

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1326/2018

### CATCHWORDS

Domestic Building Contracts Act 1995 – claim by cabinet maker for supply and installation of cabinetry – whether agreement a major domestic building contract – whether the Applicant a sub-contractor – First Respondent a registered builder - Respondents carrying on business as builders in partnership - cabinetry required for house owned by the Second Respondent – house described as display home - Respondents contracting in the name of the partnership – Applicant a sub-contractor – purported termination of contract by Respondents before work completed – Applicant excluded from site – work incomplete – no defects proven - damages claim by Applicant – assessment – claim for interest Domestic Building Contracts Act 1995 - s.53 – damages in the nature of interest

<b>APPLICANT</b>	Plyboard Distributors Pty Ltd (ACN 099 040 865)
<b>FIRST RESPONDENT</b>	Vasilios Apostolopoulos
<b>SECOND RESPONDENT</b>	Angela Apostolopoulos
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	18-19 March 2019
<b>DATE OF ORDER</b>	17 April 2019
<b>CITATION</b>	Plyboard Distributors Pty Ltd v Apostolopoulos (Building and Property) [2019] VCAT 573

### ORDERS

1. Order that the Respondents pay to the Applicant the sum of \$52,750.72, plus the issuing fee of \$679.20, making together the sum of \$53,429.92.
2. The counterclaim is dismissed.

### SENIOR MEMBER R. WALKER

#### APPEARANCES:

For the Applicant Mr A. Sterck, Director

For the Respondents In person

### REASONS

**The parties**

1. The Applicant is a cabinet maker. The first Respondent is a registered domestic builder, unlimited. The Respondents have carried on a construction business under the name “Cavallo Homes” for a number of years although they have recently cancelled the registration of that business name.
2. The Applicant claims \$48,959.61 plus interest for joinery work carried out for the Respondents at a house in Vermont South (“the House”). The House was described by the Respondents in their counterclaim as their display home but it is also the place where they live.
3. The Respondents deny that they are indebted to the Applicant in any sum. They say that the cabinetry is defective and incomplete and claim damages which they say exceed any sum due to the Applicant.

### **The hearing**

4. The matter came before me for hearing on 18 March 2019 with one day allocated.
5. The parties were unrepresented. For the Applicant, I heard evidence from its directors, Mr and Mrs Sterck, from its cabinetmaker, Mr Fletcher and from an employee, Ms Murray. In addition, a statutory declaration was produced by a designer formerly employed by the Applicant, Ms Jessica Davies (“Jessica”).
6. For the Respondents I heard from the Respondents themselves and from a carpenter who does carpentry work for them in their business, Mr Nixon.
7. The hearing proceeded over two full days and I informed the parties that I would provide a written decision.

### **The witnesses**

8. Mr Sterck gave a measured account of what he said took place. His evidence was supported by the documents that he produced and also by the evidence of his wife, Mr Fletcher and Ms Murray. Mr Fletcher was the cabinet maker who installed the cabinetry. He gave evidence as to the installation and also the preparation of templates for the stone bench tops that the Respondents sourced from another contractor.
9. The evidence of the Respondents was less measured and at times, Mr Apostolopoulos, became quite emotional. He was clearly upset at what he said were shortcomings in the Applicant’s work and the respects in which, he alleged, it did not accord with what he claimed he and the second Respondent had wanted. I had to tell him several times to focus upon the facts of the case rather than upon his personal feelings and the assumptions that he appeared to have made. On occasions, he would not give a straight answer to a question. For example, when I asked him if he had signed the plans for the cabinetry that the Applicants relied upon he said that the signature on the plans did not look like his. Since Ms Murray swore that she saw him sign the plans I am satisfied that it is his signature.

10. The Respondents' denials about the numerous changes that they made to the works are not credible, particularly having regard to the emails. I am satisfied that there were many such changes. Also, Mr Apostolopoulos suggested that only one day was allowed for installation whereas it is clear that installation took place over a number of days.
11. Consequently, I preferred the evidence of the Applicant's witnesses to that of the two Respondents.
12. Mr Nixon's evidence was uncontroversial and related to observations that he made of the work after the Applicant had been excluded from the site. I see no reason to disbelieve his evidence.

