mr Zaatini to enter into the 4 October Contact on his behalf on the relevant date.

- 298 It is submitted that Mr Saaib's denial that he authorised Mr Zaatini to enter into the 4 October Contract is supported by the objective evidence, namely the 4 October Contract and other unauthentic documents, and the evidence that points to Mr Saaib not having been paid for and not doing any work on the Marrickville project.
- 299 Mr Saaib says that the lengths to which the Antouns and/or Mr Zaatini were prepared to go to create so many documents in Mr Saaib's name is a positive basis on which to conclude that Mr Saaib had no knowledge of the Marrickville project at the time, did not authorise Mr Zaatini to create the 4 October Contract in his name and was the subject of a widespread fraud perpetrated by them to obtain bank finance and home warranty insurance for the construction of the Marrickville property. Mr Saaib also points to the use of Award Build's 703 number and a PO Box unrelated to Mr Saaib on the various documents as suggesting an intention on the part of the Antouns and Mr Zaatini to intercept queries directed to him by third parties and conceal what they were doing from him.
- 300 Mr Saaib submits that Mr Zaatini was a brazen risk taker who also duped Ms Alexandrova, referring to the creation of unauthentic documents involving third parties, such as the GIO certificate, and the emails to Ms Alexandrova which indicate that Mr Zaatini lied to her about matters such as arranging Mr Saaib to sign documents.
- 301 Mr Saaib argues that, viewed objectively, the emails between Mr Zaatini and Ms Alexandrova, Mr Saaib's signing of the Eligibility Application and the evidence of the phone calls and text messages in mid-October 2010 could not satisfy the Court that Mr Saaib authorised Mr Zaatini to enter into the 4 October Contract. He submits that his evidence is consistent with the Eligibility Application being for the purpose of obtaining eligibility for "big jobs" in the future, an enquiry about what documents were needed for the application and the Marrickville project not having been mentioned.
- 302 Mr Saaib submits that even if Ms Alexandrova's evidence is accepted, the authority provided to her by Mr Saaib was limited to lodging the Eligibility and Home Warranty Applications and did not extend to Mr Saaib having authorised

Mr Zaatini to enter into the 4 October Contract on Mr Saaib's behalf. He also submits that the alleged authority that was put to Mr Saaib in cross-examination, that he authorised Mr Zaatini to "sign any required building contract" and "sign any building contract on [his] behalf" (T291:20, T302:2), is inherently improbable given it was an authority unconstrained by price or subject matter as to what Mr Saaib would have to build.

303 Finally, Mr Saaib submits that it is not open to the Court to draw an adverse inference from the failure to call Mr Zaatini as a witness as there is insufficient evidence to draw any such inference and, in any event, Mr Zaatini is not in Mr Saaib's "camp".

Ms Alexandrova's submissions

304 It is appropriate to record that Ms Alexandrova submitted that Mr Saaib authorised her to upgrade his eligibility and apply for a home warranty certificate for the Marrickville project, and that she understood that the upgrade of his eligibility was required specifically for the Marrickville project.

Consideration and determination

305 The Owners Corporation bears the onus of proving, on the balance of probabilities, that Mr Saaib authorised Mr Zaatini to enter into the 4 October Contract on his behalf.

306 This means that the Court must "feel an actual persuasion" of the occurrence or existence of the fact before it can be found, which cannot be reached by a "mere mechanical comparison of probabilities [independent] of the belief in its reality": *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361; [1938] HCA 34. Actual persuasion is achieved where the allegation is made out to the reasonable satisfaction of the court taking into account the seriousness of the allegation made, the inherent unlikelihood of the occurrence and the gravity of the consequences flowing from the particular finding: *Evidence Act*, s 140(2); *Warner v Hung, In the matter of Bellpac Pty Limited (Receivers and Managers appointed) (In Liq) No 2* (2011) 297 ALR 56; [2011] FCA 1123 at [48]; *Atanaskovic v Birketu Pty Ltd* [2019] NSWSC 1006 at [366].

307 In this case, the Owners Corporation contends that Mr Zaatini (as agent) had implied actual authority to enter into the 4 October Contract on behalf of Mr

Saaib (the principal) and relies, in large part, on inferences that it says arise from the evidence.

- 308 There was no dispute as to the applicable principles when determining whether a principal and agent relationship exists. The essential elements of such a relationship are the consent (or assent) of the principal and agent and the authority conferred on the agent to act: *Tonna v Mendonca* [2019] NSWSC 1849 (**Tonna v Mendonca**) at [377]. Both elements of consent and authority may be implied from the circumstances of a particular case.
- 309 Consent to agency may be implied where a principal places another in a situation that a reasonable person would understand the other to have the principal's authority to act on their behalf, or where the principal's words or conduct are such as to lead to a reasonable inference that they are authorising the agent to act for them: *Tonna v Mendonca* at [379], citing *Pola v Commonwealth Bank of Australia* (Federal Court, Sundberg J, 19 December 1997, unrep) at 12.
- 310 The question of whether authority has been given and, if so, its scope, are questions of fact to be determined by evidence. Actual authority may arise from the principal and agent so conducting themselves that agency should be inferred, including by reference to the parties' prior habits, course of dealing, words used, circumstances or acquiescence in a course of behaviour. Evidence that a person is purporting to do acts on behalf of a principal in circumstances from which it may be inferred that the principal knew and approved of those acts is evidence that the principal authorised that person to act in the particular capacity: *Bonette v Woolworths Ltd* (1937) 37 SR (NSW) 142 at 150; *Tonna v Mendonca* at [383], [387]; *Vukmirica v Betyounan* [2008] NSWCA 16 at [50]; *Junker v Hepburn* [2010] NSWSC 88 at [43]–[44].
- 311 Authority may also be implied by subsequent ratification or a course of conduct: G E Dal Pont, *Law of Agency* (4th ed, 2020, LexisNexis) at [8.3].
- 312 It has been said that the drawing of inferences from evidence is a process involving "plain commonsense". An inference (if A, B and C exists, then Z exists) is open to be drawn if genuine human experience (plain commonsense)

would be contradicted if Z did not exist: *Fabre v Arenales* (1992) 27 NSWLR 437 at 445 (Mahoney JA)

- 313 The evidence must give rise to a reasonable and definite inference that makes it reasonably probable that the fact exists. An inference cannot be drawn where the evidence goes no further than showing the possibility that a fact may exist or giving rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture: *Rail Corp New South Wales v Donald*; *Staff Innovations Pty Ltd* [2018] NSWCA 82 at [76]–[78]; *Nominal Defendant v McLennan* [2012] NSWCA 148 at [139].
- 314 As to the application of *Jones v Dunkel*, it is common ground that there must first be available an inference to be drawn against Mr Saaib from the facts proved by direct evidence. A *Jones v Dunkel* inference does not permit a choice between two guesses or conjectures or supply a missing gap in the evidence: *Manly Council v Byrne* [2004] NSWCA 123 at [54]; *RHG Mortgage Corporation Ltd v Iaani* [2016] NSWCA 270 at [161].
- 315 As already noted, based on the evidence Mr Saaib gave and his demeanour, I make no finding that Mr Saaib is a dishonest person or that he knowingly gave false evidence although, like Ms Alexandrova, I have issues about the reliability of his evidence. While I conclude that Mr Saaib and Ms Alexandrova are both unreliable witnesses, this does not mean that none of their evidence is to be relied on or accepted. It is necessary to carefully consider the evidence, particularly where it conflicts, against the “contemporary materials, objectively established facts and the apparent logic of events”: *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [31].
- 316 Having considered the evidence carefully and the above principles, I am not persuaded that the Owners Corporation have established, on the balance of probabilities, that Mr Saaib authorised Mr Zaatini to enter into the 4 October Contract on his behalf.
- 317 While I conclude it was likely that the Marrickville project was mentioned during the mid-October 2010 conversations between Mr Saaib and Ms Alexandrova, in my view, the objective facts, contemporaneous materials and logic of events do not support the inference that Mr Saaib consented to Mr Zaatini acting as

his agent and knew and approved of him entering into the 4 October Contract on his behalf. Nor, in my view, do they support the inference that Mr Saaib authorised Ms Alexandrova (directly or via Mr Zaatini as his agent) to lodge with the insurer the 4 October Contract, the QBE and Home Warranty Applications and other documents he did not sign, such as the Appointment Letter.

- 318 While accepting that Ms Alexandrova was an honest witness attempting to state events as she recalled them, I am not satisfied, on the balance of probabilities, that she spoke to Mr Saaib about the Marrickville project, his “role” as builder or Mr Zaatini’s authority in relation to documents naming Mr Saaib as builder in the terms in which she deposes or more generally in relation to those matters prior to 12 October 2010. Nor do I feel an actual persuasion that she had any conversation with Mr Saaib from which I can infer that he had placed Mr Zaatini in a position where he was authorised to deal with Ms Alexandrova as Mr Saaib’s agent in relation to home warranty insurance in respect of a contract which named Mr Saaib as the builder of the Marrickville project, or from which I can infer that Mr Saaib knew and approved of Mr Zaatini entering into the 4 October Contract on his behalf.
- 319 I accept that Ms Alexandrova’s evidence of the conversations she says she had with Mr Saaib prior to 12 October 2010 may not be inconsistent with some of the emails in evidence. The first of the 29 September emails, in which Mr Zaatini refers to a quote that Ms Alexandrova did “under Tony Saaib” (see [65]), indicates that a proposal had been put to Ms Alexandrova prior to that time that contemplated that Mr Saaib might be the builder of the Marrickville project. However, it may be inferred from Mr Zaatini’s 29 September email that Ms Alexandrova had been dealing with Mr Zaatini in relation to the Marrickville project and the “quote”, rather than with Mr Saaib himself. That she had been dealing with Mr Zaatini is supported by the call records, that indicate Award Build’s 703 number called Ms Alexandrova on 6, 7 and 9 September 2010, and the emails exchanged between Mr Zaatini and Ms Alexandrova on 29 and 30 September 2010 which do not refer to any discussions between Ms Alexandrova and Mr Saaib.

320 Ms Alexandrova's evidence regarding her mid-2010 call with Mr Saaib was also significantly undermined by her evidence in cross-examination about Award Build being the intended builder, the "to whom it may concern" letter being used for Award Build's eligibility increase in relation to the Marrickville project, and Award Build's later approach to Mr Saaib. If Ms Alexandrova had been dealing with Joe Antoun and Mr Zaatini on Award Build matters for some time, knew that Mr Zaatini was Mr Saaib's nephew and knew (or understood) that Award Build was the intended builder for the Marrickville project, a conversation with Mr Saaib about the Marrickville project (whether it was in mid-2010 or sometime later) that does not mention Award Build and refers to a "new project which [Mr Saaib] will be doing with [his] nephew William" makes little sense. If there was such a conversation, presumably there would have been a discussion regarding Award Build's role and her prior dealings with Mr Zaatini.

321 I accept Ms Alexandrova's evidence that she became aware that Award Build could not increase its eligibility and that Mr Saaib was to be named as the builder sometime on 29 September or 30 September 2010. I find that Ms Alexandrova and Mr Zaatini discussed this prior to Ms Alexandrova's 30 September email which refers to Mr Saaib having eligibility with QBE and the contract needing to be in his name. This is consistent with Ms Alexandrova's oral evidence and the record of the call from Mr Zaatini (on the Award Build's 703 number) to Ms Alexandrova at 12:18 pm on 30 September 2010. However, I am not satisfied, on the balance of probabilities, that Ms Alexandrova spoke to Mr Saaib "shortly after" the 29 September email or sometime later in the terms in which she deposes (Alexandrova II at [29]). That conversation is at odds with her 30 September email, which makes no reference to any discussion with Mr Saaib and asserts that the contract "has be to in Mr Saaib's name", and her oral evidence that she understood that Award Build had approached him to be their partner.

