VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP519/2016

CATCHWORDS

DOMESTIC BUILDING − contract for cabinets; repudiation; assessment of damages; counterclaims for damages for rectification costs; for bank interest charges and loss of earnings arising out of alleged delay; and wasted marketing expenses; and for director's fees, all dismissed.

APPLICANT	Kitchen By Matric Pty Ltd
RESPONDENT	Citadel Group (Victoria) Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	11 April 2017
DATE OF ORDER	30 May 2017
CITATION	Kitchen By Matric Pty Ltd v Citadel Group (Victoria) Pty Ltd (Building and Property) [2017] VCAT 723

ORDER

1 The respondent, Citadel Group (Victoria) Pty Ltd, must pay the applicant, Kitchen By Matric Pty Ltd, the sum of $13,350.

2 The respondent's counterclaim is dismissed.

3 Interest, costs, and reimbursement of any fees paid under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* are reserved, with liberty to apply within 60 days. **The principal registrar is directed to list any application to Member Edquist, with an allowance of 2 hours.**

MEMBER C EDQUIST

APPEARANCES:

For Applicant	Mr L P Wirth of Counsel
For Respondent	Mr S Dizdarevic, Solicitor

REASONS

INTRODUCTION

1 The applicant, Kitchen By Matric Pty Ltd ('the cabinet maker'), is a company operated by its sole director, Mr Rick Hartshorn. On or about 2 October 2014 the cabinet maker entered in to a contract ('the contract') with the respondent, Citadel Group (Victoria) Pty Ltd ('the developer'), a company operated by a builder and developer named Mr Simon Rendle. The contract was for the construction of cabinetry for two units being developed by the developer in Alma Road, St Kilda East, Victoria ('the project'). The works were largely completed when the parties fell into dispute.

2 The cabinet maker has come to the Tribunal seeking payment of the balance of the contract sum, which is put at $15,350. The cabinet maker also seeks interest under the contract at a rate of 9.5% from 17 June 2015 to 28 April 2016. When the proceeding was issued, the interest claimed stood at $1,265.18. The cabinet maker also seeks costs of the proceeding on an indemnity basis.

3 The developer has made a counterclaim seeking damages of $74,500, comprising the following items:

(a)	the cost of rectifying defective works and completing works −	$ 3,500;
(b)	bank interest −	$11,000;
(c)	additional marketing fees incurred as a result of delay in sales due to defective works −	$10,000;
(d)	loss of profit on the sale of unit 1 −	$20,000;
(e)	Loss of earnings arising from forced delay on commencement of another job −	$20,000;
(f)	director's fees −	$10,000.

4 The developer also seeks interest and costs.

The contract sum, variations and payments made

5 The initial contract sum is not in issue. It was $188,100. The parties agree that the contract sum was reduced to $152,350 as a result of seven variations. Two of these increased the contract sum, one was neutral, and four reduced the contract sum. The nett effect was that the contract sum was reduced by $35,750.

6 The parties also agree that payments of $17,000, $10,000, $30,000, $20,000, $30,000, $10,000, $15,000 and $5,000 were made. The total payments made accordingly were $137,000.

7 The cabinet maker calculates its claim of $15,350 by subtracting the payments made of $137,000 from the adjusted contract sum of $152,350.

The hearing

8 The hearing began on 11 April 2017 and ran for 3 days. The chief witness for the cabinet maker was Mr Hartshorn. The cabinet maker also called Ms Kathryn Hartshorn, who worked in the business as a senior designer, and Mr Haydn McCallum, who had worked on the project to fit cabinetry. The cabinet maker would have called Debra Randle, its office manager, who had put in a witness statement, but she was unavailable as she was overseas. The only witness called by the developer was Mr Rendle, its sole director.

THE CONTRACT

9 The parties agree that the liability of the developer to the cabinet maker turns on the terms of the contract, as amended during the course of the project.

Formation of the contract

10 In his evidence in chief, Mr Hartshorn said his involvement with the project began in or about September 2014 when Mr Rendle and his business partner, Mr Stuart Morton, visited his factory to discuss the supply and installation of cabinets at the property. A quotation was provided, and a meeting subsequently took place on 2 October 2014 at which, Mr Hartshorn deposed, he gave Mr Rendle a copy of a standard form HIA kitchens and bathrooms contract. He said further that Ms Hartshorn then explained the contract to Mr Rendle and Mr Morton. They were happy, and signed and initialled it. Ms Hartshorn gave consistent evidence. Mr Rendle did not dispute this account.

11 There is accordingly no dispute that the contract was initially in the form of the HIA kitchens and bathrooms contract which was signed by the parties on 2 October 2014.