### **The agreement**

13. In March or April 2017, the Respondents approached the Applicant with a view to designing, manufacturing and installing cabinetry in the House. The Applicant had previously carried out cabinetry work for them on another project without incident and to their apparent satisfaction.
14. The Applicant provides a design service to its customers free of charge and the Respondents initially dealt with its employee designer, Jessica, in the development of the initial design for the cabinetry. According to Jessica's statutory declaration, her designs for the cabinetry that the Respondents wanted were done, and quoted for, by the time she went on maternity leave in May 2017. Her role was then taken by another designer, Claudia Deyulia ("Claudia"). The Respondents then asked the Applicant to put everything on hold because the overall design of the House was to be substantially changed.
15. In July 2017 the Respondents provided to the Applicant the new plans for the House. Since these were a different design, Claudia had to start re-designing the cabinetry from the beginning.
16. The new design then went through a number of changes and Claudia became very frustrated with what she considered to be conflicting instructions from the two Respondents and indecision as to what they wanted. According to the Respondents' Points of Defence, there were six meetings with Claudia, each lasting four hours. The Respondents then informed Mr Sterck that they were not happy with Claudia and they proposed to engage Jessica directly to re-design the cabinetry for them.
17. According to the statutory declaration from Jessica, the Respondents contacted her in October 2017. She said that she agreed to do the design work for them and attempted to do so but then withdrew her services. She said:

"Within the time I spent working on this project, the amount of indecision and changes that were made no progress had been made to get the job into production. The continued back-and-forth and phone calls late at night took its toll on my personal life therefore my resignation to Angela and Bill. Throughout the process Angela and Bill continued to show their lack of respect and

professionalism to me as a designer and Plywood Distributors and their process”.

18. After Jessica withdrew from the project, Mr Sterck offered to develop the designs that had been done on the Applicant’s computer in an effort to arrive at some plans that were acceptable to the Respondents. According to Mr Sterck, the plans then went through a “huge” number of changes requiring substantial redesign of the cabinetry. A quotation was given in October and an initial deposit of \$5,000.00 was paid to secure some components that would be required, that were going to be in short supply. Thereafter, the Respondents made further changes to the design.
19. Finally, on 8 or 9 November the parties met at Officeworks and, using a computer programme, went through the design in two dimensions and also in three dimensions. After some further changes the final design for the kitchen was then agreed upon. Plans for the kitchen were then printed and, on 10 November 2017, Mr Apostolopoulos came into the Applicant’s office, signed the plans on the first page and paid a further deposit of \$10,000.00. The agreed price for the kitchen was \$52,240.00.
20. Plans for the laundry and bathrooms were agreed upon on 16 November 2017. The price for the laundry was \$12,864.00 and the price of the bathrooms was \$7,552.00. A further deposit of \$5,300.00 was paid, of which \$3,800.00 was for the laundry and \$1,500.00 was for the bathrooms.

#### **Manufacture and installation**

21. The Respondents had informed Mr Sterck that they needed to move into the House before Christmas because they were living in rented accommodation which they would need to vacate by then. As a consequence, once the plans were agreed upon and the deposits were paid, the project proceeded quickly.
22. The manufacturer of the cabinets started on 16 November 2017 and, according to Mr Fletcher, the installation of the carcasses started on the 27<sup>th</sup> or 28<sup>th</sup> November 2017. The cabinetry benchtops were to be stone, and stonework was also required for some of the panels and to clad some of the surrounding walls. This was not to be supplied or installed by the Applicant but by a stonemason engaged directly by the Respondents. Mr Fletcher made templates for the bench tops for use by the Respondents’ stonemason. Substrate for the stone work was excluded from the Applicant’s scope of works.
23. By 22 December 2017, the cabinetry was largely completed, although there were still some items to attend to and adjustments to be made. At this time, the Respondents were moving into the House and it was agreed that the Applicant would leave the site and finish off the remaining matters after Christmas.
24. In early January, Mr Sterck rang Mr Apostolopoulos to arrange a time to return to finish the work. Mr Apostolopoulos told him first, that he would

speak to him later, and then said that he (Mr Apostolopoulos) was going on holiday.

### **The 24 January meeting**

25. A meeting was arranged at the House on 24 January 2018. The Respondent's description of what occurred on that day in their Points of Defence is very emotive. Their oral evidence was considerably more muted.
26. According to Mr Sterck, when he arrived at the House he found the front door open and assumed that it had been left open for him, there being no doorbell or knocker. He said that he entered the House calling out : "Hello". He acknowledged that in doing so he appeared to have given the second Respondent a fright.
27. The Respondent's account in their points of defence is as follows:

"The Applicant thought it would be prudent to simply open the front door of our home, whilst Angela and our children were inside living in the said home, the Applicant is fortunate that we did not call the police and have him charged with trespass for entering private property, as it was clearly labelled, totally oblivious to what he had just done, Angela yelled at the Applicant in fear, 'get out of the House, how dare you invade our privacy and enter unannounced', this is not the action of a reasonable, logical and professional business person. Angela was seriously contemplating an intervention order against the Applicant."