322 I find that Ms Alexandrova acted on instructions from Mr Zaatini (not Mr Saaib) when she lodged the QBE Application and the 4 October Contract with OAMPS on 6 October 2010. This is to be inferred from the emails she received from Mr Zaatini on 5 October 2010, the record of the call from Mr Zaatini (on Award

Build's 703 number) at 3:14 pm on 5 October 2010 and her prior dealings with him. I do not accept Ms Alexandrova's evidence that she also spoke to Mr Saaib that day.

- 323 Ms Alexandrova's evidence of her mid-2010, "shortly after" and 5 October conversations with Mr Saaib might not be inconsistent with the events at the time. However, there are no documents or call records referring to or evidencing the discussions and her evidence is, in my view, more likely to be a product of reconstruction (conscious or otherwise) rather than actual recollection.
- 324 The fact is that, as at 12 October 2010, there are no emails, calls records or other documents that refer to any communication between Ms Alexandrova and Mr Saaib in relation to the Marrickville project and/or Mr Zaatini. In addition, none of the Marrickville project-related documents that existed at that time had been signed by Mr Saaib. Indeed, the 4 October Contract was not signed at all but was simply an altered form of the Second Contract and likely the First Contract.
- 325 The Owners Corporation's submission that it is highly improbable that Ms Alexandrova did not mention the Marrickville project to Mr Saaib and what she was doing in relation to that project (as evidenced by the contemporaneous emails) is, in part, premised on Mr Saaib's evidence in chief that, in 2010, he spoke to Ms Alexandrova "regularly" (Saaib I at [40]). The call records in evidence do not support such a finding, in the sense that "regularly" might be ordinarily understood to mean routinely or at uniform times. Only two calls and one text message were made from Mr Saaib to Ms Alexandrova during the period 1 August 2010 to 30 November 2010, namely those on 13, 14 and 15 October 2010. This is to be contrasted with the volume of communications from Mr Zaatini (on Award Build's 703 number) to Ms Alexandrova; 29 calls and three text messages during the period 1 July 2010 to 14 January 2011. While the calls records are not conclusive, in that they do not include outgoing calls from Ms Alexandrova's number, they support a finding that Mr Zaatini and Ms Alexandrova, rather than Mr Saaib and Ms Alexandrova, were in regular contact.

- 326 There is no doubt that Mr Zaatini referred to Mr Saaib as the builder of the Marrickville project in his emails with Ms Alexandrova and was in regular contact with Mr Saaib over the relevant period. Mr Saaib submits, and I accept, that Mr Zaatini's emails amount to an assertion of authority.
- 327 The level of contact between Mr Saaib and Mr Zaatini was significant⁵. However, it is not inconsistent with Mr Saaib's evidence that he had a very close relationship with Mr Zaatini at the time and sometimes spoke to him on a daily basis. The nature of their relationship, the storage of Mr Saaib's documents at Mr Zaatini's office, Mr Saaib's limited English and lack of technology skills, and the inclusion of Award Build's and Mr Zaatini's contact details on the unauthentic documents are also factors which, to my mind, indicate that Mr Saaib was someone who might be more easily taken advantage of and kept in the dark by Mr Zaatini, rather than a person who would be expected to have become aware of what was happening with the use of his name at an early point in time, as the Owners Corporation submits.
- 328 Mr Saaib signed the blank Eligibility Application and, as noted earlier, his evidence on this topic was not convincing (at [262]–[267]). Despite his assertions that he did not leave it to Mr Zaatini to complete, it may be inferred that, by his actions, Mr Saaib authorised Mr Zaatini to act on his behalf in relation to the Eligibility Application.
- 329 The Owners Corporation refers to Mr Saaib being content to sign the blank form as suggesting that the existence of documents which contain false information and signatures that are not his does not demonstrate an absence of authority from Mr Saaib for Mr Zaatini to do whatever was required to obtain home warranty insurance and to enter into the 4 October Contract on his behalf. I disagree. In my view, signing someone else's signature on a large number of documents that contain false information tends against the conclusion that the relevant party knew the documents were being signed on their behalf and authorised the person to sign them. This is particularly where, as here, the purported principal personally signed a document that could be

⁵ 52 calls were made from Award Build's 703 number to Mr Saaib's number during the period from 1 July 2010 to 14 January 2011 and 80 calls and text messages made from Mr Saaib to Mr Zaatini's 545 number.

described as generic and unrelated to the Marrickville project at the request of the purported agent.

- 330 Giving Mr Zaatini the signed but incomplete Eligibility Application suggests that Mr Saaib consented to Mr Zaatini acting on his behalf for a specific capacity, not that Mr Saaib had consented to an agency relationship that encompassed Mr Zaatini signing documents in Mr Saaib's name which related to the Marrickville project. Having authority to do one thing does not necessarily imply authority to do another: *Tonna v Mendonca* at [382].
- 331 There is also no apparent logic or rational reason why Mr Saaib would sign the Eligibility Application himself but not sign the Marrickville project documents if, as the Owners Corporation contends, he had discussed and agreed with Mr Zaatini to be named in the 4 October Contract as the builder of the Marrickville property and the applicant for home warranty insurance.
- 332 As to the calls and text message on 13, 14 and 15 October 2010, I prefer Ms Alexandrova's evidence that she and Mr Saaib discussed her request for Mr Saaib to "sign the application" in addition to discussing the need for the 2009 and 2010 financial statements. A discussion in those terms is inherently likely given the emails sent by Ms Alexandrova on 13 and 15 October 2010 and the concessions made by Mr Saaib in cross-examination.
- 333 I also find it likely that, during one or more of those calls, the Marrickville project was mentioned. There is no compelling reason why Ms Alexandrova would not mention the project to Mr Saaib and it is inherently unlikely for her not to have done so in circumstances where the "application" that needed to be signed was the Home Warranty Application for the Marrickville project, Ms Alexandrova was working towards lodging the Eligibility Application and the Home Warranty Application at the same time, and Mr Saaib's increased eligibility was a necessary precondition to home warranty insurance being issued for the Marrickville project. Thus, I reject Mr Saaib's evidence that the Marrickville project was not mentioned on those calls.
- 334 It is not necessary for me to determine whether Mr Saaib was lying about his knowledge of the Marrickville project at that time, simply mistaken as to his recollection or conflating events. A discussion referring to or knowledge of the

Marrickville project on the part of Mr Saaib at that time is not, in my view, sufficient evidence from which to infer implied actual authority on the part of Mr Zaatini to enter into the 4 October Contract or to find that Mr Saaib knowingly authorised Ms Alexandrova to lodge the Home Warranty Application with the insurer naming him as the builder of the project. Nor do I consider the calls to be sufficient to conclude that Mr Saaib had consented to and authorised Mr Zaatini to act as his agent on anything other than in respect of the Eligibility Application.

- 335 Ms Alexandrova or Mr Saaib may well have referred to the Marrickville project on one of the calls but likely did so in circumstances where the 4 October Contract was not mentioned at all given it had already been lodged with the insurer. In any event, the discussions post-date entry into the 4 October Contract.
- 336 The language skills of the participants, particularly Mr Saaib, the evidence suggesting that the calls on 13 and 14 October may have been very short (of 21 and 41 seconds only), and the 15 October email that refers to a discussion with Mr Saaib about the 2009 and 2010 financial statements, being documents relevant to the Eligibility Application (rather than the Home Warranty Application), also leave me unpersuaded that a reference in those calls to the Marrickville project or to an application that needed to be signed was understood by Mr Saaib to be to anything other than a reference to the Eligibility Application and a possible project or future “big job”.
- 337 As to the other events on 15 October 2010, I find it more likely that Mr Saaib was not present at Mr Zaatini’s office when Mr Zaatini sent his email to Ms Alexandrova stating “I’m here with the man himself” given the email suggests, falsely, that Mr Saaib had signed the Builder’s letter and that Ms Alexandrova should compare false signatures
- 338 Although Mr Saaib conceded that he had a call with Ms Alexandrova on 15 October 2010, I find that Ms Alexandrova acted on instructions from Mr Zaatini to lodge the Eligibility Application and the Home Warranty Application to the insurer. This is to be inferred from the multiple emails she received from Mr Zaatini that day, the call from Mr Zaatini (on Award Build’s 703 number) at 2:40

pm and the limited period, of just over one hour, available to her to make any call to Mr Saaib. Ms Alexandrova's recollection of the text message from Mr Saaib was also inconsistently expressed and leads me to conclude that her evidence about the call with Mr Saaib is unreliable and likely a product of reconstruction (conscious or otherwise).

339 Ms Alexandrova does not give evidence about who she emailed or spoke to about the Appointment Letter or when or from whom it was received. Based on their prior dealings and the record of three calls made from Award Build's 703 number to Ms Alexandrova on 2 December 2010, I infer that she spoke to or dealt with Mr Zaatini about the Appointment Letter, that Mr Zaatini sent it to her that day, and that Mr Saaib did not authorise Mr Zaatini or someone else to sign it on his behalf.

340 While I accept the logic to Ms Alexandrova's evidence that it was her "general/normal practice" to call a client when an eligibility increase had been approved and to send them copies of their eligibility certificate or home warranty certificates, I am left unpersuaded that she spoke to Mr Saaib in December 2010 in the terms she describes. I find it more likely that she sent the Eligibility Certificate and home warranty certificates to Mr Zaatini based on the evidence of her dealings with him in December 2010 and January 2011 and her understanding of his role as the project manager. I do not accept Ms Alexandrova's evidence that Mr Saaib told her in February 2017 "don't say anything" about the Marrickville project. Based on the contemporaneous emails and doubts about the reliability of her recollections, I prefer Mr Saaib's evidence and find that they discussed restoring his eligibility for home warranty insurance.

341 I am also unpersuaded by the Owners Corporation's submission that there was no good reason why Mr Zaatini would not disclose the Marrickville project to Mr Saaib, particularly as Mr Saaib signed the Eligibility Application for the prospect of new jobs. As Mr Saaib's submits, and I accept, the likely reason was to avoid discussing the fact that Mr Zaatini had, by that time, been involved in creating a number of documents which had been purportedly signed by Mr Saaib without his authority and contained false information about him.

- 342 There is logic to the Owners Corporation's submission that, in the absence of evidence that Ms Alexandrova was asked to keep what she was doing with Mr Zaatini secret from Mr Saaib, the Court might infer that Mr Zaatini was not concerned about Ms Alexandrova speaking to Mr Saaib about his role as the builder on the Marrickville project and that Ms Alexandrova was likely to have done so. But that logic also involves some conjecture and guesswork as to what motivated Mr Zaatini and what might have happened.
- 343 The objective facts are that at least 24 documents were created in relation to the Marrickville project that involved the falsification of Mr Saaib's signature, the use of contact details of others, fake company names, false statutory declarations and an illegitimate insurance certificate. There is no evidence that Mr Saaib received copies of those documents or was involved in their creation.
- 344 This was not a situation where one or two documents were signed by Mr Zaatini on behalf of Mr Saaib. Rather, all of the Marrickville project-specific documents that required Mr Saaib's signature were not signed by him. If, as the Owners Corporation contends, Mr Saaib had discussed and agreed to be the builder of the Marrickville property with Mr Zaatini and authorised him to enter into the 4 October Contract on his behalf, there is no logic, rational reason or need for the creation of the First, Second and 4 October Contracts, the Builder's Side Deed and the 13 September letter to include Mr Saaib's false signatures and incorrect contact details. Nor is there apparent logic, rational reason or need for the creation of 15 statutory declarations with falsified signatures of Mr Saaib and fake witnesses or the GIO Certificate if Mr Saaib had agreed to be the builder of the Marrickville project and undertook the building works.
- 345 The facts referred to above (at [183], [185], [187]–[191]) are consistent with Mr Saaib's denials that he did not get paid or receive any financial benefit from the Marrickville project and did not undertake any work on the Marrickville property, and support findings that he did not do so. For the reasons set out above (at [282], [285]), I do not consider Mr Saaib's evidence regarding the Leura project to be probative on these issues. While not at all determinative, Mr Zaatini's

email to Mr Dona stating that Mr Saaib was not the builder on site is also consistent with Mr Saaib's denials.