12 The initial contract terms regarding payment were contained in clause 7, which was headed 'Payment Schedule'. This clause read:

Deposit: (5%)	$9,405.00
Prior to materials ordering:	(45%) per room
Delivery of *product* to *site*	(45%) per room
Completion of installation	(5%) $9,405.00
Total of *Agreement Price*	$188,100.00

Variation of payment arrangement

13 Mr Hartshorn gave evidence that the developer, from the outset, made payments other than in accordance with the contractual payment schedule. In particular, the developer paid on 2 October 2014 the sum of $17,000, which Mr Hartshorn said included the initial deposit of $9,405, and an additional $7,595 as an advance against the next payment due, of 45%.

14 At the hearing, Mr Hartshorn said that a practice was put in place by him and Mr Rendle to the effect that they would walk around the project together and agree on progress payments to be made. Mr Rendle gave evidence to similar effect, emphasising that valuation usually occurred after a joint site inspection on a room by room basis.

15 I find that the contract was varied in this regard, and the payment schedule was no longer binding. The effect of the changed arrangement was that the cabinet maker was to be paid progressively when Mr Hartshorn and Mr Rendle were agreed that particular cabinets had been delivered and installed.

THE DISINTEGRATION OF THE RELATIONSHIP BETWEEN THE PARTIES

16 In Mr Hartshorn's witness statement he said that he telephoned Mr Rendle frequently between April 2015 and June 2015 about payment. He said that Mr Rendle had told him he was having money issues, and in support of this statement Mr Hartshorn tendered a text message he had received from Mr Rendle from a bank referring to approval for an additional loan of $200,000.[1]

17 This was the context in which the cabinet maker's office manager, Debra Randle, sent an email to Mr Rendle dated 11 June 2015,[2] which relevantly read:

> In reference to your telephone conversation with Rick last week and this week we are still awaiting payment of $12,000.00.
>
> As agreed last week you would do a payment of… $27,000.00 but we only received $15,000.00. Rick spoke to you again on Tuesday and you told him the $12,000.00 will be paid that night but it is still not showing in our account.
>
> Your total account due to KMB is $20,350
>
> We have not completed the fridge doors, bifold doors etc., due to the large amount that is still due to us and for which the majority should have been paid before Easter.
>
> As agreed Rick sent the fridge doors to the painted on Tuesday but you have not held up your part of the agreement. Once the $12,000.00 has been paid we will complete all works upon which the remaining balance of $8,350 will be immediately due…

18 The developer did not pay the full $12,000 demanded in this email but did pay $5,000 on or about 16 June 2015. This payment is evidenced by a credit of $2,536 appearing in the cabinet maker's MYOB record. The balance of the $5,000 paid, namely $2,464, was credited against variations.

19 The cabinet maker did not contend in its pleading that it terminated the contract after 16 June 2015, but it is clear that no further delivery was made

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1 Mr Hartshorn's witness statement, paragraph 22-24 inclusive.
2 Exhibit A13.

to the site and that no further work was done on the site. Mr Hartshorn's evidence, supported by reference to his phone account, was that his last conversation with Mr Rendle was on 23 June 2015. Mr Hartshorn's recollection was that, in this conversation, he pressed for further payment.

The Magistrates' Court proceeding

20 Even though the contract had not been expressly terminated by the cabinet maker, Mr Hartshorn instructed the cabinet maker's solicitors to issue a letter of demand on 7 July 2015 claiming $15,530, being the balance remaining to be paid of the whole adjusted contract sum. This demand was made 'for work and labour done and materials supplied'.[3]

21 The developer did not pay the demanded sum of $15,350 and, on 28 July 2015, the cabinet maker initiated a claim in the Magistrates' Court of Victoria at Melbourne seeking $15,350.

22 The proceeding in the Magistrates' Court was issued even though some items such as the bi-fold doors which had been made as a result of a variation to the contract, and the remade refrigerator doors, were still sitting in the cabinet maker's factory. Furthermore, the cabinet maker had not conducted a final walk-through with the developer and attended to minor adjustments and defects rectification in order to put itself in a position where it could demand the final payment.

THE PLEA OF REPUDIATION MADE IN THE HEARING

23 Although repudiation of the contract by the developer, and rescission by the cabinet maker, was not pleaded, counsel for the cabinet maker contended at the conclusion of the cabinet maker's evidence that the effect of issuing the proceeding in the Magistrates' Court was to accept the repudiation of the contract.

24 Because the matter had not been pleaded, I expressly raised with the solicitor for the developer whether he required an adjournment. He responded that the submission did not fit the evidence, and then referred to some items of evidence to justify his point. He confirmed that he did not require an adjournment.