28. That is an extraordinary thing to say, when one considers that:
  - (a) Mr Sterck had arrived for a previously arranged meeting at the House at that time;
  - (b) there was no door bell or knocker; and
  - (c) the Respondents had left the door open.

However, the overblown nature of this statement is consistent with much of Mr Apostolopoulos' evidence.

29. It is agreed that, in the ensuing meeting, they went through a list of complaints about the work which are all dealt with below, some being defects and some being incomplete work. In regard to some of the items, Mr Sterck said that they would be attended to in the course of completing the job. In regard to others he said that they were not the Applicant's responsibility.
30. I do not accept the Respondents' suggestion, made in their Points of Defence, that Mr Sterck did not listen to them or take their concerns seriously or that he laughed at them, making snide remarks. I prefer Mr Sterck's evidence that he accepted responsibility for some matters, denied responsibility for others and agreed that the Applicant would attend to all matters for which it was responsible when it returned to the site.
31. According to Mrs Apostolopoulos, Mr Sterck sought some payment during the meeting, and said to them: "Can you give me something?" whereupon Mr Apostolopoulos said that the Respondents would think about that and get someone to look at the issues.

32. Mr Sterck said that he did ask if some payment could be made but not all of the contract price, because the job had not been completed.
33. I accept Mr Sterck's evidence that it was arranged that Mr Fletcher would come back and complete the installation after Mr Apostolopoulos had returned from a further holiday on Phillip Island.
34. Mr Sterck said that when he attempted to contact Mr Apostolopoulos afterwards, he avoided his calls.

### **Subsequent matters**

35. On 10 February 2018, Mr Apostolopoulos sent the following email to Mr Sterck:

“Tony, thank you for your call the other day.

To provide you an update, as we expressed to you in person, we are not satisfied with the works conducted.

We appreciate your offer to return, rectify and complete your works however we have unfortunately lost all confidence in the existing trades and will be sourcing alternatives in order to complete and also rectify the shortfalls.

To assist with this process, we have commissioned a private building inspector who is preparing a report of all the defects and costs associated, joinery included, he holds a qualification in dispute resolution, he will direct the appropriate course of action, please be patient, we'll have an update to you as soon as the report becomes available.

Regards, Bill.”

36. It would seem from this email that the Respondents' professed dissatisfaction extended to other tradesmen as well as the Applicant. The report that was foreshadowed in the email was never sent to the Applicant and Mr Sterck said that he never heard from the Respondents again.
37. On 4 March 2018 the Respondents cancelled the registration of their business name, Cavallo homes.

### **Recovery proceedings**

38. The Applicant brought a complaint to Domestic Building Dispute Resolution Victoria seeking payment for what it had done. The conciliator's certificate states that he made five attempts to contact the Respondents by telephone, email and SMS message on various dates but received no response. A certificate was granted to the Applicant on the ground that there was no reasonable likelihood of settlement of the dispute by conciliation.
39. On 7 August 2018, this proceeding was issued by the Applicant. On 20 September 2018, a copy of the application was sent by registered mail to the Respondents, addressed to them at the House. It was received back marked “RTS”.

40. Correspondence sent by the Tribunal to each of the Respondents, also addressed to them at the House, was similarly returned. In each case, the name and address has been blacked out and the words: "Please return to sender. No letterbox" are written on the envelope. When I asked Mr Apostolopoulos about this, he said that his carpenter, Mr Nixon, had not installed a letterbox in front of the House. It seems remarkable that someone conducting a business would arrange their affairs in such a manner.
41. The Respondents did not attend the first directions hearing on 18 October 2018. The Senior Member conducting the hearing made the following note in the order:
- "The Tribunal telephoned both Respondents on the numbers provided in the application. The first Respondent did not answer and his number did not have a message. Two messages were left for the second Respondent advising her that she and the first Respondent are Respondents to this proceeding and suggesting that she telephone the customer service number, [number given], to seek copies of the application and supporting documents."

Various directions were then given and the matter was fixed for hearing on 6 December 2018 with two hours allocated.

42. A copy of this order was emailed to the second Respondent on 18 October 2018.
43. On 7 November 2018 the first Respondent sent an email requesting an adjournment of the hearing, claiming that they first received correspondence informing them of the proceeding on 24 October 2018 and their solicitor was obtaining an expert's report.
44. On 27 November 2018 the tribunal granted the request for an adjournment, re-fixing the hearing for 18 March 2019, and gave various directions.