- 346 The facts do not establish, and the Owners Corporation did not contend, that Mr Saaib ratified the 4 October Contract or subsequently adopted it by his conduct, something that could be expected if Mr Saaib had discussed and agreed to be the builder of the Marrickville project and had authorised Mr Zaatini to enter into the 4 October Contract on his behalf
- 347 For reasons set out above, Ms Alexandrova's evidence does not persuade me that Mr Saaib spoke to her and held out Mr Zaatini as authorised to represent him as the builder of the Marrickville project in relation to the 4 October Contract and the Home Warranty Application. Nor do the facts that Mr Saaib signed the blank Eligibility Application and spoke to Ms Alexandrova about that Application during which the Marrickville project was mentioned.
- 348 There is an absence of documentary evidence, including from Ms Alexandrova, from which it may fairly be inferred that Mr Saaib knew and approved of Mr Zaatini entering into the 4 October Contract on his behalf and what Mr Zaatini (and/or Transformer Group) was otherwise doing in his name. The call records do not indicate that Mr Saaib and Ms Alexandrova spoke regularly and the emails from Mr Zaatini to Ms Alexandrova further establish the falsity of what Mr Zaatini was representing to her, namely that Mr Saaib signed the Marrickville project documents and that the Architect and Engineer references were authentic.
- 349 There is also no evidence of any prior habits or course of dealing to suggest that Mr Saaib had previously given authority to Mr Zaatini to enter into contracts on his behalf or sign documents in his name from which it might be inferred that he did so on this occasion. To the contrary, the evidence in relation to the 31 July letter relating to the Leura project and the blank Eligibility Application suggests that Mr Saaib's habit was to sign contractual and business documents himself but rely on and trust others to draft or complete them.
- 350 In the end, I am simply unpersuaded that the objectively established facts and logic of events give rise to reasonable and definite inferences that Mr Zaatini

and Mr Saaib had discussed and agreed that Mr Saaib would be named in the 4 October Contract as the builder of the Marrickville property, that Mr Zaatini had been authorised by Mr Saaib to provide to Ms Alexandrova the documents that he in fact provided to her, including the 4 October Contract, and, therefore, that Mr Saaib had authorised Mr Zaatini to enter into a building contract on his behalf in relation to the Marrickville project.

- 351 As I am not persuaded that there is sufficient direct evidence to enable the inferences that the Owners Corporation seeks to be drawn, a *Jones v Dunkel* inference does not assist the Owners Corporation's case.
- 352 I should record that I was not persuaded that Mr Zaatini was to be regarded as now in Mr Saaib's "camp" or that it was natural for Mr Saaib to call him. Mr Saaib described Mr Zaatini as a "liar" and a "bullshit person" (T354:23, T237:36–37) and someone who, as family, he was "close to" (T280:24) and spoke to regularly "before we have all that bullshit scene" (T357:45–T358:2) but with whom he now has "no business" (T237:36–37).
- 353 Mr Saaib also gave evidence that he reported "the this matter" to the police (Saaib I at [71]). I do not accept the Owners Corporation's submission that the lodgement of the fraud report with the police by Mr Saaib's lawyer is no reason for not drawing a *Jones v Dunkel* inference. To my mind, reporting Mr Zaatini to the police in relation to a suspected fraud, a criminal offence, is a factor that supports the conclusion that Mr Zaatini would not be expected to be called by Mr Saaib as his witness.
- 354 The effect of the evidence is that Mr Saaib and Mr Zaatini no longer have an ongoing close relationship, Mr Saaib would not expect Mr Zaatini to tell the truth if he was called to give evidence and was aware of a reason (the police report) why Mr Zaatini would not do so: cf *RHG Mortgage Ltd v Rosario Ianni* [2015] NSWCA 56 at [90]; *Westpac Banking Corporation v Velingos* [2011] NSWSC 607 at [78].
- 355 Section 38 of the *Evidence Act* may be relied on and a certificate under s 128 of the same Act would be available to deal with the fact that, if called by Mr Saaib, Mr Zaatini would have been asked in effect to admit to crimes of some seriousness: *RHG Mortgage Ltd v Rosario Ianni* [2015] NSWCA 56 at [90],

[122]. However, that factor taken together with the nature of Mr Zaatini's conduct in falsifying Mr Saaib's signatures and his statements to Mr Saaib denying any involvement in the Marrickville project (Saaib I at [14], [18], [26]) must raise significant doubts about what Mr Zaatini may or may not say in evidence, his reliability and credibility as a witness and whether it could be said to be natural for Mr Saaib to call him: *Fabre v Arenales* (1992) 27 NSWLR 437 at 450.

Conclusion

356 For the above reasons, I am not satisfied that the Owners Corporation have established, on the balance of probabilities, that Mr Saaib authorised Mr Zaatini to enter into the 4 October Contract on his behalf. It follows that the Owners Corporation has not established that Mr Saaib entered into and is a party to the 4 October Contract and its case against him fails.

357 On the conclusion I have reached, the other issues raised in the Saaib proceedings do not arise. However, as they were the subject of debate and in case I am wrong, I set out below my factual findings relevant to those other issues and respond to some of the submissions made.

Did Transformer Group assent to the 4 October Contract?

358 The Owners Corporation accepts that it must establish that both parties assented to the 4 October Contract in order for it to be legally binding.

359 The Owners Corporation submitted that the Court should conclude that Transformer Group assented to the 4 October Contract and understood and agreed that it would be the contract under which the building work would be done for the following reasons. First, the First and Second Contracts had not come into effect and were conditional on home warranty insurance being obtained. Second, home warranty insurance was obtained under the 4 October Contract and the premium was paid for by Transformer Group. Third, Transformer Group was provided with the certificates of home warranty insurance that related to building work under the 4 October Contract which it in turn provided to the certifying authority to obtain the Construction Certificate and, via its agent, to ANZ in order access construction finance. Fourth, it can be inferred that Mr Zaatini was dealing with Ms Alexandrova on behalf of and

with the consent of Transformer Group when he provided her with the 4 October Contract and the council rates notice for the Marrickville property and asked for an estimate for the all risk insurance given that insurance was a condition precedent to the ANZ offer of finance.

360 Mr Saaib submitted that there was insufficient evidence from which to conclude that Transformer Group assented to the 4 October Contract. He said there was no reason why a third contract was created, no evidence it had been given to Transformer Group, the company's assent to the First and Second Contract was reason not to find that it has assented to the 4 October Contract, and the payment of the insurance premium was of no consequence given it would have been the same amount under the Second Contract and paid well after the 4 October Contract was created.

361 The matters relied on by the Owners Corporation lead me to conclude that Transformer Group had knowledge of the 4 October Contract and agreed to it being used for the purposes of obtaining home warranty insurance so as to permit building work to be done. It seems fanciful that the 4 October Contract would have been created without Transformer Group's consent given its role as developer, the borrower of construction finance from ANZ and the party who ultimately seems to have been involved in undertaking and managing much of the building works.

362 As to Mr Zaatini, I have already found that he was likely employed by or otherwise acting with the authority and consent of Award Build in 2010 when he was dealing with Ms Alexandrova. It is not possible to say one way or the other whether he created the 4 October Contract, although I would infer that Transformer Group knew and consented to him using it to arrange home warranty insurance.

363 Mr Saaib submits that the Court would infer that there was no intention on the part of Transformer Group to create any actual contract and that the transaction was a sham in order to get bank finance and home warranty insurance. While there is some force to that submission, I make no finding that the 4 October Contract was a sham transaction. Such a finding would require me to conclude Transformer Group and Mr Saaib had a common intention that

the 4 October Contract would give the appearance of creating legal rights but which should not have legal consequences, which I do not consider to be open to make on the evidence: *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2004) 218 CLR 471; [2004] HCA 55 at [46].

364 Based on the evidence to which I already referred, I find that Transformer Group assented to the 4 October Contract to enable home warranty insurance and thus, bank finance to be obtained but without any intention for Mr Saaib to carry out the works as the builder for the Marrickville project.

Did Mr Saaib undertake building work in relation to the Marrickville property?

365 The Owners Corporation pleads that Mr Saaib undertook the building work leading to the construction of the Marrickville property, an allegation he denies.

366 The issues raised by the Owners Corporation's and Mr Saaib's submissions are whether the Owners Corporation has to prove that fact, and also whether Mr Saaib did in fact undertake the works.

367 The Owners Corporation contended that it did not need to prove that Mr Saaib had carried out the building works, arguing that all it had to establish was that Mr Saaib entered into the 4 October Contract as builder and that the works were carried out under that contract. It submitted that, as a matter of statutory construction, the relevant provisions of the HBA do not require proof that the builder undertook the work, consistent with the HBA's intended function as a consumer protection regime. It also submitted that, so long as there was proof of the facts necessary as a matter of law to its cause of action, it did not matter if all of the pleaded facts were not proved.

368 The Owners Corporation also submitted that, if it is necessary for it to prove that Mr Saaib did the building work, the Court can infer from other aspects of the evidence, such as the regular contact between Mr Saaib and Mr Zaatini, that Mr Zaatini did the building work under Mr Saaib's supervision (T510:33–511:29).

369 Mr Saaib took the position that the Owners Corporation should be held to its pleaded case because of the nature of the case sued on, namely a breach of the statutory warranties for defective work, and because it had taken upon itself

to prove the fact that Mr Saaib did the building work, referring to the *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [2709].

370 He raised three scenarios which he contended illustrated that the issue of whether it had to establish that Mr Saaib undertook the building work was one of substance and not simply a pleading point, referring me to *Carr v Miller* [2018] NSWSC 1424, a case involving a sham building contract, and *Chapman v Taylor; Vero Insurance Ltd v Taylor* [2004] NSWCA 456, a case in which the court considered whether the statutory warranties continued to apply upon termination or frustration of a building contract. Mr Saaib's submission was, in essence, that pleading and proving that he did or did not do the Work was a necessary pre-condition to the Owners Corporation succeeding with its claim for breach of statutory warranties and also relevant to whether or not the Court might conclude that the 4 October Contract was a sham transaction.

371 Mr Saaib also submitted that the evidence supports a finding that he did not, in fact, undertake any building works at the Marrickville property.

372 Given my earlier conclusion regarding Mr Saaib, it is not necessary to resolve the issue of whether, as a matter of pleading, the Owners Corporation has to prove that Mr Saaib undertook the building works in order to succeed on its claim. It is, however, appropriate for me to record my factual findings on this issue.

373 On the basis of the documentary evidence and Mr Saaib's oral evidence, I am satisfied that Mr Saaib did not, in fact, undertake any building work at the Marrickville property whether by himself or supervising others. In my view, the evidence to which I have referred (at [345]) supports that finding.

374 I am also unpersuaded that Mr Saaib's evidence that he spoke to Mr Zaatini regularly in 2011 and 2012 is a sufficient basis from which to infer that Mr Zaatini did the building work under Mr Saaib's supervision. In my view, the documentary evidence and, in particular, the existence of the forged statutory declarations weighs against such an inference being drawn.

375 Thus, I can see no basis on which it could be said that Mr Saaib undertook the Work leading to the construction of the Marrickville property (Further Amended

List Statement filed 20 November 2018 (**Further Amended List Statement**) at [17]) or that the Work embodied in the common property was undertaken by Mr Saaib (Further Amended List Statement at [25]). On that analysis, the Owners Corporation has not established the facts as currently pleaded.

DEFECTS AND QUANTUM

- 376 I deal with the defects and quantum issues here as they are relevant to the damages claimed in both the Saaib and the Alexandrova proceedings, although in different ways.
- 377 In the Saaib proceedings, the defects formed the basis of the Owners Corporation's claim for damages from Mr Saaib for alleged breaches of the statutory warranties implied by s 18B of the HBA. The Owners Corporation relies on s 18D(1) of the HBA as a "successor in title" to the developer, Transformer Group, and seeks to recover the estimated costs of rectifying a large number of common property defects and non-complying works which have not yet been rectified and other related costs.
- 378 In the Alexandrova proceedings, the Owners Corporation claimed to be entitled to recover the common property defect rectification costs and other related costs from Ms Alexandrova as damages under s 236 of the ACL and/or s 68 of the FTA.
- 379 As noted above, the Owners Corporation's defects and quantum evidence was not challenged. Ms Alexandrova left the running of the defects and quantum issues to Mr Saaib's legal team and supported his submission in relation to one of the issues that remained in dispute.