25 In final submissions, the solicitor for the developer contended that I should not take into account the claimed repudiation as it had not been raised in the written pleadings. I do not accept this submission. Although it is regrettable that the claim for repudiation was not articulated in the pleadings, it was raised at the midway point in the hearing, and the developer was given an opportunity to seek an adjournment. It elected not to do so. Importantly, the claim that the contract had been repudiated was made at a time before the developer's director, Mr Rendle, had given his evidence. Furthermore, the developer had ample time to prepare a final submission about the matter, and its solicitor did address the issue in detail

[3] Exhibit R2.

in oral submissions. For these reasons, I find that the developer has not been procedurally disadvantaged by the addition of the claim for repudiation during the course of the hearing.

26 The effect of allowing the cabinet maker to maintain the repudiation claim is that it has a legal basis to claim the whole contract sum. The developer cannot complain of being taken unaware of the sum claimed, as $15,350 is the claim the cabinet maker made in its points of claim when it initiated the proceeding.

REPUDIATION

Requirements for repudiation

27 In order to make out its claim of repudiation, the cabinet maker will have to demonstrate that:

(a) the developer repudiated the contract; and

(b) it accepted the developer's repudiatory conduct and brought the contract to an end.

28 At the hearing it was submitted that the cabinet maker accepted the repudiation, and brought the contract to an end, when it issued proceedings in the Magistrates' Court. It is necessary for me to determine whether repudiation, and acceptance of it, has been made out.

Objective test as to whether repudiation has occurred

29 It is well established that the test of whether a party has repudiated a contract is an objective one. Counsel for the cabinet maker referred me to the recent Victorian Supreme Court case of *Versa-Tile Pty Ltd v 101 Construction Pty Ltd*.[4] In that decision, Ginnane J had to determine whether a Senior Member of the Tribunal had made an error of law when reaching his decision in failing to apply an objective test in determining whether repudiation had occurred. Ginnane J said, at [18] and [19]:

> I am not persuaded that the Senior Member failed to apply an objective test, in determining whether repudiation had occurred. Before embarking on his analysis of the facts, the Senior Member set out the relevant legal test of repudiation in the following passages by reference to authority:
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> 17 In *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*, Deane and Dawson JJ summarised the concept of repudiation as follows:
>
> > ... repudiation turns upon objective acts and omissions, not on uncommunicated intention, and it is sufficient that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other

[4] [2017] VSC 73.

party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

18 Similarly, in *Kane Constructions Pty Ltd v Sopov*, Warren CJ stated:

> Gibbs CJ in *Shevill & Anor v The Builders Licensing Board* likewise observed that a contract may be repudiated where one party renounces their liabilities under it, evincing an intention to no longer be bound by the contract. His Honour further observed that repudiation may also occur when one party demonstrates an intention to fulfil the contract, but in a manner "substantially inconsistent with his [or her] obligations and not in any other way..."
>
> These passages identify the relevant legal test as contained in High Court authority that makes clear that the proper test is an objective one.[5]

Breach of essential term by the developer?

30 At the hearing, the solicitor for the developer argued that in order for the cabinet maker to establish repudiation, it would have to demonstrate that there had been breach of an essential term of the contract. He referred to *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*[6] ('*Koompahtoo*').

31 He went on to say that non-payment of a progress claim was not breach of an essential term of the contract. I accept this proposition. Looking at the contract as a whole, I do not think a single instance of non-payment of a progress claim would justify termination at common law. This is because the contract contains a provision which entitles the cabinet maker, if there is a serious breach of the contract on the part of the developer, to issue a written request that the breach be remedied within 14 days.[7] If the breach is not remedied within that time limit, then the cabinet maker may terminate the agreement by issuing a further written notice. The upshot is that, in the event of non-payment by the developer of a progress payment which has fallen due, the cabinet maker can use this provision against the developer, and in that way elevate a breach of an important but non-essential term into a breach which would justify termination of the contract.

32 However, the developer's solicitor's reference to *Koompahtoo* did not, in my view, do justice to the judgment of the majority. In that decision, the majority, comprising Gleeson CJ, Gummow, Heydon and Crennan JJ, said at [47]:

> For present purposes, there are two relevant circumstances in which a breach of contract by one party may entitle the other to terminate. The first is where the obligation with which there has been failure to

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5 [2017] VSC 73.
6 [2007] HCA 61.
7 General condition 25.

> comply has been agreed by the contracting parties to be essential. Such an obligation is sometimes described as a condition.