### **The respective claims**

45. In response to the Applicant's claim, the Respondents dispute the contract price, they allege that the work was defective and incomplete and that the cost of rectification will exceed any amount due to the Applicant.
46. In particular, they complained in their counterclaim that the Applicant:
- (a) obtained more than the 5% deposit permitted for a major domestic building contract pursuant to the provisions of the *Domestic Building Contracts Act 1995* ("the Act");
  - (b) failed to provide services performed to an acceptable level or with proper care and skill;
  - (c) failed to supply all of the cabinetry;
  - (d) failed to deliver by the date set for completion, being 30 November 2017; and
  - (e) was not registered with Victorian Building Authority for carrying out works worth more than \$10,000.00.

47. I will deal first with the alleged breaches of the Act, then the contract price, then the allegation of delay and finally, the claims for allegedly defective workmanship which is linked in turn with the alleged grounds upon which the Respondents purported to terminate the contract.

**Was the contract a major domestic building contract?**

48. The Respondents allege that the contract for the cabinetry was a major domestic building contract and complain about various alleged breaches of the Act.
49. The House was first described to me by the Respondents as a display home for their building business, Cavallo Homes, and that is how they also described it in their counterclaim. It is clear from the evidence that it was also intended by them to be their home as well.
50. Mr Apostolopoulos is a registered domestic builder, unlimited. In their Points of Defence, the Respondents stated:
- “We personally have over 30 years’ experience and have built and renovated some amazing Vogue homes that have been showcased and admired by industry professionals...”
51. Mr Sterck said that Mr Apostolopoulos said that he was a registered builder and a member of the Housing Industry Association and approached him, not as a private individual but as Cavallo Homes. He said that the Applicant undertook the work as a subcontractor of Cavallo Homes. It had previously done a job for Cavallo Homes.
52. All of the emails passing between the Respondents and the Applicant were in the name of their building business, Cavallo Homes. The contract was negotiated and entered into by the Respondents in the name of Cavallo Homes.
53. The quotations for the cabinetry that the Respondents accepted were addressed to Cavallo Homes. Mr Sterck said that the Applicant was not a builder but a cabinet maker “working under” the first Respondent’s license.
54. The land upon which the House has been constructed is registered in the name of the second Respondent. The building permit with respect to the construction of the House was not produced but there is no evidence that any other builder was involved in the construction of the House apart from the first Respondent.
55. Mr Sterck can have no knowledge of the private financial arrangements the Respondents had between themselves but I find on the balance of probabilities that the Respondents, as partners in the building business Cavallo Homes, constructed the House for the second Respondent who was the owner of the land.
56. In addition to that finding, the Respondents, by representing that they were entering into the agreement as Cavallo Homes, have held themselves out to be the builders of the House. The Applicant has contracted with them in reliance upon that representation and so the Respondents are now estopped



from saying that they were private individuals building a House for the second Respondent without any intervening builder.

57. Finally, Mr Sterck produced a screen shot of the kitchen in the House that is displayed on the Nikpol website – Nikpol being the cabinetry product used – describing the builder as Cavallo Homes.
58. By s.3 of the Act, the term “domestic building contract” does not include a contract between a builder and a subcontractor. In this instance, the builder was the partnership, Cavallo Homes, and the owner was the second Respondent.

### **The contract price**

59. The documents produced by Mr Sterck support his evidence as to the contract price of the cabinetry for the kitchen, laundry and the two bathrooms. Mr Apostolopoulos produced a document showing a figure exactly \$10,000 less for the kitchen cabinetry. Mrs Sterck said that the Applicant had generated that document to reflect the deduction of the \$10,000 deposit paid by the Respondents. I accept the Applicant’s evidence as to the contract prices.

### **Failing to supply all the cabinetry**

60. Mr Apostolopoulos said that, “in the final hours”, Mr Sterck told him that the Applicant would not do their wardrobes, bookcase and entertaining cabinetry, linen cupboards or office, leaving them in “...an absolutely terrible predicament”.
61. Mr Sterck said that the additional cabinetry had not been decided upon by the Respondents and there was no quotation or design for it.
62. Since there was no accepted quotation or design for this cabinetry, this claim is baseless

### **The date for completion**

63. The Respondents alleged that the work was to be completed by 30 November 2017. Mr Sterck denied that and said that, although he said they would do their best, they could not do anything until the design was agreed upon and a quotation was accepted, which did not happen until 10 November. I prefer Mr Sterck’s evidence.
64. It would seem likely from the photographs that the House, which was under construction, was not ready for cabinetry at any earlier date.
65. I am satisfied that the Applicant manufactured and supplied the cabinetry without any delay on its part. Considering that the final designs and prices for the cabinetry were not signed off by the Respondents until 10 November (for the kitchen) and 16 November (for the bathrooms and laundry), due to the Respondents’ numerous changes of mind, the degree of completion reached before Christmas 2017 was a remarkable achievement by the Applicant.

