QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Helyar v Civil and Property Development Consulting Pty Ltd (in liquidation) & Ors* [2020] QCAT 465
PARTIES:	**DEAN HELYAR** (applicant) **v** **CIVIL AND PROPERTY DEVELOPMENT CONSULTING PTY LTD (IN LIQUIDATION)** **ADAM WILLIAM SCOTT ALLEN** **COBBLESTONE CONSTRUCTIONS PTY LTD (IN LIQUIDATION)** (respondent)
APPLICATION NO/S:	MCDO 481/20
MATTER TYPE:	Other minor civil dispute matters
DELIVERED ON:	30 November 2020
HEARING DATE:	31 July 2020
HEARD AT:	Brisbane
DECISION OF:	Adjudicator Alan Walsh
ORDERS & DIRECTIONS:	**ORDERS:** **1. Adam William Scott Allen pay Dean Helyar $25,000 for claim, $3,353.84 for interest from 17 April 2018 to 30 November 2020 and $338.20 for filing fee, in total $28,692.04 on or by 14 December 2020.** **2. The claim against Civil and Property Development Consulting Pty Ltd (In Liquidation) is dismissed.** **3. The claim against Cobblestone Constructions Pty Ltd (In Liquidation) now deregistered is dismissed.** **DIRECTIONS:** **4. I direct that the Principal Registrar refer a copy of the papers in this matter and these reasons for decision to:** **(a) The Commissioner of the Queensland Police Service for investigation of Mr Allen for perjury, forgery, fraud and attempting to pervert the course of justice.**

(b) The Chief Legal Officer, ASIC, GPO Box 9827, Queensland 4001 for investigation of Mr Allen for breach of directors' duties.

5. I direct the Principal Registrar to refer a copy of these reasons for decision to the Liquidator, Mr Jarvis Archer of Revive Financial Services Pty Ltd, PO Box 307 Noosa Heads, Qld 4567.

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – minor civil dispute – claim for debt or liquidated demand of money - consumer claim for misleading, deceptive and unconscionable conduct – claim in tort – claim against an accessory

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – jurisdiction – whether Tribunal may exercise jurisdiction for creditor claim for compensation for insolvent trading – whether Tribunal has jurisdiction otherwise

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – evidence - whether evidence of insolvent trading admissible notwithstanding absence of jurisdiction to hear creditor claim for compensation for insolvent trading

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – CORPORATIONS - MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATIONS – OTHER MATTERS - where Dean Helyar (Helyar) claimed refund of moneys paid in full to Cobblestone Constructions Pty Ltd (Cobblestone) upon formation of construction contract – where Civil and Property Development Pty Ltd (Civil) called tenders for construction contract – where three tenders obtained – where two unsuccessful tenderers were independent of Civil and Cobblestone – where Helyar accepted Cobblestone's tender - where Adam William Scott Allen (Allen) was sole director and member of Civil and Cobblestone – where Allen was not a party to the Cobblestone construction contract - where Cobblestone failed to perform site works – where Helyar terminated construction contract and demanded refund – where Cobblestone was illiquid and insolvent at formation of construction contract – where Civil, Cobblestone and Allen did not disclose illiquidity and insolvency of Cobblestone

to Helyar - where Allen subsequently put Civil and Cobblestone into liquidation – where Helyar proved a claim in the liquidation of Cobblestone - where no dividend paid to unsecured creditors – where claim made against Allen in this proceeding for involvement in misleading, deceptive and unconscionable conduct – whether claim one for a debt or liquidated demand of money - where Australian Consumer Law (ACL) and common law applies – where ACL claim need not be for a liquidated sum but may be - whether construction contract entire – whether Allen in breach of fiduciary duties to Civil and Cobblestone – whether Cobblestone's conduct vis a vis Helyar misleading, deceptive and unconscionable - whether Allen liable as accessory for misleading, deceptive and unconscionable conduct of Civil and Cobblestone - whether Allen involved in misleading, deceptive and unconscionable conduct of Civil and Cobblestone – whether Allen concurrently liable to Helyar in negligence

Acts Interpretation Act 1954 (Qld), s 27B, s 49A
Acts Interpretation Act 1901 (Cth)
Australian Consumer Law (Qld), s 2, s 3, s 18, s 20, s 236
Competition and Consumer Act 2010 (Cth), s 139G, Schedule 2
Corporations Act 2001 (Cth), s 95A, s 180, s 181, s 182, s 183, s 588G, s 588R, s 588M
Fair Trading Act 1989 (Qld), s 19, s 50, s 267
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 9, s 11, s 11A, s 12, s 13, s 14, s 28, s 29, s 126, s 292

AB v CD [2020] QCAT 295
Amos v Walter [2020] QCAT 360
APS Satellite Pty Ltd (formerly known as "Skymesh Pty Ltd") v Ipstar Australia Pty Ltd [2016] NSWSC 1898
ASIC v Kobelt [2019] HCA 18; (2019) 368 ALR 1
Batwing Resorts Pty Ltd v Body Corporate for Liberty on Tedder CTS 27241 [2011] QCAT 277
Blomley v Ryan (1954) 99 CLR 362
Bridgewater v Leahy (1998) 194 CLR 457
Brookfield Multiplex Ltd v Owners (2014) 254 CLR 185
CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd [2004] VSCA 232
Commercial Bank of Australia v Amadio (1983) 151 CLR 447
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31; (1992) 110 ALR 608
Farah Constructions Pty Ltd v Say-dee Pty Ltd (2007) 230 CLR 89
Kakavas v Crown Melbourne [2013] HCA 25

Kenxue Pty Ltd ATF The Susan Investment Trust v Westpro Finance Pty Ltd [2020] NSWSC 1146
Kimberly NZI Finance Ltd v Torero Pty Ltd (1989) ATPR (Digest) 46-054
Liao v LNG Properties Pty Ltd [2019] NSWSC 1846
Louth v Diprose (1992) 175 CLR 621
Mousa & Anor v Vukobratich Enterprises Pty Ltd & Anor [2019] QSC 49
NZI Capital Corp Ltd v Fulton (unreported, Fed C of A, 10 June 1998)
Phillips v Ellinson Brothers Pty Ltd (1941) 65 CLR 221
Royce v Youi [2018] QCAT 5
Yorke v Lucas (1985) 61 ALR 307; [1985] HCA 65
Waterfront Investments Group (in liq) (2015) 105 ACSR 280
Williamson v Murdoch (1912) 14 WALR 54

APPEARANCES & REPRESENTATION:	
Applicant:	Self-Represented
Respondents:	Adam William Scott Allen - Self-Represented

REASONS FOR DECISION

Jurisdiction

[1] This Application for minor civil dispute – consumer dispute is justiciable in the Queensland Civil and Administrative Tribunal (QCAT) both as a consumer claim and for a debt or liquidated demand of money.[1] Issues of unconscionable dealing, misleading and deceptive conduct, and negligence arise for adjudication on the evidence.

Delay

[2] Delay is almost always this Tribunal's statutory enemy. That is because proceedings must be conducted in a way that minimises costs to parties and is as quick as is consistent with achieving justice.[2] Most cases are finalised relatively quickly in the minor civil dispute jurisdiction of this Tribunal. Others, because of complexity or special circumstances, may be the exception to the rule of expedition. In particular, a speedy conclusion to a case must not come at the expense of due process[3] and justice.[4]

[3] There has been much delay in the finalisation of this case, caused variously by events including the necessity for joinder of parties,[5] the non-service of documents and the

---

1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 12(1), (2), (3) and (4)(a) (the QCAT Act).
2 Ibid, s 3(b) and s 4(c).
3 Ibid, s 28(3)(a) and (e).
4 Ibid, s 28(3)(d).
5 Orders dated 17 May 2019 at Brisbane in MCDO 1114/18.

need for orders to rectify that,[6] venue transfers,[7] adjournments,[8] illness,[9] difficulties with remote conferencing, dismissal of claim for the Applicant's non-attendance by telephone at a final hearing,[10] the re-opening of proceedings,[11] the disruption and shutdown of Queensland Courts by the Covid-19 pandemic emergency, and the need for filing of further documents and submissions.[12]

[4] A new document of evidentiary significance, to which I will again refer later, emerged in July 2020 after the final hearing at Brisbane on 17 June 2020. That necessitated additional hearing on the papers and the re-reservation of my decision on 31 July 2020.[13]

Application

[5] Dean Helyar (Mr Helyar), the Applicant, claims $25,000.00, presently the limit of this Tribunal's monetary jurisdiction for a claim excluding interest[14] and filing fee, in partial refund of an "upfront" fee of $30,580.70 (the upfront fee) paid to one of the two corporate Respondents, Cobblestone Constructions Pty Ltd (Cobblestone), in August 2017, pursuant to a civil works construction contract (the construction contract) between them.

[6] Originally, Civil and Property Development Consulting Pty Ltd (Civil) was the sole Respondent, however a letter of demand dated 9 April 2018, addressed to the Secretary of Cobblestone, attached to Mr Helyar's Application for a consumer dispute filed on 1 August 2018 at Brisbane, referred to his intention to make a claim against Mr Allen and "his company" as well. See Part C Section 2 at page 3 of the Application and the attachment for its full text.

[7] After discussion with the parties consistently with my statutory obligation to explain, and ensure an understanding of, Tribunal procedures as required by section 29(1)(a) and (b) and section 29(2)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the QCAT Act), I ordered the formal joinder of Mr Allen and Cobblestone as Respondents at Mr Helyar's request on 17 May 2019, as the audio recording of the hearing on that day reflects.

[8] Subsequently, by resolution of Mr Allen, sole member and director of each company at a Member's meeting, Cobblestone and Civil were placed in liquidation on 14 June 2019, suspending Mr Helyar's claim against them and leaving Mr Allen the remaining active Respondent. The liquidation of Cobblestone was finalised in June 2020 when deregistration proceedings commenced.

[9] Mr Helyar cannot claim the difference of $5,580.70 between what he actually paid Cobblestone and $25,000 because a claimant is deemed by operation of law to limit their claim to $25,000.00 by filing it with QCAT.[15] However, in terms of section 126(2) of the QCAT Act:

---

6 Ibid.
7 Orders dated 5 July 2019 in MCDO 1114/18 and 27 April 2020 in Beenleigh Claim 190/19.
8 Order dated 27 August 2019 and 2 September 2019 in Beenleigh Claim 190/19.
9 Transcript 11 December 2019 in MCDO 190/19, T1-26 lines 12 to 15.
10 Order dated 17 December 2019 in Beenleigh Claim 190/19.
11 Order dated 20 January 2020 in Beenleigh Claim 190/19.
12 Orders dated 25 May 2020 in Brisbane Claim 481/20.
13 Orders dated 17 July 2020 in Brisbane Claim 481/20.
14 QCAT Act, s 11A(1)(b), s 11A(3)(a), s 13(2)(a)(i), s 14(1) and s 14(3).
15 Ibid, s 12(3).

> The making, by the Tribunal, of a final decision in a proceeding for a minor civil dispute does not prevent a court or another Tribunal making a decision about an issue considered (whether or not decided) by the Tribunal in the proceeding if the issue is relevant to a proceeding for another matter before the court or other tribunal.

Facts/Evidence

[10] In 2017, Mr Helyar was, and still is, the registered owner of land at [redacted], Eagleby, in Queensland (the land) which he had bought with future subdivision in mind. He instructed Civil, which had previously performed consulting engineering work for him in connection with the land, to call for tenders for civil subdivisional works on the land.

[11] Anthony Simonetta (Mr Simonetta) was a staff member of Civil previously involved with others in the preparation of engineering drawings for services for the subdivision.[16] In late 2017, Civil, by Mr Simonetta acting on Mr Helyar's instruction to the company, called for three tenders for roadworks and drainage on the subdivision.[17]

[12] Tenders were submitted. Two of the tenderers, one of which was Akron Civil and Drainage, were companies entirely independent of Civil and Cobblestone. The third tenderer, Cobblestone, was not independent. It was one of a group of companies controlled and directed by Mr Allen who was also their sole member. He referred to them in these proceedings as "sister companies." They shared the same corporate office.