Overview of evidence and issues in dispute

- 380 The Owners Corporation relied on evidence from seven experts, each of whom deal with a separate defect category: acoustics (Renzo Tonin), waterproofing (Darryl Pickering, BWR), electrical services (Dean Eislars, Norman Disney & Young), external walls (Peter Karsai), hydraulic services (Mr Simon Ingegneri, Norman Disney & Young), mechanical services (Richard Duggan) and structural and building (Daniel Cully, Triaxial). Each expert provided a detailed report (two in the case of Mr Karsai) describing the nature of the various

defects and explaining why the relevant work was not done with due care and skill, in accordance with plans and specifications that formed part of the contract or in accordance with laws.

381 The Owners Corporation also relied on an expert report from David Madden, quantity surveyor, dated 12 October 2018. Mr Madden's report quantified the total rectification costs as around \$3.7 million, made up of \$2,094,438 of trade costs relating to 100 defect and non-complying work items and \$1,583,053 of on-costs (preliminaries, contractor margin, fees and costs).⁶ He further quantified \$270,190 of consequential costs for accommodation of the Marrickville property residents and the associated removal, reinstatement and storage costs for their personal belongings.⁷

382 Discussions during the course of the hearing led to the Owners Corporation revising its trade costs claim down from \$2,094,438 to \$1,719,908,⁸ of which only \$149,120 was identified as being in dispute by the time of closing submissions.⁹

383 By the end of closing submissions, only four defects remained in dispute: a hydraulics defect, two waterproofing defects and one general building defect with a total rectification cost of \$117,247. In addition, Mr Saaib and Ms Alexandrova disputed the Owners Corporation's claim for a 10% contingency and risk allowance.

384 I deal with each of the four disputed defects and other challenges below. I then set out, by reference to each defect category and cost claim, a summary of the claim reflecting my findings in relation to each of the disputed items and how much I allow for the Owners Corporation's defect claims.

Lot vs common property

385 The four remaining disputes raised the issue of whether the defects relate to common property or lot property. The Owners Corporation accepted that it does not have title to sue for defects relating to lot property.

⁶ CB994.

⁷ CB995.

⁸ Owners Corporation's Outline of Closing Submissions, Table of Defects.

⁹ MFI-16, Table 1.

386 At the time the Strata Plan was registered, the *Strata Schemes (Freehold Development) Act 1973* (NSW) (**Strata Schemes Act**) was in force.

387 Section 5(1) of the Strata Schemes Act includes the following relevant definitions:

common property means so much of a parcel as from time to time is not comprised in any lot.

lot means one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan, a strata plan of subdivision or a strata plan of consolidation to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), but does not include any structural cubic space unless that structural cubic space has boundaries described as prescribed and is described in that floor plan as part of a lot.

floor plan means a plan consisting of one or more sheets which:

(a) defines by lines ... the base of each vertical boundary of every cubic space forming the whole of a proposed lot ... ; and

(b) shows:

(i) the floor area of any such cubic space; ...

structural cubic space means

(a) cubic space occupied by a vertical structural member, not being a wall, of a building,

(b) any pipes, wires, cables or ducts that are not for the exclusive enjoyment of one lot and:

(i) are in a building in relation to which a plan for registration as a strata plan was lodged with the Registrar-General before the day appointed and notified under section 2 (3) of the Strata Titles (Development Schemes) Amendment Act 1985, or

(ii) in any other case—are in a building or in a part of a parcel that is not a building,

(c) any cubic space enclosed by a structure enclosing any such pipes, wires, cables or ducts.

388 Section 5(2)(a) of the Strata Schemes Act provides that the boundaries of any cubic space referred to in paragraph (a) of the definition of *floor plan* in subsection (1):

(a) except as provided in paragraph (b):

(i) are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition – the inner surface of that wall, and

(ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space – the upper surface of that floor and the under surface of that ceiling, ...

389 Barrett J analysed these definitions in *Symes v The Proprietor Strata Plan No. 31731* [2001] NSWSC 527 at [25]–[27] (**Symes**), which I respectfully adopt and will not repeat here.

390 The Strata Plan for the Marrickville property comprises four pages of floor plans.¹⁰ They show the internal areas of the 11 units and the balconies, terraces and courtyards delineated separately by heavy lines with a short wavy line (a vinculum) across the boundary of the internal and external areas on the ground and first floors of each unit and across the boundary between the terraces and the courtyards on the ground floor. A vinculum indicates that an area is linked to and forms part of a lot, thus indicating that the balconies, courtyards and terraces of each unit forms part of each lot rather than part of the common property: Peter Butt, *Land Law* (7th ed, 2017, Thomson Reuters) at [13.90]; *Smouha v Fleming* (1997) 8 BPR 15,419 at 15,424.

Hydraulics defect: Item H-14

391 The hydraulics defect relates to the rainwater distribution systems that service each of the 11 units. The defect is described in Mr Ingegneri's report as a failure to comply with AS3500 and manufacturer requirements due to a lack of additional marking and signage identifying pipework and outlets as "rainwater" and the omission of first flush diverters, strainers and filters.¹¹ The cost of rectifying the defect is estimated by Mr Madden to be \$6,340.¹²

392 The Owners Corporation submits that the rainwater distribution systems defect is a common property defect because the systems are not located inside each lot. It also submits that it is a common property defect on the basis that the

¹⁰ CB2311A–2311D.

¹¹ CB214–5.

¹² CB1105.

rainwater distribution systems comprise pipes, wires and ducts that are not for the exclusive enjoyment of one lot and thus fall within the definition of “structural cubic space”. As was put by the Owners Corporation, the rainwater distribution systems are not for the exclusive enjoyment of one lot because if they are defective, the whole building gets covered in water and, as such, they are pipes that have an impact on the whole of the building.¹³ At the hearing, I was not taken to any evidence that indicated that the pipes of the various rainwater distribution systems are connected.

393 Mr Saaib submits, and I accept, that the rainwater distribution systems are located inside the lots. Mr Ingegneri’s report states that the “location of alleged defect” (namely the defects to each of the rainwater distribution systems) is “in all units”. The photos in his report also show the systems to be located in what looks to be an outdoor or wet area, possibly a patio or internal laundry based on the tiling and outdoor power points.¹⁴

394 I am also not persuaded by the Owners Corporation’s submission that the rainwater distribution systems fall within the definition of “structural cubic space” because they comprise pipes that are not for the exclusive enjoyment of one lot such that they are excluded from the definition of “lot” and are common property.

395 Mr Ingegneri’s report indicates that the pipework and outlet of each rainwater distribution system are supplied from a “rainwater tank” and that each unit is serviced by its own rainwater tank.¹⁵ I would infer from this that the pipes that comprise the rainwater distribution system for a particular unit are connected to the rainwater tank that services that unit, rather than being connected with the system of each unit. On that basis, I would also infer that the pipes relating to a rainwater distribution system for a lot are used for the exclusive enjoyment of that lot and do not form part of the structural cubic space excluded from the lot.

396 Accordingly, I find that the rainwater distribution system defect relates to lot property and is not recoverable by the Owners Corporation.

¹³ T432:13–28.

¹⁴ CB214.

¹⁵ CB215 and the stormwater sketch at CB230.

Waterproofing defect: First floor balconies leaking: Item S.4

- 397 The waterproofing defect item S.4 is described as “first floor balconies leaking”.¹⁶ Mr Pickering’s evidence is that the first-floor balconies are the subject of multiple defects for which Mr Madden estimates the total cost of rectification to be \$149,330.84.¹⁷
- 398 At the hearing, most of this defect was agreed. The remaining issue relates to that part of the defect described by Mr Pickering as “cavity flashing and weep holes omitted” on the walls between the inside of the unit and the balcony and the alcove masonry walls at the west or east end of the unit balconies.¹⁸ According to Mr Pickering, by failing to install any cavity flashing or weep holes to the external walls of the habitable spaces abutting the balconies, the work was not performed in a proper and workmanlike manner and failed to comply with AS3700-2011.¹⁹ The cost of rectifying the defect is estimated by Mr Madden to be \$18,055, being the per unit cost of cavity flashing work quantified in his report (items 18–28) multiplied by ten for each affected unit.²⁰
- 399 The issue to be determined is whether the external facing walls, on which the cavity flashings and weep holes should have been installed, are to be treated as common property, as the Owners Corporation submits, or as lot property, as Mr Saaib contends.
- 400 Both parties rely on the presence of the vinculum. Mr Saaib argues that, as the vinculum indicates that the balcony forms part of the unit (and thus the lot), the walls are not to be treated as external walls but as internal walls that form part of the internal space within the boundary of the lot.²¹ I disagree and accept the Owners Corporation’s submission that the defect is a common property defect.
- 401 The vinculum on the floor plans identify that the first-floor balconies form part of the lot. They also convey that the intervening boundaries, namely the external facing walls adjacent to the balconies, are not to be treated as part of the lot but as common property. This is because it is appropriate to regard the cubic

¹⁶ CB290.

¹⁷ CB290, 1016.

¹⁸ CB348 at [383], [384].

¹⁹ CB353.

²⁰ CB1023.

²¹ T434:28–50; T436:1–15.

spaces on either side of the walls as different “parts” of the one lot so that the boundary of each part becomes the inner surface of the wall between them with the wall becoming common property, or as one single composite cubic space subdivided by a common property wall: *Symes* at [39]–[40]; Neville Moses, Ross Tzannes and Diane Skapinker, *Strata Titles NSW* (2017, Thomson Reuters) at [SSDA.6.20].

402 Accordingly, I find that the cavity flashing and weep holes defect is a common property defect and that the Owners Corporation is entitled to recover the costs of rectifying the defect in the amount of \$18,055.

Waterproofing defect: Bedroom 1 plasterboard setting: Item 6.2

403 This defect is described in Mr Pickering’s report as “poor setting of plasterboard joints in the bedroom 1 wall” of Unit 6 which he observed on the wall lining that surrounds the re-entrant corner of the north elevation balcony.²² He opines that the defect is in the setting and sanding of the sheeting as a result of work undertaken by the builder that has not been performed in a proper and workmanlike manner and is not in accordance with AS2589-2007.²³ Mr Madden estimates the cost of rectifying this defect as \$1,176.03.²⁴

404 The Owners Corporation submits that this is a common property defect because it relates to the wall that coincides with the boundary between the internal and outside areas of Unit 6. Mr Saaib submits that the defect is a lot property defect because it appears on the inner side of an internal wall to the lot.

405 In my view, the Owners Corporation’s submission should be accepted. The defect relates to the poor setting of joints “in” the lining to a wall that comprises part of the boundary between the balcony and the internal areas of the lot, which boundary wall is marked by a vinculum. As such, the defect does not relate to the inner surface of the wall that forms part of the cubic space of the lot boundary but relates to that part of the wall which is to be treated as common property: s 5(2)(a) Strata Schemes Act; *Symes* at [39]–[40].

²² CB490 at [1804], [1806].

²³ CB491-2 at [1822]–[1826].

²⁴ CB1017.

406 Accordingly, item 6.2 is recoverable by the Owners Corporation as a common property defect and I allow \$1,167.03 for the cost of rectification.

General building defects relating to the tiling of the en-suite and bathroom walls: Item 6.1.19.7

407 This defect relates to the tiling of all four walls in the en-suite to Unit 1 and bathrooms in Units 2 to 11. Mr Cully's report describes the defect as involving significant issues with the alignment of the tile finishes (vertical and horizontal), cracking to tiles and joint grouting, cracks between tiles, the ceiling and cornices, and drummy areas on tiled surfaces. He opines that the work is non-complaint with AS3958.1.²⁵ Mr Madden's report estimates the cost of rectifying the defect to be \$366,702.60.²⁶

408 The Owners Corporation accepts that three of the en-suite and bathroom walls are lot property and only one wall, an intertenancy wall, is common property, and limits its claim to \$91,675.50, being approximately one quarter of Mr Madden's estimate.