### **Termination**

66. The Respondents' substantive defence to the Applicant's claim is the allegation that the work was incomplete and defective. In so far as it was incomplete, it is clear that the Respondents excluded the Applicant from the House before it was able to complete the work. For them to be able to complain now of incomplete work it is necessary for them to establish that their purported termination was lawful.
67. There was no term of the contract allowing early termination by the Respondents and so they must prove an entitlement to terminate conferred by law. In general:
- “A right to terminate a contract for breach arises by law if the breach constitutes repudiation, or breach of an essential term, or causes loss of the substantial benefit of the contract.”
- (Cheshire & Fifoot “Law of Contract” 9<sup>th</sup> Australian Edition para 21.1)
68. In order to establish repudiation, it must be shown that the other party has shown an intention no longer to be bound by the contract or indicated that he will only fulfil it in a manner substantially inconsistent with his obligations (see Cheshire & Fifoot *Law of Contract* 9<sup>th</sup> Australian Edition para 21.12 and the cases there cited).
69. In *Shevill v. Builder's Licensing Board* [1982] HCA 47 Wilson J said (at para.8):
- “Repudiation of a contract is a serious matter and is not to be lightly found or inferred: *Ross T. Smyth & Co., Ltd. v. T.D. Bailey, Son & Co.* (1940) 3 A11 ER 60, at p 71. In considering it, one must look to all the circumstances of the case to see whether the conduct "amounts to a renunciation, to an absolute refusal to perform the contract": *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App Cas 434, at p 439.”
70. The conduct said to amount to repudiation must be assessed objectively. In *Laurinda Pty Ltd v. Capalaba Park Shopping Centre* [1958] HCA 23, Brennan J. said (at para 14):
- “Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way.”
71. The Respondents' justification for terminating the contract was that the work was defective.

### **The alleged defects and incomplete work**

72. The Respondents produced a report they obtained from a Building Inspector, Mr Fitzmaurice, dated 20 December 2018. His comments are based upon the plans that he was given and what he was told by the

Respondents. The Respondents also produced a report from a Mr Zoanetti, who is described in the report as a Building Inspector. His comments are similar to those of Mr Fitzmaurice.

73. According to Mr Sterck, when he contacted Mt Fitzmaurice he discovered that the plans the Respondents had given him were of an earlier design, prepared a month earlier, which had different dimensions. Mr Sterck said that he was unable to contact Mr Zoanetti, whose report contains no contact details, and so it is not known what plans he was shown.
74. It is also now known what either expert was told by the Respondents, because no instructions were in evidence. However, from their comments it is clear that each of them assumed for the purpose of his assessment that what he saw was a finished job, whereas in fact it was a job still in the course of installation.
75. Neither Mr Fitzmaurice nor Mr Zoanetti was called to give evidence and so their evidence could not be tested.
76. I will deal with each of the issues raised by the Respondents in the order set out in the list that was produced at the meeting of 24 January 2018.

#### **Glue on edges of panels**

77. The Respondents wanted to use ready-manufactured panels of a particular brand for much of the cabinetry. Mr Sterck suggested to the Respondents that they should go to the supplier's showroom and inspect the product because he was concerned that the glue used in their manufacture shows on the edges of the panels. In her statutory declaration, Jessica said that she advised the Respondents not to use the product. They nevertheless decided to proceed with it.
78. The Respondents now complain about the presence of the glue residue that the Applicant had warned them would be on the panels. They said that the Applicant was responsible for the glue because it had installed the panels.
79. The complaint does not relate to a fault in installation but rather, to a characteristic of the product itself. Having required the use of this product knowing about this particular characteristic the Respondents cannot now complain about it.

#### **Island bench**

80. There is a very large and heavy island bench partially clad in stone with a stone bench top. The Respondents complain that it is 20 mm out of parallel with the adjacent bank of cabinetry. Mr Fitzmaurice said there was a discrepancy of 18mm in the length of the island bench, making it out of square.
81. Both Mr Sterck and Mr Fletcher said that the island bench was quite square, parallel and level when they installed it. Mr Sterck said that they had measured it the night before the stone was installed by the Respondents' stonemason and it was perfect.

82. Mr Sterck said that the Respondents' carpenter had moved the bench after the Applicant had left the site. He produced a text message dated 3 December 2017 from Mr Apostolopoulos to say that their carpenter had needed to level the bench.
83. Both Mr Sterck and Mr Fletcher impressed me as being reliable witnesses and since it is acknowledged that the Respondent's own carpenter interfered with the bench after the Applicant left the site I cannot find that its present condition or position is due to poor workmanship on the part of the Applicant.