[13] Cobblestone's tender (the first Cobblestone tender) to Mr Helyar came in the form of a letter from one James Cevik on its behalf to a Mr Dean Villani (Mr Villani) of Civil dated 6 March 2017. Mr Villani in turn emailed it to Mr Helyar at [redacted] the same day.[18] It read as follows:

> Please find attached quote for works we can perform under both companies. As mentioned to you and Alex on the Phone (sic) our director (sic) Adam also owns Cobblestone Constructions so we can provide quotes under a D&C type arrangement. So I have taken the liberty of providing you their quote for the works as well.

[14] A Bill of Quantities accompanying the tender referred to a total lump sum contract price of $52,351.20. The person referred to as 'Adam' in Mr Villani's email was (and is) Mr Allen.

[15] Mr Helyar said in evidence that he was unaware in March 2017 that Mr Allen was then a director of both Civil and Cobblestone. In an attachment to an email sent to the Tribunal dated 30 September 2019, Mr Helyar said that he did not have a record of receiving any email referring to such directorship.

[16] To the extent that Mr Villani's email dated 5 March 2017 informed Mr Helyar that Mr Allen was a director of Civil and owner of both Civil and Cobblestone, Mr Helyar

---

16 Letter John Nagel & Co. to Cobblestone Constructions Pty Ltd dated 9 April 2018; Transcript 17 June 2020, T1-4, lines 10 to 46; T1-5 lines 24 to 46; T1-6 lines 5 to 17.

17 Transcript 17 June 2020, T1-6, lines 29 to 40.

18 Filed by Mr Helyar.

was in fact informed of Mr Allen's ownership and control of both Civil and Cobblestone.

[17] Subsequently, Mr Simonetta confirmed with Mr Helyar that Mr Allen was a director of both Civil and Cobblestone in a telephone conversation which he had with Mr Helyar in mid-November 2017.[19]

[18] Mr Helyar rejected the first Cobblestone tender. He replied to Mr Villani's email on 24 March 2017 by an email of that date[20] saying:

> Dean please find attached authorisation to proceed for C&P. I have decided not to engage Cobblestone at this time as I am not confident you have the design correct to be able to quote it accurately.

[19] Mr Simonetta told Mr Helyar that he would see if any of the three tenderers would improve their price.[21] Later, he informed Mr Helyar that only Cobblestone would improve the tender price[22] and that it offered a 5% discount (of approximately $1,500) conditional on the upfront payment of the total tender price.

[20] Mr Allen, in his capacity as sole director of Cobblestone, then emailed Mr Simonetta of Civil on 30 July 2017. In reference to a further quotation attached, Mr Allen told Mr Simonetta that:

> We really want to win this project so please let me know if we need to discuss it with the client.

[21] Mr Simonetta emailed Mr Allen on 25 August 2017 and said that Mr Helyar was looking to award the project "on Monday." On 28 August 2017, Mr Allen again emailed Mr Simonetta and referred to the Cobblestone tender as "competitive" with a 5% discount, saying that:

> We expect the works would be completed within 8 weeks should the authorisation be received today.

[22] Mr Simonetta then forwarded by email the revised tender (the second Cobblestone tender) to Mr Helyar, again with a bill of quantities and the standard terms of tender, together with a draft invoice addressed to Mr Helyar dated 29 August 2017 for the reduced tender price of $30,580.70 including GST.

[23] As with the first Cobblestone tender, Tender Notes forming part of the Pricing Summary for the second Cobblestone tender stated that, prior to the commencement of work, proof of "the ability (sic) of payment must be provided" and that "a 50% non-refundable commissioning fee must be paid prior to the commencement of work."

[24] As also with the first Cobblestone tender, a document entitled "Authorisation to Proceed" accompanying the second Cobblestone tender referred to general conditions of engagement, Condition 3 of which read as follows:

> The Client shall pay to the Contractor the Fee as set out in the Fee (sic) together with any such other amounts in respect of other services agreed to be provided. The Fee will be invoiced progressively for fees and costs for work actually done in providing the services.

---

19 Transcript 17 June 2020, T1-10 lines 33 to 48 and T1-11 lines 1 to 8.
20 Filed by Mr Helyar.
21 Transcript 17 June 2020, T1-6, lines 29 to 39.
22 Ibid, T1-7, lines 25 to 32; T1-8, lines 35 to 44; T1-9, lines 15 to 19; T1-9, lines 42 to 46.

[25] The narrative in the draft invoice accompanying the second Cobblestone tender read as follows:

> Full upfront discounted payment for civil works as described in tender submission … 5% discount for full upfront payment.

[26] If accepted, that narrative read together with the terms of the second Cobblestone tender and accompanying documents displaced:

(a) Mr Helyar's obligation in the Tender Notes otherwise to pay Cobblestone a 50% non-refundable commissioning fee prior to the commencement of work and fees for subsequent stages because the lump contract price for the entire works had to be paid in full upfront.

(b) General condition 3 (supra) in the Authorisation to Proceed for the same reason.

[27] Mr Helyar accepted the second Cobblestone tender and promptly paid Cobblestone the agreed tender price of $30,580.70[23] upfront in two instalments, i.e. $25,000.00 on 29 August 2017 and $5,580.70 on 30 August 2017.[24]

[28] Mr Allen said that Mr Helyar signed the "authorisation page" required by Cobblestone to commence works. It referred to "General Conditions" which were also published on the company's website.[25] Apparently, Mr Allen was there referring to the Authorisation to Proceed.

[29] As with the Tender Notes, the General Conditions did not contain any provision by which Mr Helyar could be contractually assured of the liquidity and solvency of Cobblestone and its ability to substantially commence and complete the civil works required by the construction contract.

[30] General Condition 13 provided that the client may terminate their obligations in the event of substantial breach by the Contractor that were not remedied within 30 days of written notice to remedy the breach.

[31] General Condition 19 provided that:

> All upfront commissioning payments that are required to be made prior to work being undertaken are all non-refundable payments. Under no circumstance (sic) will the client receive a refund on any commissioning payment.

[32] The lump sum contract price paid by Mr Helyar in full upfront for completion of the entire construction contract was just that, not a commissioning payment. Alternatively, if payment of the entire contract price could properly be characterised as commissioning payment/s, General Condition 19 could not stand if void or unenforceable by statute or the common law.

[33] I will return to that issue when considering liability later in this decision.

[34] By the Personal Guarantee Clause at the end of the General Conditions, Cobblestone could pursue the person "using (sic) the Contact Details on the signed Authorisation to Proceed" after a default by the client of 30 days' duration.

---

23 Ibid, T1-14, lines 33 to 39.
24 Ibid, T1-15, lines 1 to 18.
25 Transcript 11 December 2019, T1-13, lines 9 to 44.

[35] Nothing contained in the Authorisation to Proceed warned that, if signed, the person signing would potentially be liable as guarantor. Plainly enough, Mr Helyar could not guarantee his own performance by signing the document since he was the one and only client.

[36] I will say more about the way in which the standard contract was drafted when discussing liability later in this decision.

[37] In terms of sub clause 2 of the Personal Guarantee:

> By signing the ATP, the client confirms they currently hold (sic) no defaults with any creditors, which Is (sic) Inclusive (sic) of Business (sic) and Personal (sic) credit history. The client has not been refused insurance by any Insurer whether it be Business (sic) or Personal (sic).

[38] In terms of sub clause 3 of the Personal Guarantee:

> If the client's debt is to be pursued all legal fees including personal time will be of a cost (sic) to the client.

[39] The General Conditions contained no provision for the protection of Cobblestone's client (Mr Helyar in this case) in the event that Cobblestone and/or its sole member and director (Mr Allen) was/were, or were to become, insolvent or bankrupt prior to, upon, or subsequent to, the formation of the construction contract.

[40] Equally, the General Conditions of Contract did not contain any provision for the protection of Mr Helyar in the event of Cobblestone and Mr Allen acting unlawfully, whether in breach of statute, the common law, or the terms of the construction contract, other than the right to terminate it.

[41] Construed literally, Condition 19 of the General Conditions, if valid and enforceable, would mean that Mr Helyar's upfront payment of the total contract price of $30,580.70 would never be repayable under any circumstances, regardless of whether or not Cobblestone did any work at all.

[42] Neither Mr Allen nor the other Respondents produced the signed Authorisation to Proceed in evidence. Mr Allen said (and I accept) that he recalled that Mr Helyar did sign the document.[26] Mr Helyar said that he probably did sign the document because "otherwise they would not have started (sic) the job."[27]

[43] Nothing really turns on the presence or absence of Mr Helyar's signature on the Authorisation to Proceed because I find that the parties proceeded on the basis that the construction contract was one for a lump sum of $30,580.70 including GST payable, and paid, in full, upfront in consideration of the discount of five per cent.

[44] The sequence of events after Mr Helyar paid Cobblestone was as follows.

[45] Cobblestone arranged a pre-start meeting for approved works at [redacted], Eagleby on site with Council for 14 September 2017. The term 'pre-start' literally means 'before starting' (in this case) construction.

[46] As a civil engineer with extensive experience, Mr Allen knew that the site works could not commence until after the outcome of the pre-start meeting was known. Evidence of Mr Allen's knowledge and experience appears in a letter on Cobblestone letterhead

---

26 Ibid, T1-13, line 46 and T1-14, lines 1 to 18 and see exhibit marked R1 referred to at lines 20 to 44.

27 Transcript 17 June 2020, T1-29, lines 38 to 42.

by email to Mr Simonetta of Civil dated Sunday, 30 July 2017, marked as exhibit A1 at the hearing on 17 June 2020.

[47] In it, Mr Allen wrote:

> On behalf of the Cobblestone Constructions team, thank you for the opportunity to submit our tender for the civil works at [redacted] Eagleby – Development.
>
> We have carefully reviewed the documentation and have a good understanding of the project scope, requirements and objectives. We have prepared the following detailed submission in accordance with the guidelines provided.
>
> Cobblestone Constructions have (sic) completed a broad range of infrastructure, subdivisions, redevelopment and maintenance projects, each with its own diverse complexity. These have been delivered in locations throughout Queensland, under a variety of contractual arrangements, for a range of satisfied clients.
>
> Cobblestone Constructions is committed to providing your client, Dean Helyar, with the highest possible quality end product delivered in a professional manner with minimal fuss. If there is anything we can do further to demonstrate this commitment we would be happy to accommodate any questions, queries or further discussions required so please don't hesitate to contact me.
>
> Yours faithfully
>
> Adam Allen
>
> Director
>
> Cobblestone Constructions Pty Ltd

[48] The pre-start meeting took place on 14 September 2017 attended by Mr Simonetta, a Logan City Council officer and another person whose name is indecipherable.

[49] An email from Dominic Morris, Floodplain and Storm Water Officer of the Logan City Council, to Mr Helyar dated 21 July 2020 confirms that the Logan City Council had been asked (by Cobblestone) to attend the pre-start meeting because of the condition of a storm water pipe owned by Council.

[50] Mr Morris of the Logan City Council explained that:

> When council assets are assessed and found to be damaged, no works can commence until the issues have been rectified either by the owner and signed off by council or completed by council. In this instance council agreed to carry out the works.

[51] By reference to a Cobblestone spreadsheet[28] entitled "[redacted] Costs Incurred" attached to Cobblestone's Response, the truth of the content of which he affirmed in evidence at the hearing on 27 August 2019, Mr Allen said that:

(a) Cobblestone had at that stage already undertaken preparatory staging, the assignment of staff, and the ordering of materials, including ready-mix concrete for delivery to site for commencement of works on 14 September 2017.

(b) the works scheduled to commence on 14 September 2017 "immediately" (sic) after the pre-start meeting had to be cancelled at Cobblestone's cost.