409 There was no challenge to the Owners Corporation's claim that the tiling is defective and should be replaced on the one common property wall in each bathroom and the en-suite. The dispute relates to the Owners Corporation's method of calculating the cost of rectification.

410 Mr Saaib submits that it is not appropriate to simply take one quarter of the total cost of rectification because it is unknown what the outcome of a process of costing the replacement of one wall would be. By way of example, he points to the inclusion in Mr Madden's estimate of large costs items for replacing fixtures to contend that it is unknown what the actual process of costing would be if only one wall is replaced.

411 I am not persuaded by Mr Saaib's submission. The Court is entitled to adopt a methodology for calculating damages provided it is rational and not "fatally flawed". Where there is an absence of evidence permitting damages to be calculated with certainty, the court may make its own estimation:

²⁵ CB829 at [6.1.19.7.1]

²⁶ CB1121.

Commonwealth v Amann (1991) 174 CLR 64 at 83; [1991] HCA 54; Sydney Jacobs, *Commercial Damages* (Westlaw AU online) at [41.30].

- 412 Whether a proposed method of rectification is reasonable or necessary in a particular case is a question of fact: *Bellgrove v Eldridge* (1954) 90 CLR 613 at 619; [1954] HCA 36. A method will only be unreasonable in “fairly exceptional circumstances”: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) (2009) 236 CLR 272; [2009] HCA 8 at [17]; *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [81] (Macfarlan JA). An example of this is where the cost of proposed rectification is “out of all proportion to the benefit to be obtained”: Philip Bambagiotti, *Building Disputes & The Home Building Act 1989 (NSW)* (2012, Thomson Reuters) at [HBA.48O.30].
- 413 In this case, there is no dispute that the retiling of the common property walls is necessary and no alternative approach to quantification has been put forward by Mr Saaib or Ms Alexandrova.
- 414 Tested against the principle of reasonableness, the Owners Corporation’s approach seems to me to be sensible, practical and reasonable as it assumes that some, but not all, fixtures relate to the intertenancy walls, an assumption that is supported by the drawings in evidence which show some bathroom fittings appearing on the common property walls (see, for example, at CB888 and CB889). The drawings also identify that some of the intertenancy common property walls are longer than the internal lot walls, which suggests that the approach adopted by the Owners Corporation underestimates the costs involved for some of the retiling.
- 415 Accordingly, and taking into account the relative difficulty and cost involved in proving quantum more precisely, I accept the Owners Corporation’s submission that one quarter of Mr Madden’s estimate is a reasonable basis for the court to approach quantification and allow \$91,675.50 for the cost of rectifying common property defect item 6.1.19.7.

Uplift for contingency and risk

- 416 The remaining issue relates to the Owners Corporation’s claim for a 10% contingency and risk uplift. It relies on Mr Madden’s report in which he opines that a contingency for the contract risks should be allowed based on several

factors: the possibility that some defect items have not been identified or a number of unforeseen items will be discovered on opening the work during the demolition phase; the possibility that the scope of rectification works might not be complete; the possibility for a number of contract and other claims arising as a result of working across different units owned by different people who will not be fully prepared to accept the noise, mess and disruptions, causing programme changes; the potential existence of latent conditions; and the inherent difficulty in estimating the cost of rectifying defects.

- 417 Mr Madden opines that the industry accepted contingency and uplift factor is between 5% to 15% for work of this nature and considers that, given the volume of defect items captured and the rectification methodology in the experts' reports, an allowance of 10% is reasonable.
- 418 Mr Saaib submits that the uplift factor claimed is not justified because it is based on defects and works beyond that which the Owners Corporation has proved and, to the extent that certain matters referred to by Mr Madden might be legitimate, such as latent defects, it is not possible to decipher how much of the 10%, if any, is attributable to them.
- 419 Ms Alexandrova submits that a 10% contingency uplift should not be applied because contingency fees in Australia can only be charged by a bank and not by an Owners Corporation
- 420 In my view, a 10% contingency and risk factor should be applied in this case. Mr Madden's evidence that a 5% to 15% contingency and risk factor was industry practice was not challenged and a fair reading of his evidence is that the selection of 10% was made because many of the defect items have been captured and the rectification methodology identified.
- 421 Mr Madden's evidence involves some estimation of the costs involved and it is, in my view, to be expected that the builder (or builders) who would ultimately be retained to do the works would include a contingency and risk factor in fixing the price for the work they do, particularly if the price is based on a fixed price contract. It also seems to me to be appropriate and reasonable to give a 10%

contingency and risk allowance in circumstances where Mr Madden has excluded escalation costs beyond October 2018.²⁷

Conclusion on defects and quantum

422 The following sets out my decision in relation to the Owners Corporation's claim for rectification trade costs in respect of each of the seven categories of defects and its claim for on-costs and consequential costs, noting where the evidence or claim is not challenged and my findings on the disputed issues above

423 **Acoustics:** Mr Renzo Tonin's report dated 1 May 2018 identifies that air noise reduction in the main bedroom of Unit 2 does not comply with Australian Standards, recommended additional investigation to ascertain whether the defect is systematic throughout the Marrickville Property and proposed certain rectification works if such defects were to be found.²⁸ Mr Madden assessed the cost of those works to be \$40,352.55.²⁹ Given that the additional investigation recommended by Mr Tonin has not been undertaken, the Owners Corporation's claim is limited to the cost of rectifying the acoustic defect in the main bedroom of Unit 2 of \$2,822.11. This is calculated as one-tenth of Mr Madden's estimate of the rectification cost for this defect in Units 2 through to 11 of \$28,221.10.³⁰ The evidence in relation to this defect and the quantum was not challenged by Mr Saaib or Ms Alexandrova and I allow the amount claimed of \$2,822.11.

424 **Waterproofing:** Mr Darryl Pickering's report dated 16 May 2018 identifies five systemic defects, five common property defects in common areas and 29 common property defects in individual units relating to water leakage and penetration which he opines are non-compliant with Australian Standards, the Building Code of Australia or the NSW Guide to Standards and Tolerances, or are otherwise the result of work not completed in a proper and workmanlike manner.³¹ Mr Madden assessed the total cost of rectification to be

²⁷ CB988.

²⁸ CB272 at [80], 278 at [99], [102], [103].

²⁹ CB1009.

³⁰ T325:20, Outline of submissions for the defendant at [19]; CB1009, MBM 1.04.

³¹ CB288–306.

\$206,082.17.³² The Owners Corporation claims \$206,082, of which \$186,851 was not challenged by Mr Saaib or Ms Alexandrova.³³ Given my findings that defect items S.4 and 6.2 are common property defects at ([398]–[406]), I allow the total amount claimed by the Owners Corporation of \$206,082 for waterproofing defects.

425 **Electrical services:** Mr Dean Eislers' report dated 9 April 2018 identifies 12 defects relating to switchboards, cabling, socket outlets, security systems and lighting which are either improperly installed, non-compliant with Australian Standards or not fit for purpose.³⁴ Mr Madden's report assessed the cost of rectifying these defects to be \$108,401.27.³⁵ The Owners Corporation's claim, as ultimately pressed³⁶ was limited to defect items E-01, E-02, E-03, E-07, E-10, E-11, E-12 and parts of E-09³⁷ with a rectification cost of \$56,806, which was not challenged by Mr Saaib or Ms Alexandrova. I allow the total amount claimed by the Owners Corporation of \$56,806.

426 **External walls:** Mr Peter Karsai's reports dated 12 March 2018 and 23 March 2018 identify five defects in the external walls of the Marrickville property relating to omitted or blocked weep holes and slots, render cracking, leachate and paint failure which he opines are non-compliant with Australian Standards, the Building Code of Australia or brick industry requirements, or are otherwise the result of work not performed with due care and skill or work not reasonably fit for purpose.³⁸ Mr Madden assessed the cost of rectification to be \$229,244.71.³⁹ The Owners Corporation claims \$229,245 for the cost of rectifying external walls, which was not challenged by Mr Saaib or Ms Alexandrova. I allow the total amount of its claim.

³² CB1017.

³³ The Owners Corporation's claim in respect of this and subsequent categories of defects is rounded to the nearest dollar, an approach that I have also adopted.

³⁴ CB141.

³⁵ CB1070.

³⁶ The Owners Corporation did not press items E-04, E-05, E-06, E-08 and certain components of E-09. The reference by the Owners Corporation's Senior Counsel at T431:21-22 to \$21,615 as the amount agreed for those parts of item E-09 regarding common property seems to be an error as the parts of E-09 agreed to be common property defects (items 1, 3, 4, 5 and 6) add up to \$19,789.

³⁷ Those parts of item E-09 that were pressed and not challenged are items 1, 3, 4, 5 and 6 with a total cost of \$19,789: CB1079.

³⁸ CB108–110, 132–133.

³⁹ CB1084.

427 **Hydraulic services:** Mr Simon Ingegneri's report dated 1 May 2018 identifies 16 defects, including defects throughout the stormwater system, stormwater ingress into units due to a failure to install grated drains and defective pipework which he opines breach Australian Standards or the Building Code of Australia, or are otherwise not fit for purpose.⁴⁰ Mr Madden assessed the cost of rectifying these defects to be \$287,749.03.⁴¹ The Owners Corporation accepts that the non-compliant hot water heaters are lot property defects and has limited its claim to \$245,497, of which \$239,157 was not challenged by Mr Saaib or Ms Alexandrova. Given my finding that the rainwater distribution system defect relates to lot property (at [391]–[396]), I have allowed the Owners Corporation's claim of \$6,340 for that item and only allow the amount of \$239,157 for hydraulic services defects.

428 **Mechanical services:** Mr Richard Duggan's report dated 30 May 2018 identifies four defects which he opines are non-compliant with Australian Standards or the Building Code of Australia: defective carpark ventilation; lack of ventilation in the electrical switch room; inadequate airflow in the ground floor toilets and laundries; and direct exhaust from first floor bathrooms and laundries into the roof space.⁴² Mr Madden assessed the cost of rectifying these defects to be \$78,285.38.⁴³ The Owners Corporation claims \$78,285 for the cost of rectifying mechanical services defects, which was not challenged by Mr Saaib or Ms Alexandrova, and I allow the total amount of this claim.

429 **Structural and building:** Mr Daniel Cully's report dated 31 May 2018 observes significant and widespread non-compliance with Australian Standards, poor workmanship, widespread water ingress issues and widespread honey combing of concrete elements in the garage.⁴⁴ The report identifies 13 defects, including deck roof and plant box leakage, water penetration into the driveway wall, non-compliant roof structures, defective garage construction and defective bathroom tiling.⁴⁵ Mr Madden assessed the

⁴⁰ CB181–220.

⁴¹ CB1091.

⁴² CB734–736.

⁴³ CB1115.

⁴⁴ CB750–751.

⁴⁵ CB750–751, 1121.

cost of rectifying these defects to be \$1,144,323.85.⁴⁶ As noted above, the Owners Corporation accepts that it is not entitled to \$275,026 of this amount and has limited its claim to \$869,298, of which \$777,622.50 was not challenged by Mr Saaib or Ms Alexandrova and \$91,675.50 was in dispute.⁴⁷ Given my finding that the Owners Corporation's approach to calculating this cost is reasonable (at [411]–[415]), I allow the claim for structural and building defects in the amount of \$869,298.

430 Accordingly, and in summary, I have allowed total trade costs of \$1,681,695.11 for the seven categories of defects.

431 In addition to trade costs, the Owners Corporation claims on-costs of preliminaries in the amount of \$654,168, design and professional fees of \$159,500 and its own costs of \$22,800 based on Mr Madden's estimates,⁴⁸ none of which are challenged by Mr Saaib or Ms Alexandrova. I allow each of these amounts.