### **LED lights**

84. The Respondents complain that the Applicant failed to rout a groove along the top and bottom panels of much of the cabinetry to allow for the installation of strip lighting. They say that to install it now will require the removal and disposal of the existing cabinets.
85. The plans or the quotations that the Respondents accepted make no provision for the routing of the cabinetry in this way or for the installation of strip lighting. Some emails were produced by the Respondents where Mr Apostolopoulos asked for the LED lighting after the contract had been entered into and it is clear from these that this is something that the Respondents decided they wanted. However no amendment was made to the plans and no price was agreed for the additional work. In the context of the numerous changes the Respondents had made it appears that this was overlooked. Mr Sterck said that he would have been happy to do it on the bottoms of the cabinets but not on the tops, which he said was not practicable.
86. Since it was not within the Applicant's scope of works I cannot find any breach by the Applicant for failing to provide it.

### **Adjustment of joinery**

87. The Respondents complained about the lack of adjustment on joinery and in particular, said that some of the doors were difficult to operate. The Second Respondent said that she could not pull them out.
88. Mr Sterck acknowledged that adjustments were required in regard to the joinery and that they had not had time to do that before Christmas because the Respondents were moving in. Covers also had to be provided for many screw holes. I accept that it was agreed in December that the Applicant would do any necessary adjustments and attend to the remaining matters when it returned to the site in January.

### **The end panel on the cabinetry**

89. The Respondents complained that the end panel adjacent to the refrigerator was black when it should have been a colour called "Feelwood Tobacco".

90. Mr Sterck pointed out that, on Sheet 2 of the kitchen cabinetry plans, there is a black line marked together with a notation to the effect that everything to the left of the line is to be black whereas everything to the right of the line is to be Feelwood Tobacco.
91. The panel in question is to the left of the line and so it is the correct colour.

### **The refrigerator space**

92. The Respondents complained that the space allocated for their second refrigerator is insufficient because, although it fits within the space, it is not possible to fully open the left-hand door because, when that door is opened, it hits the wall and a louvre glass window.
93. This part of the kitchen was redesigned a number of times. According to an earlier design, the space was wider and incorporated a narrow open cupboard between the refrigerator and the wall and window in question intended for the storage of wine. The Respondents deleted the cupboard and the size of the opening was reduced.
94. Normally, where an appliance is to be fitted within cabinetry, the cabinet maker is provided with specifications of the appliance to avoid a problem such as this. However, this was an existing refrigerator already owned by the Respondents and no specifications for it were provided. In particular, the Applicant was not told that it had a left-hand opening door.
95. The space the Applicant has created is of the dimensions shown on the plans that the Respondents agreed to and so there is no breach of contract.

### **Drawer under the dishwasher**

96. Mr Sterck acknowledged that the drawer does not operate correctly. The cabinet had to be modified because the wall of the House was out of square. The hardware to operate the modified drawer had to be re-ordered and it was obtained before Christmas, after the Applicant left the site. Mr Fletcher said that it was sitting on his desk and was able to be fitted.
97. Since the job was not completed and the Applicant was excluded from the site, it had no opportunity to finish the drawer. Mr Sterck said that it would have been completed when they returned in January.

### **The ensuite**

98. There are four mirrored doors on the vanity in the ensuite to the master bedroom. Mr Sterck said that Mr Apostolopoulos told him not to fit the mirrors and that he would do that himself. The Applicant deducted the cost of the mirrors, which Mr Sterck said was \$675. Immediately below those doors there is an open shelf. A side panel on each side of the vanity extends vertically down to the bottom of the open shelf so that there are two panel edges on each end of the open shelf, one being the edge of the end of the open shelf and the other being the edge of the vertical panel. Mr Apostolopoulos complains that the Applicant should have extended the open shelf so that there would be only one panel edge on each end.

99. After the contract had been entered into, Mr Apostolopoulos sent an email to Mr Sterck with a sketch showing a black edge right round the upper part of the cabinet. That would indicate that the leading edge of those panels was to be black and that is the way it was built. Mr Apostolopoulos says that he intended to convey that the open shelf should go all the way out to and incorporate the end panel. That does not appear clearly in sketch that he sent.
100. Mr Sterck said that Mr Apostolopoulos also requested that the material from which the open shelf was to be constructed be changed from Formica to Feelwood and that, although not on the plans, the Applicant made a replacement carcass that was installed at no additional charge.
101. Finally, the Respondents complain that there should have been routing for LED lighting around the cabinet. That is not shown on the signed drawing.
102. Apart from the change of material from Formica to Feelwood that the Applicant made at the Respondents' request, the drawing that was signed by Mr Apostolopoulos shows the cabinet as it has been constructed and installed.