33 After referring to a well-known passage in the judgment of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*,[8] the majority went on to say at [49]:

> The second relevant circumstance is where there has been a sufficiently serious breach of a non-essential term.

34 The majority then went on to discuss the English Court of Appeal decision in *Hong Kong Fir Shipping Ltd v Kawasaki Kisen Kaisha Ltd*.[9] The case concerned a stipulation as to seaworthiness in a charter party.

35 The High Court of that case said at [49]:

> The Court of Appeal held that to the accepted distinction between "conditions" and "warranties", that is, between stipulations that were in their nature essential and others, there must be added a distinction, operative within the class of non-essential obligations, between breaches that are significantly serious to justify termination and other breaches.

36 The High Court went on to add, at [50]:

> … *Hong Kong Fir* was decided in 1961 and has long since passed into the mainstream law of contract as understood and practised in Australia.

37 In *Koompahtoo,* the High Court was concerned with an appeal in a case where a party had been held by the trial judge to have grossly departed from a contract and where the innocent party had purported to accept the repudiation of the contract. In deciding the appeal, the majority expressly rested their decision 'not upon the ground of breach of an essential obligation, but upon application of the doctrine respecting intermediate terms'.[10]

38 The upshot is that if I were to find that there had been a serious breach of a non-essential term on the part of the developer, I would be entitled to find there had been a repudiation of the contract by that party.

39 Furthermore, as observed by Gibbs CJ in *Shevill*,[11] a contract can be repudiated by a party renouncing their liabilities under it, and in this way evincing an intention no longer to be bound by it.

Was the contract repudiated by the developer?

40 As a starting point, I note that the contract is clearly at an end. The developer accepts this, but it says the contract was abandoned by the parties, rather than terminated following repudiation.

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8 (1938) 38 SR (NSW) 632 at 641-642.
9 [1962] 2 QB 26.
10 [2007] HCA 61 at [53].
11 *Shevill v Builders Licensing Board* (1982) 149 CLR 620.

41 This not a situation where the parties merely walked away from the contract. At the hearing, evidence was given that Mr Rendle had taken a number of steps to reduce the involvement of the cabinet maker in the project. Some of these steps were clear to the cabinet maker, as the deletion of some packages of work from the cabinet maker's scope were negotiated. These negotiations resulted in the negative variations which have been discussed.

42 But at least one such step taken by Mr Rendle was covert. In March 2015, Mr Rendle unilaterally engaged another contractor, F&J Spiteri Cabinets and Joinery ('Spiteri'), to carry out works which were part of the cabinet maker's scope. I consider that this action evinced an intention not to be bound by the terms of the contract. Although it was an action taken in secret, in the sense that the cabinet maker was not aware of it for some months, it demonstrated that Mr Rendle did not respect that the cabinet maker was entitled to perform the whole of the works left within its contract scope.

43 This was the context in which the parties, between April and June 2015, fell into dispute about payment.

44 As noted, by email dated 11 June 2015 the cabinet maker demanded payment of $12,000, being the balance of a payment of $27,000 which it said had been agreed in the previous week. In that email the cabinet maker expressly linked its refusal to do more work to the failure of the developer to pay the $12,000. A further payment of only $5,000 was made by the developer.

45 Mr Hartshorn gave oral evidence that Mr Rendle had agreed to pay $27,000. When it was put to Mr Rendle in cross-examination that he had made such an agreement, he denied it. He referred several times to the arrangement which had been put in place to the effect that Mr Hartshorn was to come to the site and assess the works with him.

46 I have difficulty in accepting Mr Rendle's denial that he made an agreement with Mr Hartshorn to pay $27,000. Putting aside the fact that Mr Rendle's denial was in direct conflict with Mr Hartshorn's evidence on the point, I note that there is no contemporary email, letter or even text message disputing the cabinet maker's written assertion of 11 June 2015 that such an agreement had been made in the previous week.

47 Furthermore, Mr Rendle agreed that a payment of $15,000 was made on or about 3 June 2015, which is consistent with the assertion made in the email of 11 June 2015 that $15,000 had been paid against the agreed sum of $27,000. Furthermore, Mr Rendle agreed that a further payment of $5,000 was made on or about 16 June 2015. I consider that the making of these two payments was consistent with Mr Rendle having made an agreement in the first week of June to pay $27,000 on the basis of the inspections which had already taken place. These payments are not consistent with Mr Rendle's position that there was no agreement to pay anything. I find that

Mr Rendle did agree with Mr Hartshorn to pay $27,000 on or just before 3 June 2015.