432 The Owners Corporation claim of a contractor's margin of 15% as part of its on-costs was not challenged in principle, although the monetary amount depended on my findings as to the trade cost of rectifying the defects. I allow 15% of \$2,335,843.11, being 15% of the total trade costs of \$1,681,695.11 plus preliminaries of \$654,148, which I calculate to be \$350,376.47.

433 Based on my findings in relation to the 10% contingency and risk uplift (at [416]–[421]), I allow 10% of \$2,868,539.58, being the total trade costs of \$1,681,695.11 plus on-costs of \$1,186,844.47, which I calculate to be \$286,853.96.

434 The Owners Corporation also claims consequential costs of \$270,190 as assessed by Mr Madden's report. As this amount was not challenged by Mr Saaib or Ms Alexandrova, I will allow it.

435 Accordingly, the total amount I allow for Owners Corporation's defects claim, made up of trade costs, on-costs and consequential costs, is \$3,425,563.54.

⁴⁶ CB1121.

⁴⁷ T436:30.

⁴⁸ CB993.

ALEXANDROVA PROCEEDINGS

436 The Owners Corporation's claim against Ms Alexandrova is that she engaged in misleading and deceptive conduct by seeking and obtaining home warranty insurance purportedly on behalf of Mr Saaib, which conduct is alleged to have caused loss to the Owners Corporation.

The pleadings issue

437 Before dealing with the substantive issues, it is appropriate to say something about the pleadings.

438 In its technology and construction list statement filed on 30 July 2019 (**List Statement**), the Owners Corporation pleaded that Ms Alexandrova's conduct was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL and that the Owners Corporation suffered loss and was entitled to recover damages under s 236 of the ACL: List Statement at [33] and [34].

439 During closing submissions, the Owners Corporation sought leave to file an amended summons and an amended technology and construction list statement (**Amended List Statement**) to plead that Ms Alexandrova's conduct was also, or in the alternative, in contravention of s 42 of the FTA and to seek damages under section 68 of the FTA. The amendment was sought because there is a question as to whether ss 18 and 236 of the ACL, which commenced on 1 January 2011, or ss 42 and 68 of the FTA as in force before the commencement of the ACL, or both, apply to Ms Alexandrova's conduct given her conduct spans the period 6 October 2010 to 17 January 2011. The Owners Corporation submitted that the amendments were for the avoidance of any doubt and are only needed to the extent that ss 42 and 68 of the FTA apply to any part of Ms Alexandrova's conduct complained of.

440 At the hearing, I granted the Owners Corporation leave to amend over Ms Alexandrova's objection. While accepting Ms Alexandrova's submission that the Owners Corporation had delayed in seeking leave to amend, I was satisfied that granting leave to do so was in accordance with the dictates of justice, having regard to ss 56 and 57 of the *Civil Procedure Act 2005* (NSW).

441 The amendments did not raise any new factual matters or change the nature of the case against Ms Alexandrova and would not have necessitated any additional evidence or hearing time. The amendments simply refer to the relevant provisions of a statute in force at the relevant time that are in substantially identical terms to those that had already been pleaded. To the extent there are differences, they are inconsequential. Further, Ms Alexandrova had been put on notice of the proposed amendments in the Owners Corporation's written submissions served prior to closing submissions.

The Owners Corporation's claim

442 The Owners Corporation's claim is based on the more unusual case of reliance on misleading and deceptive conduct by a third party, which is said to have led to other events and caused the Owners Corporation loss and damage. It is, therefore, important to set out in some detail how the claim is advanced.

443 The Owners Corporation's allegation of misleading and deceptive conduct is based on Ms Alexandrova's conduct during the period 6 October 2010 to 17 January 2011 of:

- (a) submitting an application to OAMPS on behalf of Mr Saaib as Builder for home warranty insurance in relation to the construction of the Marrickville property (**Application**): Amended List Statement at [30(a)]; and
- (b) in connection with that Application, providing to OAMPS a copy of the 4 October Contract, the Builder's letter, an application for home warranty insurance in relation to the construction of the Marrickville property and the Appointment letter (**Related Documents**), all purportedly signed by Mr Saaib: Amended List Statement at [30(c)].

444 While not identified as such in the List Statement, I understand the QBE Application to be the Application and the Home Warranty Application to be one of the Related Documents on the basis that the QBE Application was signed in Mr Zaatini's name on behalf of Mr Saaib and the Home Warranty Application was purportedly signed by Mr Saaib but, in fact, was not.

445 The Owners Corporation pleads that, by submitting the Application and Related Documents, Ms Alexandrova impliedly represented that she was authorised to do so by Mr Saaib as Builder (**Authorisation Representations**): Amended List Statement at [30(b)] and [30(d)].

446 The Owners Corporation alleges that, if Mr Saaib's contentions in the Saaib proceedings are correct, Ms Alexandrova's conduct (or alternatively the conduct of Shima in which Ms Alexandrova was involved) in making the Authorisation Representations and submitting the Related Documents purportedly signed by Mr Saaib was misleading or deceptive in contravention of s 18 of the ACL and/or s 42 of the FTA because:

- (a) Ms Alexandrova was not authorised by Mr Saaib to submit the Application and Related Documents, contrary to the Authorisation Representations: Amended List Statement at [33(a)(i)]; and
- (b) each of the Related Documents contained forged signatures of Mr Saaib: Amended List Statement at [33(a)(ii)].

447 The contentions of Mr Saaib referred to by the Owners Corporation are the following: that he did not enter into the 4 October Contract with Transformer Group; that he did not carry out or contract to carry out building works at the Marrickville property; that, accordingly, he did not give statutory warranties under the HBA in relation to the construction of the Marrickville property; that he did not engage or authorise Ms Alexandrova to obtain home warranty insurance in relation to the construction of the Marrickville property; and that he did not sign the Related Documents or authorise any person to sign them on his behalf (**Mr Saaib's contentions**): Amended List Statement at [32].

448 The Owners Corporation alleges that:

- (a) Ms Alexandrova's misleading and deceptive conduct caused the home warranty insurer to issue, on 18 January 2011, home warranty insurance for work to be undertaken by Mr Saaib on the Marrickville property in accordance with the requirements of the HBA: Amended List Statement at [31(a)] and particulars to [33(b)];
- (b) as a result of home warranty insurance being issued by QBE:
 - (i) the Construction Certificate was able to be issued in accordance with the *Environmental Planning and Assessment Act 1979* (NSW) and the requirement that the principal certifying authority be satisfied that the principal contractor be covered by appropriate insurance: Amended List Statement at [31(b)(i)];
 - (ii) construction finance from ANZ was able to be made available to Transformer Group to fund construction of the

Marrickville property: Amended List Statement at [31(b)(ii)]; an

- (iii) the Marrickville property was able to be constructed by a person who was not a licensed builder without any valid home warranty insurance in place and the work embodied in the common property contains defects and non-complying work (**Defects**): Amended List Statement at [25] and particulars to [33(b)];
- (c) because of Ms Alexandrova's misleading and deceptive conduct, the Owners Corporation will be unable to recover from Mr Saaib for breach of the statutory warranties in respect of the Defects and unable to benefit from the home warranty insurance issued by QBE: Amended List Statement at [33(b)];
- (d) had Ms Alexandrova not engaged in the misleading and deceptive conduct, Transformer Group would have had to and would have taken steps to engage a licensed builder and obtain a valid home warranty insurance policy for the building work prior to it being undertaken or, alternatively, would not have constructed the Marrickville property: Amended List Statement at particulars to [33(b)]; and
- (e) thereby, the Owners Corporation has suffered loss and damage because of Ms Alexandrova's conduct (or alternatively the conduct of Shima in which she was involved) by virtue of its liability to maintain and repair the common property of the Marrickville property pursuant to s 106 of the *Strata Schemes Management Act 2015* (NSW) and the existence of the Defects to the common property, for which it claims compensation by way of damages for the cost of rectifying the Defects and other related costs: Amended List Statement at [27] and [33(c)].

449 As was put in the Owners Corporation's written closing submissions at [176]–[177]:

In short, as a result of Ms Alexandrova's conduct, the plaintiff has been placed in the position of being the registered proprietor of common property in a strata scheme containing building defects, which the plaintiff is required to rectify by force of s.106 of the *Strata Schemes Management Act 2015*, without being entitled to be compensated for the cost of rectifying the defects by the builder or a home warranty insurer.

In this way, if the Builder's Contentions are correct, the plaintiff has suffered loss and damage, being the cost of rectifying the building defects, because of the conduct of Ms Alexandrova which contravened of section 18 of the ACL and/or section 42 of the FTA.

Ms Alexandrova's response

- 450 As noted above, Ms Alexandrova has not filed a list response but denies the allegations. Based on her written and oral submissions, the matters raised by Ms Alexandrova by way of defence to the claim can be summarised as follows.
- 451 First, she says that the claim against her personally is not valid as, in 2010, she was trading through Shima and she has limited liability as the director (T496:4–7). By this submission, I understand Ms Alexandrova to be contending that, even if the Court concludes that the submission of the Applications and Related Documents involved misleading and deceptive conduct, she provided those documents in her capacity as a director of Shima only, not in her personal capacity, and so cannot be found to have engaged in the alleged misleading and deceptive conduct and be personally liable.
- 452 Second, Ms Alexandrova says she believed she was authorised by Mr Saaib to send the Application and Related Documents to OAMPS. She also says that she did not have to provide a letter of appointment because she had previously been authorised and appointed as Mr Saaib's broker (T500:34–41). Essentially, this submission seeks to raise, by way of defence, that Ms Alexandrova acted honestly and did not know that Mr Saaib was not going to be the builder.
- 453 Third, Ms Alexandrova submits that she is not a handwriting expert, as an insurance broker she had no duty of care to review or verify the authenticity of Mr Saaib's signatures on the Related Documents, and all applications are accepted by way of facsimile or email (Ms Alexandrova's Outline of Submissions at [12]). She also submits that she relied on Mr Zaatini to get Mr Saaib to sign the applications and had no knowledge that the signatures were fraudulent and that her role was limited to attracting business for OAMPS (T497:30–38; T500:20–25). By this submission, I understand Ms Alexandrova to be contending that she was acting as a "mere conduit" of the information, had no knowledge that she was passing on documents that included falsified signatures and, as such, she cannot be personally liable.
- 454 Fourth, Ms Alexandrova submits that there are others who should have checked the signatures on the 4 October Contract and Payment Sheet, such

as ANZ, others who the Owners Corporation could have sued, such as the Department of Fair Trading, the officer who issued Mr Saaib's builder's licence and the assessor at QBE who approved his eligibility for multi-unit projects on 15 December 2010, and that she is the victim of fraud and has been duped as well (Ms Alexandrova's Outline of Submissions at [10]; T498:30–31, T501:15–23). By this submission, I understand Ms Alexandrova seeks to argue that one or more third parties have caused the Owners Corporation loss and should be liable and that her liability, to the extent she has any, should be limited or relieved of entirely along the lines of a concurrent wrongdoer defence.

455 Fifth, Ms Alexandrova submits that the Owners Corporation has no evidence against her, cannot prove that her conduct caused it any loss or damage, and that it is absurd that a broker dealing with home warranty insurance could be sued by any property owner for a builder who refuses to rectify construction defects (Ms Alexandrova's Outline of Submissions at [3] and [9]; T500:6–7). I take this submission to be putting in issue the Owners Corporation's claim that her conduct is causative of its loss.

456 Sixth, Ms Alexandrova asserts that some of the cases cited by the Owners Corporation are irrelevant to the proceedings: (Ms Alexandrova's Outline of Submissions at [11] and [13]).

457 Seventh, Ms Alexandrova's written and oral closing submissions also raise allegations about her treatment by the Owners Corporation's legal representatives (solicitors and counsel) during the conduct of the proceedings against her. The Owners Corporation submits, and I accept, that the matters referred to by Ms Alexandrova are not relevant to the issues to be determined or based on evidence that has been admitted in the proceedings. At the hearing, I explained to Ms Alexandrova that she may have other avenues available to her if she has concerns about the conduct of a legal professional.