#### **The kickboard under the sink**

103. The kickboard under the sink has been damaged. Mr Sterck said that it was not damaged when the Applicant left the site but he nevertheless would have replaced it when they came back in January 2018.
104. There were other trades on the site in that area of the House. In the absence of some evidence to the effect that this was damaged by the Applicant I cannot find that it was responsible.

#### **Shelf or Drawer under the sink**

105. There was a shelf or drawer to be fitted under the sink around the pipework that was there. Mr Sterck said that the Applicant had fitted it but that someone else had taken it out. He said that it would have been replaced when the Applicant returned in January.

#### **Handle for the refrigerator door**

106. Included in the contract was an integrated panel for the door of the main refrigerator. It required a handle and there was a particular handle specified in the quotation which was to be fitted on the panel. After the quotation was accepted it was found that the particular handle that had been specified was no longer manufactured. A replacement handle was ordered by the Applicant and had to come from overseas. It had not arrived by the time the Applicant left the site in December.
107. Mr Sterck acknowledged that the handle needs to be fitted but the Applicant could not do so because it was excluded from the site.

#### **Door handles**

108. The Respondents complain that door handles were not supplied. Handles were not included in the quotation. According to Mr Sterck, whose

evidence I accept, this was because the Respondents couldn't make up their minds about what they wanted.

### **Additional items**

109. Further items were raised in the experts' reports and by Mr Nixon and the Respondents during the hearing. They were as follows.

### **The cracked benchtop**

110. The marble benchtop adjacent to the cut out for the cook top has cracked between the cut out and the front edge. The Owners claim that the Applicant is responsible because it failed to provide a sufficient substrate to support the bench top. They also allege that the template that Mr Fletcher made for the benchtop was too narrow, with the result that the marble did not reach to the rear of the carcass and so was insufficiently supported.

111. Mr Nixon gave evidence that there was no continuous substrate provided to the carcass directly below the benchtop. Mr Fletcher said that there were strips of timber under each side of the bench which provided support. He also said that the template was the correct size and produced photographs which seemed to demonstrate that, although it was difficult to be certain. The template was not produced and I am unable to find that it was the wrong size.

112. The quotation for the kitchen states:

“BENCHTOPS, SUBSTRATES NOT INCLUDED IN QUOTATION”

113. Since substrates were not included, the provision of substrates was the responsibility of the Respondents. If a better support was required apart from the strips of timber described by Mr Fletcher, the Respondents should have installed it before installing the benchtop.

114. It was also suggested that the crack was caused by the Applicant's workmen when the rangehood was installed. Mr Sterck said that he assisted the Respondents' tradesmen when they installed the rangehood but did not notice any crack at the time and none was drawn to his attention. It is not established precisely when or how the crack occurred.

### **The “soft-close” doors**

115. Some cupboards have soft close hinges, which are hinges that cause the doors to close slowly, and also “push-open” rods, where one pushes the cupboard door and a spring-loaded rod causes it to open. The Respondents claimed that one operates against the other.

116. Mr Sterck and Mr Fletcher denied that this was a defect and said that any difficulty in operation was a matter of adjustment. They said that, if the Respondents wished, they could change the “soft-close” hinges to ordinary hinges, which would be cheaper.

### **Kitchen drawer**

117. Some of the drawers, which were imported from Germany, have glass sides. When the components arrived in Melbourne it was found that one

side of one drawer was broken. A letter from the supplier confirmed that it was broken in transit.

118. A replacement side was ordered but was not received until January. Mr Sterck acknowledged that it needs to be fitted but the Applicant has been prevented from doing so.

### **The slider cabinet**

119. The Respondents complain that this does not open easily. Mr Sterck said that it was operating properly when the Applicant left the site before Christmas. Any adjustment that might have been required could have been made when the Applicant returned to the site but it did not get that opportunity.

### **The main bathroom vanity**

120. The bottom edges of the cupboard doors in the ensuite cabinet overlapped the bottom shelf to allow for opening by what is called a “finger pull” arrangement. Mr Apostolopoulos said that the overlap is excessive. The plans show the overlap of a similar cabinet in the bathroom to be 38 mm but no overlap is shown for the cabinet in the ensuite to the master bedroom.

### **The pantry shelves**

121. The shelves in the pantry were to be either scalloped or straight. Mr Sterck said that the Respondents were going to consider what they wanted and let him know of they wanted the shelves that were installed replaced.

### **Repudiation**

122. The Applicant was entitled to the opportunity to finish its work and, in the process, to address any shortcomings. It had never presented the installation as having been completed.
123. I find that the Applicant was not in breach of the contract and, as a consequence, there was no valid ground for the Respondents to refuse to allow the Applicant to return to the House and complete its work. The Applicant is entitled to treat the contract as discharged and seek damages for breach.