48 As Mr Hartshorn and Mr Rendle had reached an agreement that $27,000 was to be paid, the developer fell under an obligation to pay that sum because of the changed payment terms of the contract requiring the developer to pay amounts agreed between those two individuals. Failure to pay the agreed sum of $27,000 in full constituted a breach of the agreement.

Discussion regarding repudiation

49 I have found above that in June 2015, Mr Rendle reneged on an agreement that the developer would pay the cabinet maker $27,000, and paid only $15,000 and then $5,000 against that liability.

50 I have previously accepted the developer's contention that non-payment of a single progress claim does not constitute a breach of an essential term of the contract. Taken in isolation, the developer's refusal to meet its obligation to pay in full the agreed progress payment of $27,000 would not amount to repudiation of the contract.

51 However, that refusal, when coupled with the earlier act of the developer in engaging Spiteri to carry out part of the cabinet maker's remaining scope of work, was, in my view, sufficient to demonstrate that the developer intended to renounce its obligation to perform the contract in accordance with its terms.

52 The two actions, viewed together objectively, were repudiatory. A finding is justified that Mr Rendle (and therefore the developer), intended to be bound by the terms of the contract only when it suited him. It follows that the cabinet maker was entitled to terminate the contract.

Was the contract terminated by the cabinet maker?

53 In its pleading in the Magistrates' Court complaint, the cabinet maker referred to the contract, the initial contract sum of $188,100, the variations to the contract which had the effect of lowering the contract sum to $152,350, and the total payments made of $137,000, and claimed the balance of the contract sum of $15,350. A reference was also made to the developer's breach of the contract in failing to make payment to the cabinet maker in accordance with the payment terms. I consider that the claim for the balance of the contract sum was consistent only with a claim for damages for breach of contract on the basis that the contract had been repudiated by the developer. For this reason, I find that the repudiation was accepted, and the contract validly terminated by the cabinet maker, following the repudiation by the developer.

54 As I have found that the cabinet maker validly terminated the contract, the cabinet maker is entitled to damages.

Assessment of damages for breach of the contract

55 The cabinet maker is entitled, as a matter of law, to be put in the same position as it would have been had the contract been performed by the developer.

56 The cabinet maker is accordingly entitled to be paid the balance of the contract sum, namely $15,350, less the cost to it of having to complete its part of the bargain.

57 The evidence of Mr Hartshorn was that, at the time his company instituted proceedings, the only work that remained to be done was the fixing of the bi-fold doors and the re-made refrigerator doors and some minor adjustments. He said that the cabinet maker's work was '99% complete'. He said two men in two days would complete the work, and valued this at $2,000.

58 I accept Mr Hartshorn's assessment that the cabinet maker only had work valued at $2,000 to do. I accordingly find that the cabinet maker is entitled to damages for breach of contract of $15,350 less $2,000, namely $13,350.

59 However, before any order is made in relation to the claim, it is necessary to deal with the developer's counterclaim.

The developer's counterclaim

60 I now turn to each item claimed by the developer.

Rectification costs − $3,500

61 Ordinarily, the cost of rectifying defective work would be taken into account in assessing the cost to the cabinet maker of completing the performance of its work for the purposes of assessment of damages.

62 In further and better particulars of its claims dated 21 September 2016 the developer says rectification works consisted of:

(a) cleaning and removing dust, pencil marks and glue from surfaces; and

(b) rectification and completion of works as left by the cabinet maker.

63 Mr Rendle said he was personally involved in cleaning, and that he charged the developer for this. The developer seeks, as part of its damages claim, to recover the amount of the invoice rendered by Mr Rendle for these and other services. The invoice is discussed below.

64 As to the $3,500, Mr Rendle gave evidence that this was the cost of having the alternative cabinet maker Spiteri make four new integrated doors for the refrigerator/freezer unit. Mr Rendle's evidence was that he engaged Spiteri to do this work on or about 20 March 2015, and he referred in support to item 9 in a tax invoice No. 911 issued by Spiteri dated 20 March 2015 in the sum of $14,140. Item 9 was '[r]eplace x4 integrated fridge doors in kitchen'.

Discussion

65 The act of engaging Spiteri in March 2015 to replace the integrated refrigerator doors was an act taken unilaterally by the developer which was not justified at that point by any breach of contract on the part of the cabinet maker. On the contrary, the evidence was that the cabinet maker accepted that the refrigerator doors needed to be replaced, and organised for this work to be done. The replacement doors were sitting in the cabinet maker's factory when the contract was terminated. Accordingly, the developer is not entitled to recover damages in relation to the payment of $3,500 it says it made to Spiteri for the replacement refrigerator/freezer doors.