Issues for determination

458 Based on the above, the key issues for determination are as follows

- (a) Did Ms Alexandrova engage in the conduct alleged and make the Authorisation Representations?
- (b) Was Ms Alexandrova's conduct misleading and deceptive?

- (c) Has the Owners Corporation suffered loss or damage by or because of Ms Alexandrova's conduct and, if so, what is the quantum of that loss?

Did Ms Alexandrova engage in the conduct alleged and make the Authorisation Representations?

- 459 The Owners Corporation's pleaded case is that Ms Alexandrova engaged in misleading and deceptive conduct by submitting the Application and Related Documents to OAMPS and making the Authorisation Representations and that she is primarily liable. Alternatively, its case is that Ms Alexandrova was involved in Shima's conduct for which she is liable as an accessory.
- 460 The facts make clear that Ms Alexandrova sent the Application and Related Documents to OAMPS in the period 6 October 2010 to 17 January 2011 (at [91], [142] and [154]).
- 461 Both the FTA and ACL prohibit misleading or deceptive conduct by any "person" in trade or commerce: FTA, s 42; ACL, s 18.
- 462 A director of a corporation who engages in conduct in the course of and for the purposes of the corporation's business may engage in conduct for which he or she can be primarily liable under the FTA and ACL. The liability is a product of their own conduct which they engaged in as a director. There is no need to find "separate conduct", being conduct engaged in other than in the capacity as a director, to conclude that a director who engages in conduct for a company can also attract primary and personal liability for that conduct: *CH Real Estate Pty Ltd v Jainran Pty Ltd*; *Boyana Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37; 14 BPR 27,361 at [101]–[105]; *Arktos Pty Ltd v Idyllic Nominees Pty Ltd* [2004] FCAFC 119; ATPR 42-005 at [13]; *Houghton v Arms* (2006) 225 CLR 553; [2006] HCA 59 at [44]–[46].
- 463 In this case, Ms Alexandrova was the "embodiment" of Shima. She was the director of Shima and described it as "her company". I would infer that she operated it as a one-person business. There is nothing to suggest that Shima had other staff.
- 464 The evidence demonstrates that Ms Alexandrova was the only person receiving documents from Mr Zaatini and, during the period 6 October 2010 to 17 January 2011, was the only person dealing with OAMPS in relation to the

application for home warranty insurance for the Marrickville project. She sent emails to OAMPS from an “Irenaalex” email address and sent the Application and Related Documents by fax from “Irena”. The “Referral Agreement with OAMPS” is not in evidence so it is unclear whether it was in Ms Alexandrova’s name or that of Shima.

- 465 In that sense, the submission of the Application and Related Documents to OAMPS was, in my view, conduct in which Ms Alexandrova engaged, as well as conduct that could be said to have been engaged in by Shima. It was conduct by a person, namely conduct which Ms Alexandrova engaged in herself even as a director of Shima, for the purposes of s 42 of the FTA and s 18 of the ACL and is, therefore, conduct for which she can be personally and primarily liable. I am also satisfied it was conduct in trade and commerce.
- 466 It follows that I do not accept Ms Alexandrova’s submission that she did not engage in the conduct herself and cannot be personally liable as she provided the documents in her capacity as a director of Shima.
- 467 The next question is whether, by submitting the Application and Related Documents to OAMPS, Ms Alexandrova conveyed the Authorisation Representations to OAMPS. I am satisfied that she did.
- 468 The question of whether a representation arises by implication is to be determined by reference to whether a reasonable person to whom the representation is directed would draw the implied representation in all of the circumstances: *Dynamic Lifter Pty Ltd v Incitec Ltd* (1994) 30 IPR 198 at 203, applied in *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595 at [71].
- 469 A person who merely acts as a conduit and does nothing more than pass on information will not be found to have engaged in conduct that is misleading or deceptive. In *Yorke v Lucas* (1985) 158 CLR 661 at 666; [1985] HCA 65 (**Yorke v Lucas**), Mason ACJ and Wilson, Deane and Dawson JJ stated:

If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can

properly be said to be itself engaging in conduct that is misleading or deceptive.

- 470 It is a question of fact as to whether a person does more than pass on information as a conduit. That question is to be decided by reference to all the circumstances of a particular case, having regard to factors such as the nature of the parties, the character of the transaction contemplated and the contents of the documents containing the misleading statements, including whether the documents clearly state that a third party supplied the information conveyed: *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435; [2013] HCA 1 (**Google v ACCC**) at [13]–[15]; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; [2004] HCA 60 at [40]; *Borzi Smythe Pty Ltd v Campbell Holdings (NSW) Pty Ltd* [2008] NSWCA 233 at [56] (Beazley JA, Handley AJA agreeing).
- 471 Ms Alexandrova’s email of 6 October 2010 attaching the 4 October Contract and the QBE application was marked as being in relation to “Tony Saaib – QBE application” and her email states that the documents are for “TONY SAAIB”. Her 15 October email, attaching the Builder’s letter and Home Warranty Application, is identified as relating to “SAAIB”. Although the 2 December email attaching the Appointment letter does not refer to Mr Saaib on the front page, the letter itself, like the Application and other Related Documents, clearly identifies that it is related to the Home Warranty Insurance Application in Mr Saaib’s name. The 4 October Contract, the QBE and Home Warranty Applications each record Mr Saaib as the builder of the Marrickville property and each of the Related Documents are purportedly signed by him
- 472 The Owners Corporation submits, and I accept, that there is nothing on the Application or Related Documents to indicate that Ms Alexandrova disclaimed any belief that she was not authorised to submit them on Mr Saaib’s behalf. Her referral arrangement with OAMPS, pursuant to which she earned commission for referring licensed builders to OAMPS, involved her arranging applications for home warranty insurance to be completed by or on behalf of licensed builders and sent to OAMPS. Those matters lead me to conclude that Mr Alexandrova was not acting as a ‘post box’ or mere conduit, but someone

who was expected to be submitting documents on behalf of those for whom she represented.

473 In my view, by submitting the Application and Related Documents to OAMPS, Ms Alexandrova conveyed that the Application and Related Documents were submitted by her on Mr Saaib's behalf as the builder of the Marrickville project, and impliedly represented to OAMPS that she was authorised by Mr Saaib to submit them.

Was Ms Alexandrova's conduct misleading and deceptive?

474 Conduct will be misleading or deceptive if it has a tendency to lead a person into error: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 (**ACCC v TPG**) at [39], [49].

475 In characterising conduct as misleading or deceptive or likely to mislead or deceive, it is also necessary to look at the conduct complained of as a whole, up to the time of the relevant transaction: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25 at [25]; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; [2004] HCA 60 at [109].

476 Ms Alexandrova's conduct is alleged by the Owners Corporation to be misleading and deceptive if Mr Saaib's contentions are correct.

477 In the Saaib proceedings, I was not satisfied that Mr Saaib entered into and was a party to the 4 October Contract or authorised Ms Alexandrova (directly or via Mr Zaatini as his agent) to lodge with the insurer the 4 October Contract, the QBE and Home Warranty Applications, and the Appointment Letter. I was also satisfied that Mr Saaib had not signed the Related Documents.

478 The effect of my conclusions in the Saaib proceedings is that his contentions that he did not enter into the 4 October Contract, did not authorise Ms Alexandrova to obtain home warranty insurance in relation to the 4 October Contract, and did not sign or authorise others to sign on his behalf the Related Documents have not been shown to be incorrect.

479 In those circumstances, I accept the Owners Corporation's submission that Ms Alexandrova's conduct in making the Authorisation Representations was misleading and deceptive within the meaning of s 42 of the FTA and s 18 of the

ACL. Having regard to the nature of the parties and the character of the documents submitted, the Authorisation Representations conveyed by Ms Alexandrova was likely to lead OAMPS into erroneously thinking that the QBE and Home Warranty Applications were made in relation to the 4 October Contract naming Mr Saaib as Builder with his authority, which has not been shown to be true, and that Mr Saaib had signed the Related Documents when he had, in fact, not signed them.

480 As to Ms Alexandrova's submission that she had no duty to check signatures, there is no allegation in this case that Ms Alexandrova represented that she had verified the contents and signatures on the Application and Related Documents or that they were accurate. Nor is it pleaded that, by submitting the Related Documents, Ms Alexandrova impliedly represented that Mr Saaib had, in fact, signed them. It is simply asserted that her conduct as a whole, which included the submission of documents containing falsified signatures and the making of the Authorisation Representations, would mislead OAMPS which, for the reasons set out above, I am satisfied that it would.

481 I also do not accept Ms Alexandrova's submission that she could not have engaged in misleading and deceptive conduct because she believed she was authorised by Mr Saaib to make an application for home warranty insurance in relation to the Marrickville project. Intent and honesty are not relevant. A person can engage in misleading and deceptive conduct in contravention of s 18 of the ACL or s 42 of the FTA even though they have acted honestly and had no intent to mislead: *Yorke v Lucas* at 666; *Google v ACCC* at [9].

482 Accordingly, I am satisfied that Ms Alexandrova engaged in misleading and deceptive conduct in trade or commerce in contravention of s 18(1) of the ACL and/or s 42 of the FTA as alleged by the Owners Corporation and the alternative pleaded case of accessory liability does not arise.

483 I should record that Ms Alexandrova's contentions that she did not know the signatures were forged and honestly believed she was authorised to submit the documents on behalf of Mr Saaib (based on her dealings with Mr Zaatini) are relevant to the question of whether she had the requisite knowledge of the essential elements constituting the contravention to be found liable as an

accessory: *Yorke v Lucas* at 670. In my view, the Owners Corporation has not shown that Ms Alexandrova knew that the signatures on the Related Documents were not Mr Saaib's. It is also arguable that, based on her dealings with Mr Zaatini, she was not aware of her lack of authority from Mr Saaib. In either case, it seems to me that the Owners Corporation has not established that Ms Alexandrova would be liable as an accessory based on her knowing involvement in contraventions by Shima.

Did the Owners Corporation suffer loss by or because of Ms Alexandrova's misleading and deceptive conduct?

484 To recover compensation from Ms Alexandrova, the Owners Corporation must establish that it has suffered loss or damage "by" (in the case of s 68 of the FTA) or "because of" (in the case of s 236 of the ACL) Ms Alexandrova's misleading or deceptive conduct. The different phrases make no practical difference to the test to be applied.

485 What is required is a causal connection between the Owners Corporation's claimed loss or damage and the contravening conduct: *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; [1998] HCA 69 at [95]; *Henville v Walker* (2001) 206 CLR 459; [2001] HCA 52 (**Henville v Walker**) at [130]. This is to be understood as taking up the common law practical or commonsense approach to causation discussed in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515; [1991] HCA 12 (**March v Stramare**): *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; [1992] HCA 55

486 There will be a sufficient causal connection between loss and contravening conduct where that conduct materially contributes to the loss or damage suffered. The contravening conduct does not have to be the sole cause of the loss; it merely has to be a sufficient cause: *Henville v Walker* at [14] (Gleeson CJ), [61] (Gaudron J), [106] (McHugh J).

487 It is not necessary for the Owners Corporation to establish that it relied on the contravening conduct in order to satisfy the concept of causation. It may recover loss or damage it suffers as a result of a third party's reliance on Ms Alexandrova's contravening conduct: *Re HIH Insurance Ltd (In Liq)* [2016]

NSWSC 482; 335 ALR 320 at [42]–[44], citing *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 (**Janssen-Cilag v Pfizer**) at 532.