### **Assessment of Damages**

124. In *Tabcorp Holdings v. Bowen* [2009] 253 ALR 1 the High Court said (at p.6):

“The “ruling principle”... confirmed in this Court on numerous occasions..., with respect to damages at common law for breach of Contract is that stated by Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365):

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."



125. By prematurely bringing the contract to an end, the Respondents have prevented the Applicant from completing the work and earning the contract price. The measure of damages is therefore the balance of the contract price, less appropriate credits for any saving to the Applicant from not having to complete the work.

126. The balance of the contract price was \$52,356.00, calculated as follows:

Price for kitchen	\$52,240.00	
Price for laundry	\$12,864.00	
Price for bathroom	<u>\$ 7,522.00</u>	\$72,656.00
less total of deposits paid	<u>\$20,300.00</u>	
Balance of contract price	<u>\$52,356.00</u>	

127. The Applicant acknowledged having made the following savings from not having had to complete the work:

Goods purchased not supplied:	
The kitchen	\$3,520.00
The laundry	\$ 784.00
The bathrooms	<u>\$ 675.00</u>
	<u>\$4,979.00</u>

128. I think some allowance should also be made for the fact that the Applicant has been saved the labour cost of returning to finish the job. It is the cost saved that should be allowed, not the charge out rate, which would have been considerably higher.

129. There is no evidence of what this cost would have been but I have to do the best I can to assess damages. Allowing two days for a tradesman at \$40.00 per hour would be \$640.00. That brings the total cost saving to \$5,619.00. When this is deducted from the balance of the contract price, the loss is found to be \$46,737.00.

### **The Respondents' cost of completion**

130. The Respondents have produced quotations from other cabinet makers for the cost of removing all of the Applicant's cabinetry and replacing it. That is far in excess of anything that would have been justified to address the complaints that were made but, in any case, since there was no breach of contract by the Applicant they have no entitlement to any damages.

### **Interest**

131. The Applicant claims interest pursuant to its Terms and Conditions. Since the work was not completed, the contract price did not become payable and the amount to be awarded on the claim is unliquidated damages. Consequently, the only interest that can be allowed is damages in the nature of interest.

132. In this regard, s.53 of the Act provides (where relevant) as follows:

“(1) VCAT may make any order it considers fair to resolve a domestic [building](#) dispute.

(2) Without limiting this power, VCAT may do one or more of the following—

.....

(b) order the payment of a sum of money—

.....

(ii) by way of damages (including exemplary damages and damages in the nature of interest);

.....

(3) In awarding damages in the nature of interest, VCAT may base the amount awarded on the interest rate fixed from time to time under [section 2](#) of the [Penalty Interest Rates Act 1983](#) or on any lesser rate it thinks appropriate.”

133. As the opening words of the section state, I can only award of damages in the nature of interest where it is fair to do so in the circumstances.

134. In *Quinlan v Sinclair* [2006] VCAT 1063, I said (at para 11):

“11. It cannot be “*fair*” to make any order that is not in accordance with the evidence and established legal principles. The Tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party’s breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an award of such damages is “*fair*” must be determined in each case.”

135. In the present case, by excluding the Applicant from the site and thereby preventing it from earning the contract price, the Respondents have deprived the Applicant of what it would have otherwise have received, had the contract not been broken. It is therefore fair to allow it damages in the nature of interest to compensate it for the loss of use of the money for the period from which it might have been expected to have received it until the date of judgment.

136. For an entitlement to the price to have arisen, the work would need to have been completed, an invoice rendered and some time in the normal course for payment to be made. As to the rate of interest, I see no reason to depart from the rate suggested by the section.

137. Interest will therefore be allowed from 28 February 2018 until 18 April 2019 at the rate of 10%, which is the rate fixed under [s.2](#) of the [Penalty Interest Rates Act 1983](#). I calculate that as being \$5,373.72.

## Conclusion

138. As a consequence, damages for the loss suffered by the Applicant are assessed at \$47,377.00 plus damages in the nature of interest of \$5,373.72, which amounts to \$52,750.72.

139. The Applicant also seeks to recover its issuing fee paid to the Tribunal of \$679.20. That is allowable under s.115B of the *Victorian Civil, and Administrative Act* 1998 and, by s,105C, the successful party, in this case the Applicant, is entitled to an order for the fee unless the Tribunal otherwise orders.

**Orders to be made**

140. There will be an order that the Respondents pay to the Applicant the sum of \$52,750.72, plus the issuing fee of \$679.20, making together the sum of \$53,429.92.

141. The counterclaim will be dismissed.

**SENIOR MEMBER R. WALKER**