66 The upshot is that I dismiss the developer's claim for rectification costs, other than the cleaning works which Mr Rendle said he carried out himself. That remaining claim is dealt with below.

Bank interest − $11,000

67 Mr Rendle contends that he incurred bank interest charges of $11,000 as a result of the failure by the cabinet maker to complete the works on time. In support of this claim he tendered bank statements which he said showed the amount of interest debited to his account each month by his bank. When he was asked what the basis of the claim was, he said that he was claiming 4 weeks delay to the project, which he said arose by reason of the need to 'cross over' from the cabinet maker to Spiteri. This claim brings into focus the developer's claim for delay.

The delay claim

68 When the developer's solicitor was asked to identify which 4 weeks of delay were claimed, he answered that they fell before April 2015, which was when the first agents were engaged to sell the property.

69 In his final submissions, the developer's solicitor contended that Mr Rendle's evidence that the cabinet maker had caused a four week delay was not challenged. I disagree.

70 In order to assess the claim for delay, it is necessary to understand the manner in which the project had been structured by the developer. Mr Rendle's evidence was that he had been a builder and developer for many years. He had carried out many projects. He usually used a separate corporate vehicle for each project. The vehicle used for the project at Alma Road was the developer (Citadel Group (Victoria) Pty Ltd). Although the developer was the entity which was in contract with the cabinet maker, it was not the builder. The builder was Mr Rendle. He had entered into a major domestic building contract with the developer.

71 The developer was put on notice during the hearing that, in order to sustain a claim for delay, it would have to demonstrate that the progress of the entire project was delayed by slow completion by the cabinet maker of its works. Mr Rendle gave evidence that the cabinet maker had delayed the

building project, but he offered no detail. The domestic building contract made between the developer and Mr Rendle was not put into evidence, and Mr Rendle did not say what the contractual date for completion was under the domestic building contract.

72 When, during final submissions, the developer's solicitor was asked to indicate why it was said that the cabinet maker had breached the term of the contract regarding completion, he did not identify a specific date by which the cabinet maker had to complete the cabinet works. The developer's solicitor agreed that the contract had stipulated that the completion period was 'TBA', which he suggested meant 'to be agreed'. The upshot is that the contract did not obligate the cabinet maker to complete by any specific date, with the result that, unless a date was otherwise agreed after the contract had been formed, the cabinet maker had a reasonable time in which to complete its works.

73 The developer's solicitor contended that Mr Hartshorn knew that Mr Rendle was to take the property to auction in April and that the end of March had become a contractual completion date. However, he had to concede that there was no evidence that Mr Hartshorn had agreed to this.

74 For these reasons, I find that the cabinet maker had a reasonable time to complete its works, and was under no contractual obligation to complete those works by a particular date. As no attempt was made to demonstrate that the obligation to complete within a reasonable time meant that the works had to be completed by April, the claim for delay must fail.

75 Even if the developer had made its claim for delay on the basis that the cabinet maker had taken more than a reasonable time to complete its work, it would have had to contend with the issue of concurrent delays. Mr Rendle had agreed when giving evidence that, in April, landscaping work was still being carried out. Mr Rendle also agreed that in April the alternative contractor Spiteri was still completing cabinet works. In these circumstances, the developer was unable to demonstrate that it was the cabinet maker, and no other party, who had delayed the units being marketed.

76 I find that the developer has failed to make out its claim for delay. This disposes of the claim for interest of $11,000.

Additional marketing fees incurred due to delay in sales as a result of defective works − $10,000

77 In support of this claim the developer tendered a cheque evidencing payment to Marshall White of $10,000 on 27 April 2015. It was said that this sum was the cost of the marketing program carried out by Marshall White. The argument put was that the benefit of this marketing program was lost because Marshall White did not sell the property, but a new agent named Gary Peer did.

78 There is a fundamental issue with this particular claim, which is that when the developer was asked to demonstrate why the cabinet maker was responsible for the change of agent, no satisfactory answer was given. Mr Rendle said that the developer's relationship with Marshall White came to an end because it became strained as a result of issues which existed regarding the cabinets. Mr Rendle's evidence was that the feedback he received from Marshall White was that there were some difficulties with the cabinet work which meant that the sale had to be postponed.

79 The cabinet maker's counsel objected to this evidence on the basis that it was hearsay. I was prepared to admit the evidence, on the basis that the Tribunal is not bound by the rules of evidence.[12] However, that does not mean I have to attach any weight to it if it lacks credibility.