---

[28] Filed in the proceeding.

[52] According to the spreadsheet, the "costs incurred" totalled $28,771.60 against the lump sum contract price of $30,580.70 paid in full by Mr Helyar to Cobblestone upon formation of the contract.

[53] I reject that unsupported evidence of Mr Allen as being inherently improbable.

[54] First, the expenditure in the tabulated spreadsheet was allegedly incurred to the point of the pre-start meeting with Council. However, as I have said, construction works could not feasibly be planned and staged to commence until after the outcome of Council's pre-start assessment was known. A definite start date for the works could not possibly be known in advance.

[55] Second, the tabulation, and Mr Allen's oral evidence in that regard, was not corroborated by any supporting documentary evidence. Mr Allen's excuse for not filing any documents was that the Liquidator would not supply them to the Tribunal.[29] I do not accept that evidence either.

[56] The truth is that the Tribunal did not ask the Liquidator to produce documents. Nor did, or would, I ask Mr Allen to ask the Liquidator to produce documents to the Tribunal.

[57] I have listened carefully to the recording of the hearing on 27 August 2019. It records that what I told the parties on that day was that they could ask the Liquidator for any documents that they needed and themselves file them with the Tribunal.

[58] The documentary evidence filed and served in this proceeding by Mr Helyar reveals that the Liquidator had no objection to supplying documents to him. Correspondence from the Liquidator's office relied on by Mr Helyar demonstrates that.[30]

[59] I therefore do not accept on the other hand that Mr Allen could not obtain such documents as he required from the liquidator to assist his case, had he requested them. There is no evidence that he requested copies of Cobblestone documents from the Liquidator and was declined.

[60] I therefore draw the inference that, had they been produced and filed by Mr Allen, the documents he could have called for would not have assisted his defence.

[61] I find that no substantial expenditure was incurred, and no substantial works were performed, by Cobblestone, before the pre-start meeting. On the evidence to which I will refer later, I also find that no site works whatsoever were performed by Cobblestone subsequently.

[62] I now turn to the chronology of communications between the parties after the pre-start meeting on 14 September 2017.

[63] Mr Simonetta told Mr Helyar that Cobblestone was too busy to start works on site before the end of 2017 and that works would (only) start in January 2018. Subsequently, in a discussion between the two on 16 January 2018, Mr Allen told Mr Helyar that Cobblestone was no longer able to carry out the works, but that it would subcontract another provider to do so.

---

29 Email dated 30 August 2019 to Mr Helyar and the Beenleigh Courthouse Registrar.

30 See amongst other correspondence, Mr Helyar's email to [redacted] (Civil) and to [redacted] dated 30 August 2019 and 30 September 2019 and attachments. Also, see Mr Helyar's email to EnquiriesQCAT (Brisbane) and Mr Allen dated 8 July 2020 and attachments filed therewith.

[64] During that discussion, Mr Allen told Mr Helyar that construction quotes (to Cobblestone) would be completed by 24 January 2018.

[65] That did not eventuate either. According to Mr Allen's oral evidence, there were, by that time, additional fees "to follow" because of costs incurred when "we … were made to stop" after "the first time we went to site and started"[31] and "there was going to be a revised quote given before we would commence."[32]

[66] I reject that evidence of Mr Allen as untrue and inherently improbable. Those assertions were not made by Cobblestone and Mr Allen in communications with Mr Helyar at the time, there is no evidence of any attempt by Cobblestone and Mr Allen to negotiate a variation of the construction contract on that basis, and Cobblestone had in any event to perform the entire contract works to conclusion in consideration of Mr Helyar having paid the full contract price upfront.

[67] The following email exchanges prove that site works were never commenced by Cobblestone at any stage and permit the inference, which I draw, that neither Mr Allen nor his company Cobblestone intended ever undertaking those works.

[68] On 29 January 2018, Mr Helyar emailed Mr Allen and said:

> I was just enquiring about the progress of the construction quotes you assured me, after our conversation on the 16th would be completed by the 24th of January. It is now the 29th of January and after multiple phone calls and messages left for you, I have still not got a reply or a phone call returned. What is happening on this front? I have already payed (sic) $30,580.70 to your company, as you assured me a discount if I payed (sic) upfront. This is a lot of money for a small investor and I would appreciate if you either contact me to let me know how things are going, or refunded me my money as I will get another company to start and complete the works. I don't think that I am asking too much. If you can not start and complete the job, could you please refund me my money to this account.

[69] Mr Allen responded by email to Mr Helyar on 31 January 2018 as follows:

> Please accept my apologies I have been stuck in a hospital having tests the last week and between that and meetings, I have a big stack of phone messages and emails to return. And unfortunately I am not able to talk clearly currently, this (is) the reason why I am writing you this email instead of calling you back.
>
> The sub-contractor that was suppose (sic) to start work on site this week has gone MIA (and is) just not contactable, so I have put it out to other contractors to perform the work on your site with my expectation that they will be locked in by Friday and will confirm when on that lock in they will perform the work but within 2 weeks from then to start as that is the brief I gave them.
>
> I wish I could give you more than this but I am sorry I cannot.
>
> I will come back to you at latest Monday and give you confirmation.

[70] Subsequently, Mr Allen sent Mr Helyar an email on 5 February 2018 saying:

> Works are booked to start Wednesday 21st, the only change to this might be the weather. The manhole works will be performed first.

---

31 Transcript 11 December 2019, T1-10, lines 5 to 32.

32 Ibid, T1-10, lines 30 to 32.

> If anything changes from this I will let you know.

[71] Mr Allen sent Mr Helyar another email on 20 February 2018 in which he said:

> As for construction starting tomorrow I have been speaking to the contractor who is programmed to do the manhole works as recent as 40m ago. Yes I am checking to ensure they are getting to site and starting the works and surprisingly he answered …. didn't answer my call or return it earlier today but he answered. He has informed me that due to the recent wet weather that (sic) the site that they are on currently is yet to be completed and that (it) will be likely be (sic) next week before works will start with this said I have requested that they do visit site tomorrow and ensure that they fully comprehend the works so that there will not be a delay when they start works next week…
>
> I know none of this is what you want to hear. But all I can do is tell you where we are at and what has changed.

[72] Mr Helyar sent Mr Allen an email on 20 February 2018 in which he said:

> I have been trying to call you for the last six weeks, on and off about this job. My calls do not even ring let alone give me the option to leave a msg. I have recently even tried to call your office and this number has been disconnected. Have your contact details changed recently? If so could you please include in an email.
>
> I understand that it has been raining which has made it difficult for the works to start. I am merely a young investor with little money who has outlaid over $30,000. I hope you can understand my concerns in my emails. If you could please respond to a few questions below to put my mind at easy (sic), so we can both organise and know what is going on, that would be greatly appreciated.
>
> - Is STF Project performing all the civil works in original contract paid in full?
> - What are STF's contact details?
> - Expected completion time once on site with no rain?
> - Can we book in a time to chat over the phone for 5 minutes so we are on the same page?
>
> I am sorry if this comes across as demanding. I just know very little about the civil works after the recent changes. Because of the small amount of contact we have had, it has just made it hard for me to pass on msg to other parties involved in the project, after your stage is completed.

[73] Having heard nothing further from him, Mr Helyar again emailed Mr Allen on 26 February 2018 in follow up and asked that he provide the information requested.

[74] Mr Allen did not reply so Mr Helyar then sent an email to Mr Allen on 2 March 2018 in which he said that he has just spoken to his lawyer, that he was formally writing to Mr Allen to demand his $30,580.70 back by the end of business on 2 March 2018, and that he had instructed his lawyer to proceed with legal action if that did not happen.

[75] Again, Mr Allen did not respond. John Nagel and Co (Nagel), solicitors acting for Mr Helyar, then sent Cobblestone a letter of demand dated 9 April 2018 putting Cobblestone on notice that it must commence the works within seven days of that date and complete them with despatch, or Mr Helyar would elect to terminate the contract,

engage another contractor, and commence proceedings to recover the amount paid to Cobblestone and any other damages suffered.

[76] Nagel also notified Cobblestone of Mr Helyar's intention to make a complaint to Engineers Australia concerning the conduct of Mr Allen and Mr Simonetta and that Mr Helyar would be including both of them and Civil as defendants if it proved necessary to commence proceedings. Again, neither Cobblestone nor Mr Allen responded.

[77] I am therefore satisfied that the construction contract with Cobblestone was terminated at midnight on 16 April 2018 for repudiation of its contractual obligations, some two and a half months after Mr Helyar's email to Mr Allen on 29 January 2018 asking for his money back.

[78] Mr Helyar subsequently instructed Akron Civil and Drainage (Akron), the replacement contractor, to commence and complete the works for which Cobblestone had previously been contracted. In an email to Mr Helyar dated 12 June 2019, a director of Akron said that:

> I can declare and state that there was no work undertaken on site before Akron started and fully completed the job. There was not (sic) materials on site. We ordered and used all our own materials purchased through our own suppliers. And there wasn't any site establishment made from any other contractor.

[79] I accept that evidence.

[80] Mr Allen agreed with me that, put neutrally, Cobblestone never recommenced the proposed works. He said in evidence that this was because Mr Helyar chose to get another contractor to complete them.[33]

[81] However, the inescapable fact is that Mr Helyar chose to get another contractor to do the works because Cobblestone, by its director Mr Allen, constructively refused to perform them and repudiated the construction contract. Mr Helyar thus had to pay twice for the works but only Akron performed them.

[82] Mr Helyar proved a claim for the full amount of $30,580.70 as an unsecured creditor of Cobblestone which the Liquidator accepted. That amounted to an admission of liability in debt, albeit in the liquidation. However, as will appear from evidence to which I will refer later, unsecured creditors were never paid anything, such was the degree of Cobblestone's insolvency.

[83] The liquidation of Cobblestone was finalised in June 2020. The Liquidator resigned and the deregistration process commenced.[34] There is consequently no credit to be brought to account in reduction of Mr Helyar's claim.

[84] I now turn to the forensic evidence of Cobblestone's financial position before, when, and after, the construction contract was formed on 29 August 2017 and Mr Helyar paid Cobblestone the upfront fee.

[85] In his Form 509 ASIC summary of affairs of Cobblestone at 14 June 2019, signed by Mr Allen on 21 June 2019, he disclosed an estimated deficiency of assets over

---

33 Transcript 17 June 2020, T1-34, lines 14 to 23.

34 See the letter of Jarvis Archer to Mr Allen dated 3 June 2020 referred to later in this decision.

liabilities to the extent of $156,993.06 and listed in the summary of affairs of Cobblestone the following unsecured creditors amongst others:

(a) Mr Allen personally for $17,708.00.

(b) a related company, Bespoke Engineering Pty Ltd (Bespoke) for $22,399.00.

(c) Civil (Civil and Property Development Consulting Pty Ltd) for $63,089.00.

[86] At hearing on 17 June 2020 at Brisbane, Mr Allen gave evidence that he was the (sole) director of Bespoke until January 2019 when the company changed its name from C & P Focon and his wife replaced him as sole director.

[87] Mr Allen said that C & P Focon (as it was then called) had previously provided structural engineering services whereas Civil provided civil engineering services[35] but Bespoke then commenced providing civil engineering services previously offered by Civil[36] as well as other services. I infer that Civil's business transitioned to Bespoke from January 2019 onwards in the period to liquidation on 14 June 2019.

[88] In his Form 509 summary of affairs of Civil dated 21 June 2019, Mr Allen disclosed an estimated deficiency of assets over liabilities of $436,957.07. In the attached list of creditors, he listed amongst others one of the unsecured creditors of Civil as the Australian Tax Office in the amount of $283,549.11.

[89] The Liquidator's subsequent investigations revealed a much worse financial position of Cobblestone as at 21 June 2019 than that disclosed by Mr Allen in the Form 509.