- 488 The causation inquiry on the basis of third party reliance requires a determination of whether the loss or damage is a "real or direct or effective cause of the applicant's loss". The loss must have been "brought about by virtue of" the conduct which is in contravention of s 18 of the ACL or s 42 of the FTA: *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 at [73]–[76], citing *Janssen-Cilag v Pfizer* at 530–531.
- 489 There must be a "sufficient and direct link" or a "requisite element of proximity" between the loss and the contravening conduct: *Downer EDI Rail Pty Ltd v John Holland Pty Ltd (No 4)* [2018] NSWSC 326 at [542]–[543]; *Finishing Services Pty Ltd v Lactos Fresh Pty Ltd* [2006] FCAFC 177 at [31].
- 490 The first aspect of the Owners Corporation's causation case is the claim that Ms Alexandrova's misleading conduct was relied on by OAMPS (an innocent party), who applied for home warranty insurance covering Mr Saaib as Builder under the 4 October Contract, and the home warranty insurer, QBE (an innocent party), which led to the issuance of the home warranty certificates on 18 January 2011. This claim turns on a finding of reliance by OAMPS on the misleading conduct and, it seems from the pleading, QBE.
- 491 No direct evidence of reliance on the part of OAMPS or QBE was adduced by the Owners Corporation. It did not call Mr Marais or any other officers from OAMPS or QBE to give evidence or adduce any internal business records of either company that detailed their decision-making processes.
- 492 The Owners Corporation submits that direct evidence of reliance is not necessary and referred to *ACCC v TPG*. In that case, the High Court held that "where a representation is made in terms apt to create a particular mental impression in the representee, and is intended to do so, it may properly be inferred that it has had that effect": *ACCC v TPG* at [55].
- 493 Ms Alexandrova submits that *ACCC v TPG* is irrelevant to these proceedings. I do not accept that submission. Although *ACCC v TPG* was a case involving misleading advertising, it is authority for the principle, which has been accepted

in other cases, that it is not necessary to adduce direct evidence of reliance and that it may be inferred in an appropriate case: *Gould v Vaggelas* (1985) 157 CLR 215 at 236; [1985] HCA 75; *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 357; 43 IPR 545 at [11] (Wilcox J), [45] (Kiefel J); *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWCA 223 at [89].

- 494 Ms Alexandrova's business involved referring licensed builders to OAMPS for the purposes of brokering home warranty insurance for building projects. There can be no doubt that, by sending the Application and Related Documents to OAMPS, Ms Alexandrova intended to create the impression that she was authorised by Mr Saaib to do so and her purpose was to get OAMPS to arrange home warranty insurance for the Marrickville project in Mr Saaib's name.
- 495 There is, thus, a fair inference of fact that OAMPS proceeded to apply to QBE for home warranty insurance because it was induced to believe that Ms Alexandrova was authorised by Mr Saaib to submit the Application and Related Documents and that he had signed the Related Documents. It seems fanciful to think OAMPS would have applied for home warranty insurance from QBE if it knew otherwise.
- 496 The position is less clear in respect of QBE, who is one step removed and there is no evidence of what documents or information was provided to QBE by OAMPS, or on which it relied. That said, it seems logical to infer that at least the Home Warranty Application and some of the information from the Related Documents were forwarded by OAMPS to QBE and relied on as part of QBE's decision-making process to issue the home warranty insurance certificates.
- 497 The second aspect of the Owners Corporation's causation case is that the issuance of the home warranty insurance certificates enabled building work to be carried out at the Marrickville property.
- 498 The Owners Corporation submits, and I accept, that obtaining home warranty insurance was a legal and factual precondition to building work being carried out at the Marrickville property. It was a requirement under ss 92 and 99 of the HBA, condition 16 of the development consent granted by Marrickville Council on 6 August 2008 and s 109E(3)(b) of the *Environmental Planning and*

Assessment Act 1979 (NSW). It was also a condition of the ANZ finance offer accepted by Transformer Group that ANZ be provided with evidence of home owner warranty insurance prior to drawdown.

- 499 Armed with the home warranty insurance certificates, Mr Zaatini and/or Transformer Group obtained the Construction Certificate). Mr Zaatini provided the certificates to Newton Fisher who in turn provided them to ANZ in April 2011 prior to the first drawdown being made available. They enabled Transformer Group to access ANZ's construction finance and pay for the building works over the course of construction of the Marrickville property.
- 500 In that sense, I accept the Owners Corporation's submission that if the home warranty certificates had not been issued, building work would not have proceeded in Mr Saaib's name.
- 501 It is true that the Owners Corporation did not itself rely on Ms Alexandrova's misleading conduct or on the home warranty insurance to enter into any relevant transaction. But that is not necessary. All it needs to show is that it has suffered loss as a consequence of the reliance by OAMPS and QBE.
- 502 The loss that the Owners Corporation claims to have suffered is the inability to recover the cost of rectifying the Defects from Mr Saaib for breach of the statutory warranties or under the home warranty insurance policy, or another licensed builder.
- 503 The Owners Corporation's causation case can be tested by the counterfactual inquiry: what would have happened if the contravention did not occur?
- 504 The Owners Corporation says that, had Ms Alexandrova not engaged in the contravening conduct, Transformer Group would have had to, and most likely would have, taken steps to contract a licensed builder to do the work and obtain a valid home warranty insurance policy for that work prior to the work being undertaken, because otherwise it would not have been able to construct the building at all. As was put in written submissions, in either case, the defects that exist in the Marrickville property would not have existed at all or compensation for the cost of rectifying the defects would have been recoverable under the statutory warranties from a licensed builder or (if the

licensed builder dies, disappears or becomes insolvent) under a home warranty insurance policy.

505 There is a degree of speculation to this counter-factual analysis. There is no evidence of what Transformer Group could and would have done absent the misleading conduct and issuance of the home warranty insurance. But it could not have proceeded with construction without that insurance and it seems reasonable to infer that it would have contracted with a licensed builder in order to do so.

506 The Owners Corporation are now in the position of being the registered proprietor of common property in a strata scheme containing building defects, which it is required to rectify by force of s 106 of the *Strata Schemes Management Act*, without being entitled to be compensated for the cost of rectifying the defects by the builder or a home warranty insurer. I accept that this position was caused, at least in part, by the insurer's reliance on Ms Alexandrova's misleading conduct, which led to the home warranty insurance and construction certificate being issued, the bank funding and the defective building works. Had there been no misleading conduct, Transformer Group could not have embarked on the course it did and the loss that the Owners Corporation has suffered would likely have been avoided.

507 This is, of course, a case where the Owners Corporation's loss comes at the end of a chain of events that involved various parties including an unlicensed builder (who may or may not have been Award Build, Transformer Group, Mr Zaatini) and Mr Zaatini, who engaged in wrongful acts along the way by creating and deploying 15 false statutory declarations and the fake GIO Certificate and earlier providing Ms Alexandrova with the Related Documents containing the falsified signatures.

508 But contravening conduct need not be the sole cause of loss. Contrary to Ms Alexandrova's written submissions at [13], it is sufficient that the contravening conduct be a material cause of the plaintiff's loss and damage; it need not be the sole cause, nor the predominant cause: *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; [2002] HCA 41 at [33] (Gleeson CJ), [57], [62] (Gaudron, Gummow and Hayne JJ).

509 Ms Alexandrova has raised, by way of defence, that others are responsible for causing the Owners Corporation's loss and should be liable. The conduct of others that is deliberate or wrongful and causes loss does not mean that Ms Alexandrova's conduct was not causative of the Owners Corporation's loss, in the sense required by statute.

510 As Mason CJ stated in *March v Stramare* at 518–519:

As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things. In such a situation, the defendant's negligence satisfies the "but for" test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it.

511 In this case, the misleading conduct led to the issuance of the home warranty insurance which generated the very risk that arose, namely the construction of the Marrickville property and the inability of the Owners Corporation to recover from a licensed builder under the statutory warranties or valid home warranty insurance. In other words, the misleading conduct was a link in the chain of causation that has a requisite degree of proximity to the loss suffered.

512 As for the conduct of third parties, s 87CD of the *Competition and Consumer Act 2010* (Cth) and s 35 of the *Civil Liability Act 2002* (NSW) provide for proportionate liability of apportionable damages claims under s 236 of the ACL and for economic loss in an action for damages under s 42 of the FTA: *Competition and Consumer Act*, s 87CB; *Civil Liability Act*, s 34. They allow for the liability of a defendant who is a concurrent wrongdoer in relation to an apportionable claim to be limited to an amount reflecting the proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss.

513 The principle underpinning the proportionate liability regimes in the *Competition and Consumer Act* and the *Civil Liability Act* is that a person who is one of a number of people who have occasioned the same damage should bear the damage proportionate to the extent of their responsibility.

- 514 As has been said, an obvious precondition to limiting liability on the basis that others are also responsible for the damage is that it is necessary to prove that those others have caused the damage and are legally responsible for it. If the provisions are to operate appropriately, it is essential that any defendant be required to plead the proportionate liability defence in a manner that discloses the cause of action and damage in at least as detailed a manner as would be required for any initiating process for a cause of action: *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [35]–[42]; *H S D Co Pty Limited v Masu Financial Management Pty Limited* [2008] NSWSC 1279 at [18].
- 515 I acknowledge that Ms Alexandrova is self-represented. That does not, in my view, absolve her of the obligation to plead or at least notify in submissions the basis on which it is alleged that the third parties to whom she has referred are concurrent wrongdoers. This is particularly as Ms Alexandrova was actively encouraged prior to and during the hearing to obtain legal representation in this case.
- 516 It is not sufficient for Ms Alexandrova to simply raise the possibility that others might be liable without asserting the bases on which they are: *Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [41]. It was her onus to prove that any damages should be reduced and that the acts or omissions of concurrent wrongdoers caused the loss or damage: *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd as trustee for the G & M Geldard Family Trust* [2013] 1 Qd R 319; [2012] QCA 315 at [60], [61].
- 517 Accordingly, I accept the Owners Corporation's submission (T446:8–25) that a positive defence that seeks, in effect, to invoke the operation of the proportionate liability regime is not open to Ms Alexandrova. That is not to say that there may not be some third parties whose acts or omissions may have caused the loss and damage that is the subject of the Owners Corporation's claim. It is simply that it is not open to the Court to make findings in relation to those matters as Ms Alexandrova has not properly availed herself of such a defence.

518 It follows that I am satisfied that the Owners Corporation has suffered loss or damage by or because of Ms Alexandrova's misleading conduct for which she is liable.

519 The loss and damage which the Owners Corporation is entitled to recover is that which the contravening conduct caused, namely, the costs of rectifying the common property defects that cannot be recovered from the builder or a home warranty insurer. Those costs, which I have quantified previously and total \$3,425,583.54, are recoverable as damages from Ms Alexandrova under s 236 of the ACL and/or s 68 of the FTA.

COSTS AND ORDERS

520 The usual order as to costs is that they follow the event: Uniform Civil Procedure Rules 2005 (NSW), r 42.1.

521 I see no reason not to make orders in accordance with that rule and will therefore order the Owners Corporation to pay Mr Saaib costs of the Saaib proceedings and make a similar order in the Alexandrova proceedings. The parties are at liberty to approach my associate if they wish to seek a different or special costs order.

522 The Owners Corporation also seeks an order for interest pursuant to s 100 of the *Civil Procedure Act* up to the date of judgment from 18 November 2018. This is claimed on the basis that the experts have costed the rectification works having regard to the costs of labour and materials as at that date. I am not persuaded that pre-judgment interest should be awarded in this case in circumstances where the claim has succeeded against Ms Alexandrova. In addition to the proceedings against her being commenced in mid-2019, the defects claim that I have allowed includes a 10% contingency and risk amount which should go some way to addressing the risk of escalation costs.

523 For these reasons, I make the following orders:

In proceeding 2016/382268:

- (1) The Plaintiff's summons filed 20 December 2016 be dismissed.
- (2) The Plaintiff pay the First Defendant's costs of the proceedings as agreed or assessed.

In proceeding 2019/235463:

- (3) There be judgment in favour of the Plaintiff against the Defendant in the sum of \$3,425,583.54.
- (4) The Defendant pay the Plaintiff's costs of the proceedings as agreed or assessed.

Amendments

01 March 2021 - Para 230: first sentence has full stop after Ms Alexandrova. Second sentence, now reads: "My findings of fact relating to the alleged conversations are set out later in these reasons."

Para 347: second sentence, the word "fact" should be "facts".

Para 348: second sentence, the words "he emails" should be "the emails".

Para 354: the words "(the police repprt)" should be "(the police report)".

Para 356: the word "aganst" should be "against".

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.