80 A problem for the developer is that it chose not to tender any evidence in the form of a statutory declaration or affidavit from any person from Marshall White, and certainly did not call any witness from that firm. Accordingly, there was no direct evidence as to what was said to Marshall White by prospective buyers. Furthermore, the cabinet maker was denied the opportunity to cross-examine in relation to any such evidence. In the circumstances, I consider that there is no reliable, let alone compelling, evidence upon which any finding can be made that any issues with the cabinet maker's work caused a postponement of the first sale campaign.

81 During final submissions, a further problem with this particular claim was raised, which was that Mr Rendle had given evidence that by April Spiteri was working on the site. Accordingly, without hearing from prospective purchasers who had been deterred by defects in the cabinets, or hearing from the relevant agent at Marshall White, there was no way of knowing whether the defects complained of were defects in the work of the cabinet maker or in Spiteri's work.

82 As it was not demonstrated that some act or omission of the cabinet maker forced the developer to change agents, the chain of causation leading to the alleged loss was not made out. I dismiss the claim for the loss of $10,000 in marketing expenses paid to Marshall White.

Loss of profit on the sale of unit 1 of $20,000

83 The evidence given by Mr Rendle in relation to this particular claim was that unit one had sold for $35,000 less than Mr Rendle had hoped to achieve. He did not claim the whole that $35,000, and limited the claim to $20,000.

84 In support of the claim the developer tendered a contract of sale which it had entered into with a purchaser on 6 September 2015.[13] The purchase price in the contract was $2 million. Against that purchase price, two other figures appeared, but had been crossed out. One was for $1,900,000. Mr

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12 *Victorian Civil and Administrative Tribunal Act 1998,* s 98(1)(b).

13 Exhibit R 22.

Rendle said that that was the purchaser's first offer. The second was for $2,035,000. Mr Rendle said that that was his counteroffer. He said that the figure of $2 million was reached after negotiations with the purchaser, who he described as 'astute'.

85 This claim for damages against the cabinet maker faces three hurdles. The first is that no breach of contract by the cabinet maker has been established. The second is that there is nothing in the evidence given by Mr Rendle to satisfy me that the reason that a price of $2,035,000 was not achieved had anything to do with the state of the cabinets. The purchaser was not called, nor was any affidavit or statutory declaration from the purchaser tendered

86 A final issue was that no independent expert from the real estate industry was called to give evidence as to what the expected price of the unit might have been on 6 September 2015, and whether that price had been affected by the state of the cabinets constructed by the cabinet maker.

87 For all these reasons I find against the developer in respect of this claim.

Loss of earnings arising from forced delay on commencement of another job − $20,000

88 The developer, in its further and better particulars, said that a month's income had been forgone because the developer could not start work on its next project due to delays in the sale of the Alma Road property because of the cabinet maker. In its further and better particulars of claim, the developer says the loss of earnings resulted from having to attend at the property:

> … on multiple occasions to deal with the defects and associated issues such as extra marketing being necessary. This resulted in a loss of one month of income on the next job that the [developer] was due to attend to but which was delayed in that the [developer] would not commence when required…

89 This particular claim faces several hurdles. In the first place, the developer cannot link a late start on the next project with the cabinet maker because I have found against the developer on its delay claim.

90 Secondly, no evidence was given regarding the nature of the next project, other than the information that it was to be in Poplar Street, Carnegie. In particular, no documents were tendered regarding the project demonstrating its nature, scope and profitability.

91 At the hearing, a third hurdle emerged, when the evidence came out that Mr Rendle typically used a new corporate vehicle for every project. As a result of this evidence, a significant question exists as to whether the developer or another corporate vehicle would have been involved in the next project.

92 For all these reasons, this claim also fails.

Directors fees

93 The final claim made by the developer was for $10,000 in director's fees which were invoiced by Mr Rendle to the developer in respect of a number of attendances. Firstly, he had charged for his time in attending to cleaning and otherwise rectifying defects allegedly caused by the cabinet maker. Secondly, the developer was charged by Mr Rendle for the time he had spent in attending to having himself re-registered as a builder and reinstating his insurance after his registration was cancelled allegedly as a result of judgment being entered against the developer in the Magistrates' Court.

94 The relevant invoice was put in evidence.[14] It was in the sum of $10,000 inclusive of GST. The heading referred to the relevant address in Alma Road. The first category of work claimed was:

> Organise completion of joinery contract at above mention project (sic)
>
> -Re-tender
>
> -On-site meetings
>
> -Supervise refit between inspections
>
> -Cleaning, etc

95 The first point to be made about this part of the invoice is that it covers work that should have been invoiced by the builder as variations under the domestic building contract. I do not think Mr Rendle can justify billing his own development company nearly $100 an hour for these works in his capacity as a director of that company.