[90] In his Statutory Report to Creditors dated 13 September 2019[37] prepared pursuant to section 70-40 of the *Insolvency Practice Rules (Corporations)* 2016 (Cth) (the Liquidator's Report), the Liquidator stated that:

(a) Cobblestone may have traded whilst insolvent.[38]

(b) The estimated date of insolvency was 30 June 2017.[39]

(c) Cobblestone had incurred a net deficiency of liabilities over assets of $13,170.00 for the financial year ended 30 June 2017.[40]

(d) The current ratio of 0.79 as at the financial year ended 30 June 2017 revealed a liquidity crisis where Cobblestone had insufficient current assets to meet current liabilities.[41]

(e) Though the current ratio improved in the 2018 and 2019 financial years, that was attributable to the existence of a debtor invoice but proceedings were commenced against Cobblestone by the debtor company in April 2018,

---

35 Transcript 17 June 2020 in MCDO 481/20 at Brisbane, T1-37, lines 1 to 38.
36 Ibid, T1-38, lines 2 to 11.
37 See the Report filed by Mr Helyar in these proceedings.
38 Ibid, section 4.6 at page 11.
39 Ibid.
40 Ibid, section 4.4 at page 10 and section 4.6 at page 11.
41 Ibid, section 4.6 at page 11.

therefore as at 30 June 2018 it should have been known that this invoice was disputed.[42]

(f) The debtor company that commenced those proceedings was Citimax Henderson Pty Ltd (Citimax) in relation to additional works carried out by Cobblestone on a development project at Everton Hills, Queensland.[43]

(g) Citimax disputed the debt and claimed damages of $197,502.31 from Cobblestone, a related entity and Mr Allen.[44] Cobblestone filed a defence and a counterclaim in the proceedings.

(h) Cobblestone did not appear to have had access to sufficient forms of finance to fund its ongoing cashflow or business operations.[45]

(i) Cobblestone continued to incur debts since the estimated date of insolvency.[46]

(j) The estimate of Cobblestone's debts incurred since the estimated date of insolvency was $227,150 being total unrelated creditors, excluding contingent claims.[47]

(k) Mr Allen disclosed personal unsecured creditors and the Liquidator was aware that he (Mr Allen) was at that time a party to legal proceedings in which a personal costs order was made against him.[48]

(l) The Liquidator's investigations identified a $70,000.00 credit in Mr Allen's Cobblestone loan account on 30 June 2018 relating to the payment of legal fees by Mr Allen personally which had been accounted for as a payment on Cobblestone's behalf to Irish Bentley Lawyers who were acting for Cobblestone in the Citimax case.[49]

(m) Cobblestone had an estimated net deficiency of $602,031.98 in assets ($6,255) over liabilities ($608,031.98) as at 14 June 2019, before costs of the external administration.[50]

(n) Related party debtors of Cobblestone, viz. Cobblestone Investments Pty Ltd, Cobblestone No. 1 Unit Trust and Cobblestone No. 2 Unit Trust, had no capacity to repay debts totalling $3,836.00, according to evidence provided to the Liquidator.[51]

(o) Cobblestone owed unsecured creditors an estimated $608,286.98 including (amongst others) Director/Related Party Claims of $103,136.00, Trade Creditors and Other Liabilities of $363,453.78, Taxation Liabilities of $16,833.20 and Contingent Creditors of $228,000.00.[52]

---

42 Ibid.
43 Ibid and see section 3.1.2 at page 6.
44 Ibid, section 4.6 at page 11.
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid, section 4.6 at page 11.
49 Ibid, section 4.7 B at page 13.
50 Ibid, section 3 at page 5.
51 Ibid, section 3.1.2 at page 7.
52 Ibid, section 3.2.1 at page 8.

(p) Though the Director (Mr Allen) had not disclosed to the Liquidator any contingent liability, Citimax had commenced proceedings against Cobblestone and Mr Allen previously in which it claimed damages of $197,502.31 from Cobblestone.[53]

(q) Mr Lawrence Ferguson and Mrs Patricia Ferguson, former customers who contracted Cobblestone to undertake works, submitted two proofs of debt totalling $228,000.00 in relation to a defective works claim and legal proceedings were commenced by them prior to the Liquidator's appointment.[54] Mr Allen failed to disclose that contingent liability.

(r) The Liquidator had prepared a Report to ASIC under section 533 of the *Corporations Act* 2001 (Cth) to be submitted, detailing his investigations into the affairs of Cobblestone and whether any possible offences had been committed by the Company's officers, which report was subject to privilege and not available to the public.[55]

(s) The Director (Mr Allen) had been an officer of two or more companies that entered external administration within a seven year period and he consequently may be disqualified from acting as a Director for five years in accordance with section 206F of the Act.[56]

(t) The Liquidator anticipated that ASIC would ask that he prepare a Supplementary Report under section 533(2) of the Act which, subject to funding, would be prepared and privileged and therefore not made available to the public.[57]

[I note that the Liquidator's reference to "the public" would obviously include unsecured creditors such as Mr Helyar.]

[91] I accept the Liquidator's report to creditors and findings.

[92] It follows that I reject, as incomplete, the content of Mr Allen's Summary of Affairs of Cobblestone supplied in his ASIC Form 509 and as untrue wherever inconsistent with the Liquidator's Report to Creditors.

[93] In his recorded evidence[58] under affirmation given at hearing on 27 August 2018 concerning an Infotrack ASIC Current Organisation Extract on 20 June 2018 marked exhibit "A1", Mr Allen said that:

(a) As of 29 August 2017, a company called Workpac Pty Ltd and three other creditors were owed money by Cobblestone which became indebted to them "in the general run of the business" in July 2017;

(b) Cobblestone's indebtedness to those creditors was not disputed and it reached a compromise with them after they applied to wind up Cobblestone for non-payment of the debt in the Supreme Court of Queensland on 31 May 2018.

---

53 Ibid, section 3.1.2 at page 6
54 Ibid, section 3.2.2 at page 8.
55 Ibid, section 4.2 at page 8.
56 Ibid.
57 Ibid.
58 At Beenleigh in MCDO 190/19 at 2pm.

[94] Mr Allen's evidence regarding Workpac is consistent with the Liquidator's report that 30 June 2017 was the estimated date of Cobblestone's insolvency and that a current ratio of 0.79 at the financial year ended 30 June 2017 revealed a liquidity crisis where Cobblestone had insufficient current assets to meet current liabilities.

[95] The Liquidator's findings, to which I have referred, including that Cobblestone may have traded whilst insolvent and that 30 June 2017 was the estimated date of its insolvency, permit the inference that the company was probably insolvent from that date onwards. I draw the inference and find that it was insolvent from that date onwards until liquidation.

[96] At the hearing on 17 June 2020, I asked Mr Helyar whether there had been a further liquidator's report to creditors since 13 September 2019, to which he responded in the negative.[59]

[97] On 18 June 2020, Mr Helyar emailed the Liquidator's manager, Mr Dekleva, asking whether an updated statutory report to creditors had issued since the report sent to him on 13 September 2019. Mr Dekleva, responded by email of the same date[60] in which he said:

> There hasn't been any additional report issued.
>
> Last year we lodged a request for funding with ASIC in order to conduct examinations of the Director and advisors. This application was denied however ASIC requested a report be prepared for the purposes of taking action to ban the director from managing corporations. This report has now been submitted and (sic) ASIC and it is up to ASIC whether they take prosecution action.
>
> Notwithstanding the above, there hasn't been any identification of potential avenues of recovery that would result in the recovery of funds for the liquidation. Unfortunately this means there are no funds to allow a dividend to creditors and the matter has been finalised.

[98] I accept, as true, Mr Dekleva's statements in that email as filed by Mr Helyar.

[99] Mr Helyar referred to section 4.6 of the Liquidator's Report in evidence at the hearing on 17 June 2020. He said that he thought Mr Allen had breached his duties as a director and improperly used his position in both companies to gain an advantage.[61] He also said that:

> Apart from trading whilst insolvent, possibly a conflict of interest, knowing the poor financial position of the company, knowing both companies and still asking for an upfront payment through his other company.
>
> That is all I have to say. I just think it is wrong.[62]

[100] At the hearing on 17 June 2020:

(a) I asked Mr Allen for his response to the Liquidator's finding that Cobblestone may have traded insolvently from 30 June 2017 when taking Mr Helyar's

---

59 Transcript 17 June 2020, T 1-45, lines 18 to 21.

60 Filed by Mr Helyar with other documents by email to the Tribunal on 8 July 2020 and emailed to Mr Allen.

61 Transcript 17 June 2020, T1-43, lines 40 to 44 and T1-44, lines 26 to 29.

62 Ibid, T1-46, lines 18 to 24.

upfront fee money on 29 and 30 August 2017, to which he replied that Cobblestone was not insolvent at that time.[63]

(b) Mr Allen said under affirmation that he had received a further report to creditors in January 2020[64] which "from memory" was that the Liquidator's Report in section 4.6 was "completely revised to March 2018 when Cobblestone ceased trading"[65] and that Cobblestone did not ever trade whilst insolvent.[66]

(c) I asked Mr Allen whether there was anything else he wanted to say, to which he responded saying that Cobblestone did not trade insolvently and then said that he had a liquidator's report which he received in January 2020 in his possession, but not with him.[67]

[101] Exculpatory conclusions of the Liquidator in the missing letter referred to by Mr Allen in his oral evidence on 17 June 2020 appeared to me to be of fundamental significance for Mr Allen's defence and I took the view that he should be given the opportunity to produce that crucial document in evidence.

[102] In the interests of fairness and justice, I ordered that:

1. Dean Helyar and Adam William Scott Allen must on or by the 16th of July 2020 file with the Tribunal's Brisbane Registry and email to each other any and all further liquidators (sic) statutory reports in respect of Cobblestone Constructions Pty Ltd (in liquidation) together with any further submissions in writing which they wish to make.

2. The Tribunal's decision is then reserved.

3. QCAT Registry email these orders to the parties.

[103] Mr Allen filed submissions and further documents with the Tribunal by email sent to [redacted] on 16 July 2020 at 6:39PM, wrongly addressed CC daenhelyar@hotmail.com to Mr Helyar.

[104] I noticed this on 17 July 2020 when reviewing the file for compliance and reading the email and documents sent by Mr Allen to the Tribunal. Thus, Mr Helyar cannot have received Mr Allen's email and documents sent to the Tribunal on 16 July 2020.

[105] To minimise more delay, I made the following orders of my own motion on 17 July 2020:

1. The proceeding be further heard on the papers with respect to Adam Allen's email to [redacted] on 16 July 2020 at 6:39PM but incorrectly addressed cc daenhelyar@hotmail.com.

2. QCAT Registry email Adam Allen's email referred to in Order 1 to [redacted].

3. Dean Helyar must by 4pm on 30 July 2020 file by email to [redacted] and email to Adam Allen his written submissions in reply.

4. The Tribunal's decision will again be reserved on 31 July 2020.

---

63 Ibid, T1-45, lines 6 to 16.
64 Ibid, lines 24 to 38.
65 Ibid, T1-46, lines 1 to 10.
66 Ibid, T1-47, lines 12 to 16.
67 Ibid, T1-47, lines 16 to 22.

5. QCAT Registry email these orders to the parties.

[106] One of the documents filed by Mr Allen on 16 July 2020 was a letter purporting, on its face, to be from the Liquidator on the letterhead of Revive Financial Pty Ltd dated 5 February 2020, addressed to Mr Allen at his address in Kingsholme by email to [redacted].

[107] That was Mr Allen's address at Bespoke and that is the letter which Mr Allen said under affirmation[68] in evidence at the hearing on 17 June 2020 that he had received in January 2020[69] from memory.

[108] The letter read as follows:

> Dear Mr Allen
>
> **COBBLESTONE CONSTRUCTIONS PTY LTD (IN LIQUIDATION) ACN 611 123 016**
>
> **Clarification of Comment re Insolvent**
>
> **Trading**
>
> I confirm at the end of my investigation into the above company for insolvent trading and with the additional evidence you supplied that the company did not trade while insolvent. You will also note in my final letter to creditors that it does state 'may' have from that particular date traded insolvent, but as you have pointed out, the books that I have do not show an entire picture of the funds that were available to the company, just literally what was in the bank at that time.
>
> I thank you for the opportunity to assist you in this matter and wish you well in your future endeavours.
>
> Yours faithfully
>
> **Jarvis Archer**
>
> **Liquidator**
>
> CC:
>
> Matthew Flowers
>
> De Jonge Read
>
> Email: [redacted]

[109] On 21 July 2020, Mr Helyar emailed that letter to Jarvis Archer seeking an explanation and comment concerning this new correspondence.

[110] Mr Dekleva, the manager employed by the Liquidator to whom I referred earlier, replied by email to Mr Helyar on 24 July 2020 in which he said the following:

> As discussed, the Liquidator of the Company, Jarvis Archer, did not issue the correspondence dated 5 February 2020. Upon review of our file, we believe that the Liquidator's letter to Mr Allen dated 3 June 2020 (attached) has been amended to the 5 February 2020 letter which was submitted in the QCAT proceedings.

---

68 Ibid, T1-2, line 10.

69 Ibid, T1-45, lines 12 to 46 and T1-46, lines 1 to 6.

> In light of the above, we are seeking advice on the appropriate authority to refer this matter to.
>
> Please do not hesitate to contact me if you require any further information.
>
> Warm Regards
>
> Daniel Dekleva / Manager

[111] I accept Mr Dekleva's explanation in that letter and I find that the letter purporting to be from Jarvis Archer to Mr Allen dated 5 February 2020 filed by Mr Allen by email to the Tribunal:

(a) is (and was) a forgery and that it was produced for fraudulent purposes for the benefit of Mr Allen's defence of these proceedings.

(b) was forged by Mr Allen, or someone at his direction, with intent to mislead the Tribunal and potentially pervert the course of justice.

[112] I find that, as former sole director and member of Cobblestone, Mr Allen was the only person with motive and opportunity to engage in the forgery and that he alone was the only beneficiary of its purportedly exculpatory content.

[113] Having regard to the facts referred to in Mr Dekleva's email dated 24 July 2020, I find that the letter was forged by Mr Allen or by someone at his direction after he received the genuine Liquidator's letter to him dated 3 June 2020, which he then used as the template for the forgery.

[114] Thus, the forged letter did not exist in January 2020 when Mr Allen said in evidence "from memory" that he had received it. Nor did the letter exist in February 2020 or at any time prior to the hearing on 17 June 2020 when Mr Allen first referred to its existence.

[115] The fact that Mr Allen did not file the forged letter with the Tribunal or email it to Mr Helyar at any time prior to 16 July 2020 is consistent with it only having been brought into existence after 17 June 2020 when he was ordered to file and serve the document, and I so find.

[116] I find that Mr Allen emailed the forged letter to the Tribunal in an attempt to mislead the Tribunal and corroborate his false oral evidence of its alleged existence and his receipt of it in January or February 2020 at a time when it did not exist.

[117] Mr Allen himself admitted that the letter "may be" a forgery in his email dated 29 July 2020 sent to the Tribunal and to Mr Helyar at 10:42 AM.

[118] Mr Allen couched his admission in the following terms:

> Upon my investigations after receiving this correspondence, I have just (sic) become aware that this document may (sic) be false and is possibly (sic) created by one of my staff, which is being dealt with internally. I Personally (sic) did not alter this letter. As such I no longer wish to rely on it (sic) in these proceeding (sic). Please note that I am referring only to the letter dated 5th February 2020 Addressed (sic) to me noting Daniel Dekleva as the Author (sic).

[119] I reject, as false, Mr Allen's evidence that he was not involved in the forgery of the letter or that he had only just become aware that it "may" be false and was "possibly" created by one of his staff.

[120] Mr Allen neither provided any corroborative evidence to support his innocence in the forgery nor explained what possible motive a staff member or anyone else would have for forging the letter solely for his benefit.

[121] Plainly, Mr Dekleva was not the author of the forged letter as Mr Allen insinuated. In fact, he was the author of the email to Mr Helyar dated 24 July 2020 which exposed the forgery and precipitated Mr Allen's retraction.

[122] Mr Allen made the following submissions amongst others in his email to the Tribunal dated 29 July 2020 that I have considered. It is convenient that, insofar as relevant, I address them [in brackets below] now.

[123] He said that:

(a) I had suggested the addition of himself and Cobblestone as Respondents and that I was aware his application to have this overturned was never processed.

[The official transcript of proceedings[70] at Beenleigh in MCDO 190/19 on 11 December 2019 records that I discussed his "application to have this (sic) overturned" (i.e. the joinder order) with Mr Allen, that I explained the Tribunal's procedures to him, and that I explained that he had filed an application for leave to appeal the joinder decision in the wrong division of the Tribunal.[71] The transcript records that I gave Mr Allen the opportunity to tell me if he did not want me to hear the case finally[72] and that he said that was not his position, that he wanted me to hear the case finally that day. I reserved my decision after hearing Mr Allen's oral evidence, Mr Helyar not having answered telephone calls to him.[73]]

(b) He had consulted his lawyer who told him he was correct and that companies and directors are separate entities.

[Mr Helyar's legal advice is not determinative of the question of personal liability and, as will appear from my consideration of the law later, it does not follow that a person associated with, but "separate" to, a company can never, under any circumstance, be held personally liable for unlawful conduct of the company and the person.]

(c) He provided clear evidence that Mr Helyar was always aware that Civil and Cobblestone were sister companies of which he was sole director.

[I have earlier found as fact that Mr Helyar was aware that Mr Allen was a director and member of both Civil and Cobblestone.]

(d) There was clear evidence that Mr Helyar had spoken with Mr Simonetta and Mr Villani and that Mr Simonetta was only "involved with the project at the end" and did not do the development application work or the "operational works design."

---

70 Transcript 11 December 2019, T1-2 lines 39 to 48, T1-3 lines 1 to 48, T1-4 lines 1 to 48, T1-5 lines 1 to 36.

71 Ibid, T1-3, lines 1 to 48.

72 Ibid, T1-5 lines 26 to 42.

73 Ibid, T1-26 lines 10 to 42.

[Neither Mr Simonetta nor Mr Villani gave evidence in this case, though I have accepted documentary evidence of the fact of communications with, or through, them to which I referred earlier.]

(e) There was clear evidence that Mr Helyar also spoke with Mr Cevik, an estimator working with Cobblestone prior to contract. There is no way Mr Helyar didn't "know about it."

[Mr Cevik did not give any evidence either but I again refer to my findings of fact earlier in this decision.]

(f) Mr Helyar suggested that he (Mr Allen) stole his money.

[Mr Helyar did not say that Mr Allen "stole" his money. I have earlier quoted from the transcript that which Mr Helyar in fact did say in evidence.]

(g) Cobblestone was not trading as insolvent and had access to sufficient funds the entire time it traded and only ceased to trade after a client failed to pay $180,000 and subsequently proceeded with legal action which was without grounds and has been concluded. There were "various receipts of money received and other assets".

[I reject Mr Allen's submission that Cobblestone had sufficient funds the entire time. The Liquidator's report to creditors dated 13 September 2019 established otherwise. Mr Allen did not produce any evidence of "receipts of money and other assets." Neither were any bank statements and tax returns for Cobblestone produced in evidence by Mr Allen.]

(h) The date of the estimated insolvency of Cobblestone was just an estimate and not proof of the fact; Cobblestone did not trade whilst insolvent and the liquidator did not have sufficient information to conclude that it had traded whilst insolvent.

[The Liquidator's report to creditors speaks for itself, conclusively so having regard to the subsequent letter from Mr Dekleva to Mr Helyar dated 18 June 2020 to which I have referred earlier. The forged letter dated 5 February 2020 purporting to be from the Liquidator to Mr Allen is compelling evidence of Mr Allen's dishonesty.]

(i) The general conditions of engagement specifically stated that all payments were non-refundable.

[Neither Cobblestone nor, indirectly, Mr Allen could claim the benefit of a "no refund" term of the construction contract lawfully terminated by Mr Helyar for Cobblestone's repudiation. Nor could the term prevail for the benefit of Cobblestone and Mr Allen if void or unenforceable according to law.]

(j) Contrary to Mr Helyar's claims, works were performed as per a spreadsheet supplied and Mr Helyar was told that additional costs would be incurred "as a result of standing Cobblestone Constructions down."

[I have rejected that evidence for the reasons to which I referred earlier.]

(k) The 5% discount was competitive when others were not offering a discount and was offered "only and simply … to secure the work."

[I accept the submission that the discount was offered to secure the work but not that it was offered only or simply for that purpose. It was offered because Cobblestone was, on the evidence I have accepted, then illiquid, insolvent and in dire need of cashflow.]

(l) I stated at "the last Beenleigh hearing" that my ruling "would be final" but that "now this is still ongoing surely there is reason to dismiss and uphold your previous judgment."

[I reject that submission. Transcript of the hearing on 11 December 2019 at Beenleigh, when Mr Helyar failed to answer the telephone, confirms that I said that I would deal with the matter then at a final hearing[74] and that I took Mr Allen through the documentary evidence and asked him what he (Mr Allen) had to say wherever he disagreed.[75] I told him I would reserve my decision[76] and that I would give it "down the track." I did. The decision was subsequently set aside upon re-opening and further evidence was given.]

Statute and Case Law

Queensland Civil and Administrative Tribunal Act 2009 (Qld) – Jurisdiction & Powers

[124] Section 9(1) of the QCAT Act gives the Tribunal jurisdiction to deal with matters for which it is empowered under the QCAT Act or an enabling Act and which includes, by subsection (2)(a), original jurisdiction.

[125] By section 9(3) of the QCAT Act, without limiting the *Acts Interpretation Act* 1954 (Qld) (AIAQ), section 49A, an enabling Act confers jurisdiction on the Tribunal to deal with a matter if the enabling Act provides for an application, referral or appeal to be made to the Tribunal in relation to the matter and, by section 9(4), it may do all things necessary or convenient for exercising its jurisdiction.

[126] Section 49A of the AIAQ says that a provision of an Act is taken to confer jurisdiction if it expressly, or by implication, authorises a proceeding to be instituted in a particular court or tribunal in relation to a matter.

[127] Section 11 of the QCAT Act confers jurisdiction on the Tribunal to hear and decide a minor civil dispute. Section 13(1) provides that the Tribunal may exercise that jurisdiction if a "relevant person" has applied to the tribunal to deal with the dispute and section 12(4) defines a "relevant person" as meaning:

(a) For a claim to recover a debt or liquidated demand of money – a person to whom the debt is owed or money is payable; or

(b) Subject to paragraphs (c) to (f), for a claim arising out of a contract between a consumer and a trader – the consumer; or

(c) (note – not applicable as it relates to a claim arising out of a contract between two or more traders); or

---

74 Transcript 11 December 2019 in MCDO 190/19 at Beenleigh, T1-5 lines 40 to 44.
75 Ibid, T1-5 from line 46 through to T1-25 at line 20.
76 Ibid, T1-25 lines 29 to 31 and T1-26 lines 1 to 4.

(d) (note - not applicable as it relates to claims for an amount for damage to property); or

(e) (note – not applicable as it relates to claims in tenancy matters); or

(f) (note – not applicable as it relates to neighbourhood disputes; dividing fences and trees); or

(g) (note – not applicable as it relates to matters under the *Building Act* 1975, chapter 8, part 2A and in the present case no building work was performed).

Mr Helyar is a relevant person in terms of section 12(4)(a) and (b).

[128] What is a "liquidated demand" is not defined in either the QCAT Act or in the Acts Interpretation Act. Its meaning is ascertained by reference to the common law. See in that regard, *Royce v Youi* [2018] QCAT 5, [126] to [127] and the decisions referred to there.