96 Another point is that no details of the hours allegedly worked are given. This is particularly significant in the light of the failure of the developer to tender any supporting documents. The claim must fail on this basis.

97 The second category of time claimed in the director's invoice relates to 'get builder's registration suspension (reinstatement process) - Time spent on process to lift suspension'. The particulars given are:

> Time spent dealing with:
>
> - Building Practitioner Board (sic)
> - VMIA
> - Interpacific Insurance Brokers
> - Wilson Pateras Accountants
> - NAB Bank Camberwell

98 A number of points may be made about this category of claim. In the first place, the date of the invoice was 8 February 2016. This was some five months after the sale of Unit 1. The inference to be drawn is that the invoice was prepared other than in the normal course of business.

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[14] Exhibit R 23.

99 Another difficulty with the second limb of the claim is causation. The basis of the claim is that Mr Rendle had lost his building registration. The argument put by the developer is that when the cabinet maker issued in the Magistrates' Court it breached the contract. Entering judgment by default was a continuing breach. As a direct result of the breaches, Mr Rendle's building insurance was allegedly cancelled. As a direct result of that the developer suffered a loss.

100 Putting aside the underlying proposition that there has been breach of contract by reason of the fact that proceedings were issued in the Magistrates' Court, which I refer to below, the claim fails because the chain of causation is breached. Even if it is assumed, for the purposes of argument, that a breach of contract has led to Mr Rendle losing his building registration, and that that event potentially caused him loss, no particulars of that loss were given. How the fact that Mr Rendle lost his registration might affect the developer was not demonstrated.

101 It would also be very difficult for the developer to demonstrate that it had suffered any loss on the next project because of Mr Rendle's loss of insurance, because Mr Rendle's evidence was that he usually used a new corporate entity for every project. No evidence was given as to how the developer had suffered loss by reason of Mr Rendle's loss of insurance.

102 Furthermore, to establish this claim, the developer must establish that initiating the Magistrates' Court proceeding constituted a breach of contract. This argument was based on two sub-arguments. The first of these was that in claiming the full contract price of $15,350 the cabinet maker was acting in breach of the contract, because s 42 of the *Domestic Building Contracts Act 1995* prohibited a party claiming the full contract until works have been completed.

103 I do not think that this claim is made out, because of my finding that the claim in the Magistrates' Court was based on repudiation. It was accepted at the hearing by the developer's solicitor that a claim for damages for repudiation of contract would not be defeated by the prohibition contained in s 42.

104 The alternative argument was that the correct forum for a claim under the *Domestic Building Contracts Act 1995* for a *domestic building dispute* was the Tribunal, not the Magistrates' Court. I do not think this argument is correct. Section 57 of the *Domestic Building Contracts Act 1995* provides:

> **57 VCAT to be chiefly responsible for resolving domestic building disputes**
>
> (1) This section applies if a person starts any action arising wholly or predominantly from a domestic building dispute in the Supreme Court, the County Court or the Magistrates' Court.
>
> (2) The Court must stay any such action on the application of a party to the action if—

(a) the action could be heard by VCAT under this Subdivision; and

(b) the Court has not heard any oral evidence concerning the dispute itself.

(3) This section does not apply to any matter dismissed by VCAT under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998*.

(4) If an action is stayed under this section, any party to the action may apply to VCAT for an order with respect to the dispute on which the action was based.

(5) If a person applies to VCAT under subsection (4) VCAT must notify the Court and on such notification the Court must dismiss the action.

(6) Subsection (5) does not apply if VCAT refers the matter to the Court under section 77(3) of the *Victorian Civil and Administrative Tribunal Act 1998*.

105 Clearly, a party to a domestic building contract can start a proceeding in a Court. However, the Court must stay the action on the application of the party if the action could be heard by the Tribunal, and if the Court has not heard any oral evidence. I emphasise that the stay must be applied for. It is not automatic. This means that both the Courts in Victoria and Tribunal have concurrent jurisdiction, and merely issuing in the Magistrates' Court is therefore not a breach of the contract.

106 For all these reasons, I find against the developer in respect of the second category of time claimed in the director's invoice.

CONCLUSION

107 As I have found that each of the developer's counterclaims has failed, I am in a position where I can make an order on the cabinet makers claim. The appropriate order to make is that the developer must pay to the cabinet maker the sum $13,350.

108 The cabinet maker has claimed interest. The cabinet maker has also claimed costs on an indemnity basis.

109 These issues, together with the issue of reimbursement of fees under s 115B of the *Victorian Civil Administrative and Tribunal Act 1998*, will be reserved.

MEMBER C EDQUIST