[129] A claim by a consumer against a trader for compensation for breach of the *Australian Consumer Law* (the ACLQ) need not however be for a liquidated demand of money. Neither the provisions of the ACLQ nor the QCAT Act require that.

[130] In terms of section 13(1) of the QCAT Act, in a proceeding for a minor civil dispute, the tribunal must (my emphasis) "make orders that it considers fair and equitable to the parties to the proceeding in order to resolve the dispute but may, if the tribunal considers it appropriate, make an order dismissing the application."

[131] For section 13(1) of the QCAT Act, the tribunal may only make the following final decision to resolve the dispute –

(a) For a claim mentioned in schedule 3, definition minor civil dispute, paragraph 1(a), (b) or (c) –

(i) An order requiring a party to the proceeding to pay a stated amount to a stated person; or

(ii) (not relevant);

(iii) (not relevant);

(iv) (not relevant);

(v) (not relevant).

[132] In Schedule 3, "minor civil dispute" is defined in subsection 1 as meaning:

(a) A claim to recover a debt or liquidated demand of money of up to the prescribed amount; or

(b) A claim arising out of a contract between a consumer and trader, or a contract between 2 or more traders, that is –

(i) For payment of money of a value not more than the prescribed amount; or

(ii) (not relevant); or

(iii) (not relevant); or

(iv) (not relevant); or

(v) (not relevant).

The present case concerns a minor civil dispute because it was variously a claim for a minor debt as against Cobblestone until effectively stayed by the liquidation and still is for a liquidated demand of money and a consumer claim against Mr Allen in terms of the provisions of section 236 of the ACLQ to which I will come shortly.

[133] Subsections 1(c) to (f) of the definition of "minor civil dispute" are not relevant. Nor are subsections 2 and 3 in the context of this case.

[134] In Schedule 3, "consumer" is defined as meaning (inter alia) an individual:

(b) for whom services are supplied for fee or reward other than –

(i) in a trade or business carried on by the individual; or

(ii) as a member of a business partnership.

[135] Subsections (a) and (c) of the definition of a "consumer" do not apply in the present case because Mr Helyar is (and was) a consumer in terms of the definition of "consumer" in the QCAT Act and the ACLQ.

[136] In Schedule 3, a "trader" means under subsection 1(a) a person who in trade or commerce –

(i) carries on a business of supplying goods or providing services; or

(ii) regularly holds himself, herself or itself out as ready to supply goods or to provide services of a similar nature.

[137] Prior to Mr Allen putting it in liquidation, Cobblestone carried on the business of supplying goods (building materials) and services (building construction services) including for civil construction works of the type which it contracted to undertake for Mr Helyar.

[138] In Schedule 3, subsection 2 of the definition of "trader" - a trader is not a trader in relation to goods or services if in supplying them:

(a) the person acts in the exercise of a discipline that is not ordinarily regarded as within the field of trade or commerce; or

(b) the person is giving effect to the instructions of someone else who in providing the instructions acts in the exercise of a discipline that is not ordinarily regarded as within the field of trade or commerce, and the goods supplied or the services provided are in all respects in accordance with the instructions.

[139] That exception does not apply in the present case. A civil construction company does not act in the exercise of a discipline that is not ordinarily regarded as within the field of trade or commerce. Cobblestone was therefore a trader up to the point that it was placed in liquidation.

[140] For a list of enterprise excluded from the definition of trader according to case law, see *Amos v Walter* [2020] QCAT 360 at [100] and [102] to [103].

Acts Interpretation Act 1954 (Qld)

[141] The AIAQ, to which I referred concerning section 9(3) of the QCAT Act, is relevant to the extent that it applies to interpretation of the QCAT Act but does not apply to

interpretation of the ACLQ, as to which the *Acts Interpretation Act* 1901 (Cth) (the AIAC) applies.[77]

[142] The term "individual" in the AIAQ, as it applies to the QCAT Act, is defined in schedule 1 as meaning "a natural person" and "corporation" in schedule 1 "includes a body politic or corporate." The definition of "person" includes "an individual and a corporation."

[143] Accordingly, notwithstanding the definition of "person" in the AIAC, QCAT may only exercise jurisdiction for a consumer claim by an individual (natural person) that is a minor civil dispute. See the definition of "consumer" in Schedule 3 of the QCAT Act. The limitation is express and is not often appreciated. In my opinion, a corporate consumer therefore cannot bring a claim in QCAT's minor civil dispute jurisdiction.

[144] For completeness, I note that Cobblestone, at all material times prior to being placed in liquidation, was a body corporate within the definition of "corporation" in the AIAQ and Mr Allen, then Cobblestone's director, was (and is) an individual but not a trader in his own right. The claim against him as an individual is not precluded by section 13 or any other section of the QCAT Act.

Fair Trading Act 1954 (Qld)/Australian Consumer Law interface

[145] The *Australian Consumer Law* (ACL) was adopted as a law of Queensland by the *Fair Trading Act* 1989 (Qld) (the FTA).[78] It is referred to as the ACL (Qld) (the ACLQ) and the ACL text, so defined in the FTA, consists of schedule 2 to the *Competition and Consumer Act* 2010 (Cth) and the regulations under section 139G of that Act.

[146] Section 19 of the FTA provides for the interpretation of the ACLQ and section 20 provides for the application of the ACL (Queensland) in Queensland.

[147] Section 50(1) of the FTA provides that a proceeding for the purposes of a provision of the *Australian Consumer Law (Queensland)* listed in the table to the section must (my emphasis) be heard in the tribunal or in a court having jurisdiction for the proceeding having regard to –

(a) for the tribunal, whether the subject of the proceeding –

(i) would be a minor civil dispute (sic) within the meaning of the QCAT Act; or

(ii) would be a matter to which section 50A applies; or

(b) for a court – any civil jurisdictional limit, including any monetary limit, applying to the court.

[148] The FTA and the ACLQ are enabling Acts as defined, in conjunction with the QCAT Act.

[149] Section 50(1)(a)(i) of the FTA is relevant in this case to the extent that the table incorporated in section 50(1) includes reference to section 236(1) of the ACLQ. I will come to that section shortly.

---

77 *Fair Trading Act* 1989 (Qld), s 19(1) and (3).

78 Ibid, s 16(1) and (2).

[150] In summary, subject to jurisdictional limits, this Tribunal has jurisdiction to adjudicate, as a minor civil dispute, Mr Helyar's claim for loss or damage suffered as a result of the conduct of:

(a) a trader, in this case Cobblestone; and

(b) another person (in this case Mr Allen) involved in contravention of sections 18 and 20 of the ACLQ.

[151] For completeness, I note that the table to section 50(1) of the FTA also includes reference to section 267(2), (3) and (4) of the ACLQ with respect to action that may be taken by a consumer against a supplier of services for breach of statutory guarantees, inter alia in the minor civil dispute jurisdiction of this Tribunal.

[152] Section 267 of the ACLQ does not however apply in the present case because Cobblestone did not perform any of the civil construction works or deliver any of the associated goods which the construction contract required.

[153] The ACLQ relevantly provides that:

(a) In terms of section 3, a person is taken to have acquired particular services as a consumer if, and only if, (a) the amount paid or payable for the services, as worked out under subsections (4) to (9) did not exceed (i) $40,000; or (ii) a greater amount if prescribed; or (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Mr Helyar's claim is within the category referred to in section 3(a)(i).

(b) In terms of section 2 (Definitions), "services" includes (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce including (b) (without limiting paragraph (a)) the rights, benefits, privileges or facilities that are, or are to be, granted or conferred under: (i) a contract for or in relation to the performance of work (including work of a professional nature) whether with or without the supply of goods; or etc. …

The services to be provided by Cobblestone to Mr Helyar in terms of the construction contract works fall within the statutory definition of services.

(c) In terms of section 2, "trade or commerce" relevantly means (a) trade or commerce within Australia and includes any business or professional activity (whether or not carried on for profit).

Cobblestone was to provide the services in trade or commerce so defined.

(d) Section 18(1) of the ACLQ prescribes that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The statutory prohibition applied to Cobblestone and Mr Allen.

(e) Section 20(1) of the ACLQ prescribes that a person must not in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law from time to time.

Until its liquidation, Cobblestone was a person within the contemplation of section 20. So too was Civil and, as sole director of both companies, Mr Allen, to all of whom the prohibition applied.

[154] Section 236 (Actions for damages) of the ACLQ is listed in the table incorporated in section 50 of the FTA. Therefore, it applies in the case of minor civil disputes in this Tribunal.

[155] Section 236(1) of the ACLQ provides that if:

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

(b) the conduct contravened a provision of Chapter 2 (General protections including those prescribed in sections 18 and 20) or 3;

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

[156] In the present case, section 236(1) of the ACLQ applies to Mr Allen as a "person involved".

[157] By section 236(2) of the ACLQ, such action may be commenced within six years after the day on which the cause of action that relates to the conduct accrued. The proceedings in this case were commenced well within six years after that day.

Case Law and Texts

[158] I turn now to case law and texts to which regard may be had in connection with the sections of the ACLQ to which I refer in this decision.

[159] In *Kenxue Pty Ltd ATF The Susan Investment Trust v Westpro Finance Pty Ltd* [2020] NSWSC 1146 (*Kenxue)* Rein J summarised, amongst others, the following principles concerning misleading and deceptive conduct:

> According to Russell V Miller, *Miller's Australian Competition & Consumer Law Annotated* (Thompson Reuters, 42nd ed, 2020) at [ACL 18.380] (*Miller)*:
>
> > The essential question is whether in all the circumstances constituted by acts, omissions, statements or silence, there has been conduct likely to mislead or deceive…[79]
>
> In *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; (1992) 110 ALR 608 at 609-610 (*Demagogue)* on the issue of silence, Black CJ said:
>
> > Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading and deceptive or that is likely to mislead and deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.[80]

---

79 *Kenxue Pty Ltd ATF The Susan Investment Trust v Westpro Finance Pty Ltd* [2020] NSWSC 1146, at [107] and see the cases there referred to.

80 Ibid, at [108].

> See also Gummow J at 618 of *Demagogue* who adopted the remarks of French J (as His Honour then was) in *Kimberly NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) 46-054 at 53, 195 (*Kimberly NZI)*:
>
> > If in a particular case silence would, as a matter of fact, constitute misleading and deceptive conduct, s 52 by virtue of its prohibition of such conduct imposes its own statutory duty to make disclosure. The cases in which silence may be so characterised are no doubt many and various and it would be dangerous to essay any principle by which they might be exhaustively defined. However, unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist.[81]
>
> It should be noted that if there has been silence on a topic of significance in a context where the expectation is established it need not be demonstrated that the silence was intentional: see *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* [2004] VSCA 232 (*CCP Australian Airships)* and *Liao v LNG Properties Pty Ltd* [2019] NSWSC 1846 at [57].[82]

[160] Reference in section 20(1) of the ACLQ to the "unwritten" law of unconscionability is somewhat of a misnomer. The unwritten law, to which the section there refers, is the common law of Australia, mostly published in written decisions by Australian Courts and Tribunals.

[161] This Tribunal does not have all of the same broad equitable powers as a superior court.[83] It is not a court of equity and it is a court in only a very limited sense[84] but, in the context of the statutory causes of action in sections 18 and 20, read with section 236, of the ACLQ the Tribunal is in my opinion bound to apply the principles of the common law of equity. Consistent with that is the requirement in section 13 of the QCAT Act (supra) that I make a decision in this case that I think is fair and equitable.

[162] Justice Alan Wilson, President (of QCAT) as he then was, in *Batwing Resorts Pty Ltd v Body Corporate for Liberty on Tedder CTS 27241* [2011] QCAT 277 said the following at [40]:

> The grant, to this Tribunal in the QCAT Act, of specific powers to provide traditional equitable remedies under its legislation, read in combination with the clauses discussed earlier, points with sufficient clarity to a construction of the legislation which would empower this Tribunal to address the equitable cross claims raised by the respondent here in a matter where the applicant has brought a claim which plainly, otherwise, falls within the Tribunal's statutory jurisdiction.

[163] Principles of the common law of equity in Australia have been progressively enunciated over time in leading cases such as *Blomley v Ryan* (1954) 99 CLR 362 (*Blomley*); *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 (*Amadio*); *Louth v Diprose* (1992) 175 CLR 621 (*Louth*); and *Kakavas v Crown Melbourne* [2013] HCA 25 (*Kakavas*).

---

81 Ibid, at [109].
82 Ibid, at [110].
83 Per Wilson J in *Batwing Resorts Pty Ltd v Body Corporate for Liberty on Tedder CTS 27241* [2011] QCAT 277 at [38].
84 See *AB V CD* [2020] QCAT 295 at [38] to [76].

[164] The following cases, texts, articles and submissions, assist in discerning the common law principles of unconscionable dealing.

[165] The High Court decision in *Amadio* concerned a bank seeking, unsuccessfully in the result, to enforce the terms of a third-party mortgagee guarantee which had been set aside at first instance. Gibbs C.J. at page 9, paragraph 18, in that case said:

> A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the party was placed. The principle of equity applies "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances (sic) affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands": Blomley v Ryan [1956] HCA 81; (1956) 99 CLR 362, at p 415, per Kitto J., and see at pp. 405-406, per Fullagar J.

[166] See also Deane J in *Amadio* at page 21, paragraph 13.

[167] Mason J in *Amadio* at page 12, paragraph 11, referring to other authorities, said:

> A bank, though not guilty of any breach of its limited duty to make disclosure to the intending surety, may none the less be considered to have engaged in unconscionable conduct in procuring the surety's entry into the contract of guarantee.

[168] Wilson J in *Amadio* at page 17, paragraph 3, said:

> The learned trial judge found that if the respondents had been fully informed of the company's financial predicament (sic) they would not have executed the document. That finding has not been challenged. Indeed, it could not be, having regard to the fact that the immediate effect of its execution was to render their assets liable to be substantially swallowed up in meeting existing liabilities of the company and without any real assurance of benefit (sic) to anyone but the bank. The circumstances required that the respondents be acquainted with the true financial position of the company and thereby enabled (sic) to make an informed decision.

[169] Deane J in *Amadio* at page 21, paragraph 13, said:

> The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued.

[170] Professor Bob Baxt, in an article on accessorial liability in the 1 September 2015 edition of the *Company Director Magazine*, referred to a decision of Justice Black in *Waterfront Investments Group* (in liq) (2015) 105 ACSR 280 (*Waterfront*) noting that, in *Farah Constructions Pty Ltd v Say-dee Pty Ltd* (2007) 230 CLR 89 (*Farah Constructions)*:

> The High Court had established that to prove that there had been a breach of trust, or a breach of fiduciary duty, to establish a claim that a person was knowingly assisting in the relevant matter, there "must (sic) be dishonest and fraudulent [behaviour] so that the impugned conduct must involve

> circumstances attracting a degree of opprobrium beyond an innocent breach of trust or duty".[85]

[171] Dr Elise Bant, Professor of Private Law and Commercial Regulation at the University of Western Australia Law School and Professorial Fellow at the University of Melbourne, has referred to the "remarkable complexity and incoherence in our statutory landscape on the issue of criminal and civil corporate liability for serious misconduct, which severely undermines the efficacy of ongoing efforts to regulate corporate wrongdoing."[86]

[172] In a submission to the Australian Law Reform Commission, Dr Bant referred to the apparently different approach of the High Court of Australia in *Kakavas* (supra) and that it:

> .. held that unconscionable conduct in equity requires proof of actual knowledge and predation of disadvantage by corporate defendants in commercial transactions.[87]

[173] Other learned authors have expressed similar concerns.

[174] In an article entitled 'The Conscience of the King: Kakavas v Crown Melbourne Ltd [2013] HCA 25 (5 June 2013)' in the *University of Western Sydney Law Review*, Vol 17.87 [2013], Ludmilla K. Robinson, Barrister, referred to the High Court's concerning circumscription of the equitable principles relating to unconscionable conduct, an unusual degree of subjectivity in weighing evidence, and the suggestion that the High Court was in some degree influenced by the potential to 'open the floodgates' to further actions by problem or compulsive gamblers.

[175] However, every case remains to be determined on its own particular facts and merits. I do not understand the High Court in *Kakavas* to have suggested otherwise or to have limited the general principles of the law relating to unconscionable dealing developed by Australian and English courts over more than a century. Rather, it signalled new rigour in applying those principles in that case.

[176] I respectfully agree with the analysis of John Tesarsch, Barrister, in his article entitled 'The Highest of the High Rollers', May 2014 88 (05) *Law Institute Journal*, p. 26 (Law Institute of Victoria) and his conclusion that:

> Unconscionability is a flexible doctrine that has been applied in many diverse instances since the seminal judgment of the High Court in *Amadio*, providing relief to persons with special disabilities who have been the victims of sharp practice. Because of its flexibility, the High Court's decision in *Kakavas v Crown* cannot be viewed as representing a fundamental shift in the nature of the doctrine. That said, it does indicate that in future courts can be expected to adopt a strict approach (sic) when assessing unconscionability claims under the Australian Consumer Law and the general law.

---

85 At pages 1 and 3 of the article *Accessorial liability.*

86 Submission 28 January 2020 to the Australian Law Reform Commission Inquiry into Corporate Criminal Responsibility, Discussion Paper 87, page 1.

87 Ibid, at page 5.

[177] Turning now to text, Ford, Austin and Ramsay's *Principles of Corporations Law*, 17th Edition, provides a convenient summary of the general principles of unconscionable dealing, some of which I repeat below.

[178] Equity is concerned to protect persons who have committed themselves by contract, disposition of property at common law or in equity or, possibly, in other ways, while they were under a special disability where another person who would benefit under the dealing took advantage of the disabled person.[88]

[179] Where the impugned dealing is one operating at common law, equity intervenes, as it does in so many areas, not by denying the existence of rights conferred by the common law, but by acting *in personam* to prevent the other party unconscionably relying on his legal rights.[89]

[180] Before the equitable doctrine can apply, the person seeking to rescind the dealing or have it modified must be able to show that he was under a special disability at the time of the dealing and that the other party was aware of it, or had reason to be to be aware of it: cf. *NZI Capital Corp Ltd v Fulton* (unreported, Fed C of A, Black, Davies, Lehane JJ, 10 June 1998)[90] (*NZI Capital Corp*).

[181] The disability must be one affecting the making of an informed judgment as to the weaker party's interests: *Bridgewater v Leahy* (1998) 194 CLR 457 at [39] (*Bridgewater*) per Gleeson CJ and Callinan J.[91] Fullagar J in *Blomley* (supra) referred[92] to some forms of special disability:

> Among them are …. Lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.

[182] Inequality of economic bargaining power cannot, of itself, be a special disability but it is an ingredient that might, in combination with one of the other forms of weakness, go to make a up a special disability.[93]

[183] Rein J in *Kenxue* (supra) at [116] referred to the following principles amongst others relevant to unconscionable conduct summarised in *APS Satellite Pty Ltd (formerly known as "Skymesh Pty Ltd") v Ipstar Australia Pty Ltd* [2016] NSWSC 1898 (*APS Satellite*) [124]-[128]:

(a) Courts should be wary of substituting phrases such as "moral obloquy" for "unconscionable conduct;"

(b) a "high level of moral obloquy" is not required for a finding of unconscionable conduct.[94]

(c) the standard of conduct expected as a person in the commercial context is not that of a fiduciary.

---

88 Ford, Austin and Ramsay's *Principles of Corporations Law*, 17th Edition, 14.170 at page 1073.
89 Ibid at page 1074.
90 Ibid.
91 Ibid.
92 Ibid.
93 Ibid.
94 See *ASIC v Kobelt* [2019] HCA 18; (2019) 368 ALR 1 at [91] referred to by Rein J at [118].

(d) the Court must "assess and characterize the conduct of the impugned party in trade or commerce against the standard of business conscience, reflecting the values and norms recognised by parliament."

(e) the evaluation includes " … a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection; …."

Corporations Act

[184] The *Corporations Act* 2001 (Cth) (the CAC) prescribes that a director of a company must:

(a) exercise a reasonable degree of care and diligence in the exercise of powers and discharge of duties.[95]

(b) act in good faith, in the best interests of the corporation.[96]

(c) avoid improper use of the position of director to gain personal advantage or cause detriment to the company.[97]

(d) not make improper use of information obtained as a director to the detriment of a company.[98]

[185] For completeness, I note that a breach of a director's statutory duties may attract civil and criminal penalties.

[186] In terms of section 588G of the CAC, a director's duty is to ensure that a company does not trade while insolvent. There is a rebuttable presumption of solvency. Section 95A(1) of the CAC provides that a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.

[187] The provisions of section 588M allow compensation to be recovered by a creditor from a director who has acted in breach of section 588G, however such a claim may only be made with the written agreement of the liquidator of the company[99] and then only, in my opinion, in a Court of competent jurisdiction, which QCAT is not.

[188] I see nothing in the CAC that, either expressly or by implication, confers jurisdiction on this Tribunal to adjudicate an insolvent trading claim of a creditor with the written consent of a Liquidator but it does not however follow that evidence of insolvent trading cannot be relied on in support of a claim for which this Tribunal does have adjudicatory jurisdiction, for example in terms of sections 18, 20, and 236, of the ACLQ and the sections of the QCAT Act to which I have referred.

---

95 *Corporations Act* 2001 (Cth), s 180.
96 Ibid, s 181.
97 Ibid, s 182.
98 Ibid, s 183.
99 See for example s 588R(1) of the *Corporations Act* 2001 (Cth).

Contract

[189] I turn now to case law relating to entire contracts.

[190] Failure to pay a sum of money that is due under a contract is a breach for which damages are recoverable. It may also create a right to recover the sum as a debt. Indebtedness is not 'a mere breach of contract, it is, rather, the detention of a sum of money'.[100]

[191] Whether or not a debt arises on part performance of a contract providing for a fixed payment depends on whether the parties have expressly or impliedly agreed that the consideration for the payment was "entire, indivisible, and not severable". If so, complete performance is a condition of payment. Whether a contract is of this kind is, of course, a matter of construction. This means that the parties can expressly provide for severability by apportioning the consideration.[101]

[192] If several distinct performances and payments are involved, the contract will normally be regarded as divisible. Conversely, a contract is normally regarded as entire if it provides for a specified task to be performed for a single sum of money, for example a lump sum building contract.[102]

[193] The decision of the High Court of Australia in *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 (*Phillips*) at 233-4 per Starke J is authority for the principle that 'parties having contracted to do an entire work for a specific sum can recover nothing unless the work be done.'[103] If termination of a contract deprives the debtor of the performance for which the debt was incurred, the debt may be extinguished or, if paid, becomes repayable, on the basis of 'failure of consideration'.[104]

[194] It follows, by extension, that a contractor's incomplete performance of an entire contract, where the consideration has been paid by the client to the contractor in lump sum upfront upon the formation of the contract, requires that the consideration paid be refunded to the payer as a debt upon termination of the contract.

[195] The only exception is where the failure to perform has been slight or trivial and the contract has been performed, in which event the contract price may be recovered, or retained where pre-paid in full, subject to adjustment by set off for damages for the breach[105] if claimed.

Accessorial Liability

[196] The High Court of Australia in *Yorke v Lucas* (1985) 61 ALR 307; [1985] HCA 65 (*Yorke*) held the following to be prerequisites for a person to have accessorial liability in terms of section 75B, for contravention of section 52, of the *Trade Practices Act* 1974 (Cth) (the TPA) for the wrongdoing of a company:

---

100 Cheshire and Fifoot *Law of Contract* 11th Australian Edition 2017, 26.9 at page 1307 and see the cases cited there.

101 Ibid, 26.13 at page 1310 and see the cases cited there.

102 Ibid, and see Samuel J Stoljar, 'Substantial Performance in Building and Work Contracts' (1954-6) 3(2) *University of Western Australia Law Review* 293.

103 Cheshire and Fifoot, 26.13 at page 1310 and page 1311; see also the text footnotes 134 and 135 to 26.13 and the cases cited.

104 Ibid, 26.14 at page 1312 and see 26.6.

105 Ibid, at page 1311 in reference to *Phillips v Ellinson Brothers Pty Ltd* (supra) at 235 (Starke J); see also *Williamson v Murdoch* (1912) 14 WALR 54 and the other cases cited there.

(a) knowledge of the essential facts constituting the contravention.

(b) being knowingly concerned in the contravention.

(c) intentionally participating in the contravention based either on actual knowledge or wilful blindness in which event constructive knowledge might suffice.

[197] Section 18 of the ACLQ is the equivalent of (former) section 52 of the TPA and section 236 of the ACLQ and the definition of "involved" section 2 of the ACLQ is of similar effect to section 75B. A person is involved in a contravention of section 18 and/or section 20 of the ACLQ if that person has:

(a) aided, abetted, counselled of procured the contravention;

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

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

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

[198] The decision in *Yorke* therefore continues to provide guidance on prerequisites for involvement of "another person" and that mere involvement of another person in contravention of sections 18 and/or 20 of the ACLQ, without substantially more, is insufficient to establish personal liability of a non-contracting party for involvement in the contravention of a company.

Tortious Liability

[199] A director of a company that has contravened the ACLQ and/or other statute law, e.g. provisions of the CAC considered earlier, in breach of a building contract, though not party to the contract, may owe a duty of care in negligence to the other contracting party. If so, a director's breach of that duty may give rise to liability of the director personally to compensate the client of the contracting company for pure economic loss.

[200] The Supreme Court of Queensland has recently revisited earlier High Court authority in this regard.

[201] In *Mousa & Anor v Vukobratich Enterprises Pty Ltd & Anor* [2019] QSC 49 (*Mousa*) at [338] to [340], Henry J referred to a line of High Court authority culminating in *Brookfield Multiplex Ltd v Owners* (2014) 254 CLR 185 (*Brookfield*) and said at [340] the following:

> In *Brookfield Multiplex,* French CJ explained there has been a shift of emphasis from proximity to vulnerability as the most material determinant of the existence of a duty of care for pure economic loss. His Honour explained the relevant vulnerability was "the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct."[106] He reiterated the authorities' emphasis on considering the salient features in the individual case under consideration:
>
> > Consistently with the approach taken in *Woolcock* and, before that, in *Bryan v Maloney*, the determination of this appeal requires consideration

---

106 (2014) 254 CLR 185, 201.

> of the salient features of the relationship between the Corporation and Brookfield, including whether Brookfield owed Chelsea a relevant duty of care and whether the Corporation was vulnerable in the sense discussed above.[107]

[202] Again, each case falls to be considered on its own particular facts.

[203] Henry J in *Mousa* at [341] said that the fact that Mr Vukobratich, the director in that case, was not a party to the building contract did not of itself preclude the existence of a duty of care owed to the Mousas under the law of tort.[108]

[204] That statement of principle applies in the present case.

[205] It is unnecessary to recite the facts in *Mousa* as they are not on all fours with those in the present case. It suffices to say that Henry J ultimately found that the clients (Mr and Mrs Mousa) were not vulnerable in the required sense. Therefore, they were not owed a duty of care by Vukobratich and the claim against him on that basis was dismissed.

Liability

[206] I refer to:

(a) my findings of fact.

(b) the evidence that I have accepted.

(c) the evidence that I have rejected for the reasons stated.

(d) my further findings that follow, applying the law to the facts and evidence.

[207] Applying the principles of the law of contract to which I have referred, I find that the construction contract for a lump sum payable (and paid) in full by Mr Helyar to Cobblestone upon formation was entire in character.

[208] I find that the contracting parties expressly, alternatively implicitly, agreed that the consideration (Cobblestone's agreement to perform the work completely) for the upfront payment of the contract price in full was entire, indivisible, and non-severable. The contract price was fixed. It could not, unless by variation mutually agreed, be increased. It was never varied.

[209] I find that Mr Allen's purported attempt subsequently to sub-contract the work that Cobblestone had to perform for Mr Helyar out to others was illusory. It disguised an underlying intention not to perform the construction contract thus allowing Cobblestone to retain the benefit of the sum of $30,580.70 paid by Mr Helyar for deployment elsewhere in insolvent circumstances. The money was not spent by Cobblestone in performance of the construction contract.

[210] I find that Mr Allen, the sole alter ego and guiding mind of Cobblestone, intended that consequence because of the illiquidity and insolvency of Cobblestone and that he caused Cobblestone to offer the 5 % discount on the contract price as the inducement to secure the upfront payment of $30,580.70 for those ulterior purposes.

---

107 Ibid, 203-204.

108 See *Bryan v Maloney* (1985) 182 CLR 609, 619-620.

[211] I find that Cobblestone had to perform the contract completely to retain the benefit of the contract price paid upfront in full, which it never did.

[212] Applying the corollary of the principle referred to in *Phillips* (supra) discussed earlier, I find that Cobblestone could not lawfully retain the benefit of the lump sum contract price paid by Mr Helyar after he accepted Cobblestone's repudiation of the construction contract.

[213] I find that, if refunded by Cobblestone at any time on or after 15 December 2018, i.e. within six months prior to the appointment of the Liquidator on 14 June 2019, the payment will have been recoverable by the Liquidator from Mr Helyar as a voidable preference of an unsecured creditor.

[214] I find that the Liquidator admitted Cobblestone's indebtedness by accepting Mr Helyar's proof of claim in the liquidation.

[215] I find that no part of Cobblestone's indebtedness to Mr Helyar could be repaid because of the extent of Cobblestone's abject insolvency.

[216] In the context to which I have referred, I find that the conduct of Cobblestone and of its sole director Mr Allen, knowingly involved in it, was misleading, deceptive, and unconscionable, in circumstances where Mr Helyar was vulnerable and in a position of special disability because:

(a) in his own words, in [72] earlier, Mr Helyar was a young investor with little money; he needed to save money where possible.

(b) Mr Allen likely knew that from previous dealings between Mr Helyar and Civil.

(c) Mr Allen caused Cobblestone to offer the inducement of a 5% discount to procure full payment of the entire contract price in advance to it in the knowledge that the company could (and would) not pay its creditors, or repay Mr Helyar if required.

(d) to receive the 5% discount offered, Mr Helyar had to accept the terms of the second Cobblestone tender and the terms of the construction contract offered by Cobblestone, none of which provided him any protection; see [28] to [41] of this decision.

(e) Mr Allen knew, and intended, that Mr Helyar would be compromised in that way.

(f) plainly, some degree of protection would have been afforded to Mr Helyar if the construction contract did not require upfront payment in full of the entire contract price, but rather the payment of a deposit and progress payments upon the completion of each stage incrementally or on a "D&C" basis. (See [13] earlier.)

(g) Mr Allen knew that as well, but the second Cobblestone tender, unlike the first Cobblestone tender, was deliberately not structured in that way.

(h) Mr Helyar's risk and exposure to financial loss would have been significantly reduced if the construction contract had provided for staged payments, payment for each stage depending upon substantial performance.

(i) Mr Allen knew that as well.

(j) whether before or after the formation of the contract, neither Cobblestone nor Mr Allen disclosed the illiquidity and insolvency of Cobblestone.

(k) neither Cobblestone nor Mr Allen disclosed that Workpac and several other unpaid creditors were owed money by Cobblestone, of which Mr Allen and the company were plainly aware. (See *NZI Capital Corp.*)

(l) Mr Helyar could not possibly have known those facts unless they were disclosed by Cobblestone and Mr Allen; he had no contractual right to be assured of Cobblestone's solvency and liquidity and no means of establishing that independently.

(m) Cobblestone and Mr Allen's non-disclosure (at least) that Cobblestone was in financial difficulty was misleading and deceptive in the sense considered in *Demagogue*; the context was such as to give rise to a reasonable expectation of the disclosure, but it was never made.

(n) the failure to make the disclosure was unfair (in the *Amadio* sense) and dishonest; it was also "sharp practice" in the sense considered in *Kenxue* and *APS Satellite*, and it placed Mr Helyar at the serious disadvantage that resulted in his financially irretrievable situation. (See *Bridgewater.*)

(o) Mr Allen's propensity for dishonesty where he thought it might go undetected is ascertained in [100] to [121] earlier and the inherently improbable evidence given by him to which I have earlier referred elsewhere in this decision.

(p) Mr Allen, and Cobblestone by him, unconscionably exploited that disadvantage for Cobblestone's financial benefit to Mr Helyar's detriment with the irretrievable loss of his capital in consequence.

(q) neither Mr Helyar, nor any reasonable person in his position, would have accepted the second Cobblestone tender and paid the lump sum construction contract price of $30,580.70 upfront had the disclosure been made.

[217] In the circumstances to which I have referred, I find that Mr Allen conducted himself in contravention of sections 180, 181, 182, 183, and 588G of the CAC, to the detriment of current and prospective creditors of Cobblestone including Mr Helyar.

[218] I find that Mr Allen and, by him, Cobblestone, unconscionably and dishonestly took advantage of Mr Helyar's special disability and vulnerability. causing him the irretrievable loss of $30,580.70 paid to Cobblestone.

[219] I find that Mr Allen was personally involved in, and directed, Cobblestone's contravening conduct in the sense that "involvement" is defined in section 2 of the ACLQ and that the conduct of Mr Allen and Cobblestone overall was unconscionably predatory, such that Mr Allen is personally liable to pay Mr Helyar $25,000 of the loss of $30,580.70 in compensation plus interest and the filing fee. That is the decision that I think is fair and equitable to the parties to resolve the dispute.

Negligence/Deceit

[220] On the facts, the evidence, and for the reasons I have given, I find that Mr Allen is also liable in negligence for deceit and must compensate Mr Helyar for the loss of $30,580.70, applying the principles in Brookfield referred to in Mousa (supra), on that basis as well.

Claims against Civil and Cobblestone

[221] In the circumstance of their liquidation, the claims against each of Civil and Cobblestone will be dismissed.

Referral

[222] Mr Allen's conduct, to which I have referred in this decision, warrants referral to the appropriate authorities for investigation and I will make directions accordingly.

[223] My orders and directions are as follows.

Orders

[224] I order that:

1. The Respondent Adam William Scott Allen pay the Applicant Dean Helyar $25,000 for claim, $3,353.84 for interest from 17 April 2018 to 30 November 2020, and $338.20 for the filing fee, in total $28,692.04 on or by 14 December 2020.
2. The claim against Civil and Property Development Consulting Pty Ltd (In Liquidation) is dismissed.
3. The claim against Cobblestone Constructions Pty Ltd (In Liquidation) now deregistered is dismissed.

Directions

[225] In view of my findings in paragraphs [85] to [120] and [207] to [219], I direct that the Principal Registrar refer a copy of the papers in this matter and these reasons for decision to:

(a) The Commissioner of the Queensland Police Service for investigation of Mr Allen for offences including perjury, forgery, fraud, and attempting to pervert the course of justice.

(b) The Chief Legal Officer, ASIC, GPO Box 9827, Queensland 4001 for investigation of Mr Allen for breach of directors' duties.

[226] I also direct the Principal Registrar to refer a copy of these reasons for decision to the Liquidator, Mr Jarvis Archer of Revive Financial Services Pty Ltd, PO Box 307 Noosa Heads, Qld 4567.

[227] I request that a Hearing Support Officer of the Tribunal forthwith email a copy of this decision together with the orders and directions to Mr Helyar at [redacted] and to Mr Allen at [redacted].