

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1712/2015

**CATCHWORDS**

Contract for construction and delivery of kitchen cabinets; termination of contract by applicants (owners) based on alleged breach by respondent (contractor); contention that contract was subject to *Domestic Building Contracts Act 1995* rejected; ss54, 55, 60, 61, 62, of *Australian Consumer Law* considered; implication of term regarding completion within a reasonable time; finding of breach of contract by respondent; assessment of damages including general damages for substantial inconvenience and loss of amenity.

<b>FIRST APPLICANT</b>	Mr Scott Robert West
<b>SECOND APPLICANT</b>	Miss Annemaree Elizabeth Coombes
<b>RESPONDENT</b>	Ms Sheena Fode t/as S&D Cabinets (ABN 638 784 78496)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member C Edquist
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	10 August, 16 August, 30 August and 27 October 2016
<b>DATE FOR FILING OF SUBMISSIONS BY BOTH PARTIES</b>	10 November 2016
<b>DATE OF RECEIPT OF FURTHER SUBMISSION FROM APPLICANTS</b>	14 November 2016
<b>DATE OF ORDER</b>	28 February 2017
<b>CITATION</b>	West v Fode (Building and Property) [2017] VCAT 271

**ORDER**

- 1 Under s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') the Tribunal declares that the clients were entitled to terminate the contract on 12 December 2015.

- 2 The respondent, Ms Fode, must pay the applicants damages in the sum of \$14,126.
- 3 The respondent's counterclaim is dismissed.
- 4 Costs are reserved, with liberty to apply within 60 days. **The principal registrar is directed to refer any application for costs to Member Edquist** so that orders can be made as to how the application is to be dealt with.
- 5 The issue of reimbursement of the filing fee and hearing fees paid by the applicants under s 115B of the VCAT Act is reserved, with liberty to apply within 60 days. **The principal registrar is directed to refer any application for reimbursement to Member Edquist** so that orders can be made as to how the application is to be dealt with.

## MEMBER C EDQUIST

### APPEARANCES:

For First Applicant:	In person
For Second Applicant:	In person
For Respondent:	In person

## REASONS

### INTRODUCTION

- 1 The applicants ('the clients') own a property in Willow Avenue, Cheltenham. In 2014, for the purposes of a renovation of their house, they engaged in discussions with the respondent Ms Sheena Fode t/as S&D Cabinets ('Ms Fode') concerning the construction of kitchen cabinets. They were to design the cabinets, and would specify many of the components. They assert they were looking for 'a high standard of quality' and 'tight tolerances'. A contract was formed late in 2014, and construction began in May 2015. The clients became frustrated with their contractor's slow progress and ultimately terminated the contract on Saturday 12 December 2015. At the heart of the case is the gap between the level of performance which the clients believed they were entitled to expect from their cabinet maker, and the timeliness and standard of workmanship actually delivered.

### The clients' case

- 2 The clients' case in essence is that the contractor breached the contract by failing to complete or supply the cabinets in 'a reasonable and realistic timeframe'<sup>1</sup> and that 'the kitchen has not been made to drawings and specifications provided' and 'hardware [was] not as specified'.<sup>2</sup>
- 3 The clients in their application seek damages including the return of the deposit they had paid of \$12,700, plus \$2,000 in respect of 'lost time, aggravation' and the added cost in having another contractor complete the kitchen. In addition, they seek to recover the cost of their microwave of \$817.13 and their rangehood of \$1,439 on the basis these items were damaged by Ms Fode. These items total \$16,956.13, but the clients state their total claim to be \$17,200.
- 4 At the hearing, it became clear that the clients also seek to recover the cost of an expert's report of \$1,755. In addition, they seek to recover all the fees they have paid to the Tribunal. By the end of the hearing, these fees included not only the application fee of \$575.30, but also daily hearing fees of \$683.00, a total of \$1,258.30.
- 5 In summary, the clients are seeking damages of \$17,200 plus costs of \$1,755 and reimbursement of fees of \$1,258.30, a total of \$20,213.30.

### Ms Fode's case

- 6 Ms Fode defended the proceeding, but made no counterclaim until the opening of the hearing, when she announced that she wished to bring a counterclaim for the balance of the contract sum. The clients objected to this, but I stood the matter down to enable Ms Fode to file a counterclaim. The claim and counterclaim were then heard together.

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<sup>1</sup> Applicants' Amended Points of Claim filed 15 February 2016.

<sup>2</sup> Applicants' Submissions filed 10 November 2016.

- 7 Ms Fode acknowledges that the cabinets were not complete on 3 December 2015 when the clients sent her an ultimatum about completion, but says that this was not her fault. In brief, she says that it was impossible to complete the works to the standard expected by the clients. Furthermore, she contends that after the demand to complete was received, she undertook to deliver the ‘oven and hot plate run’ by 11 December 2015 (later adjusted to 12 December), and to deliver the completed kitchen by 18 December 2015. However, the contract was terminated on 12 December 2015, before this deadline. She contends the termination was unlawful.
- 8 In her counterclaim Ms Fode seeks damages of \$9,545.86. Ms Fode particularised her claim in a document filed during the hearing. The \$9,545.86 comprised the unpaid balance of the initial contract sum of \$12,632, plus a variation of \$707.86 in respect of the supply of Zenolite panels, less deductions in respect of stone (the bench top), a Magic Corner (to be fitted in a corner cupboard) and under sink bins. These agreed deletions from the scope of works resulted in respective deductions of \$2,744, \$700 and \$350. Ms Fode also seeks reimbursement of the filing fee paid on the counterclaim of \$292.70 and the hearing fees paid by her.

#### **A BRIEF HISTORY OF THE PROCEEDING**

- 9 The clients promptly initiated this proceeding, on 29 December 2015. The parties participated in a mediation and signed terms of settlement on 17 February 2016. The basis of the settlement was that Ms Fode would supply and deliver the kitchen in accordance with agreed drawings, as amended. Ms Fode was then to appoint Phillip Naughton ‘to assess the works and give a report on any defective or incomplete work’ and Ms Fode would then rectify the defective or incomplete work based on Mr Naughton’s report. The settlement encapsulated in the terms of settlement collapsed, because after the clients received Mr Naughton’s report they wrote to the Tribunal asserting that Ms Fode had breached the terms.
- 10 At a hearing on 21 April 2016, the Tribunal reinstated the proceeding and listed the proceeding for a directions hearing at which the Tribunal was to consider preliminary questions, including whether Mr Naughton had assessed the cabinetry works as required by the terms of settlement. The parties were ordered to exchange contentions about that. Ms Fode was ordered to give the clients and their expert access to inspect the cabinets. Mr Peter Limburg inspected the cabinets on the clients’ behalf on 28 April 2016, and prepared a report.
- 11 On 26 May 2016 the Tribunal found that Mr Naughton’s report was not conducted in accordance with the terms of settlement. The report was set aside. The proceeding was listed for hearing.
- 12 The matter came on for hearing before me on 10 August 2016, and continued on 16 August, 30 August and 27 October 2016. At the conclusion of the hearing on 27 October 2016, the parties were given leave to send to the Tribunal and to the other party written submissions. Both parties did so.

- 13 Mr West and Miss Coombes appeared in person on each day of the hearing. Both gave evidence. They relied on Mr Limburg's report.
- 14 Ms Fode also appeared in person on each day. She gave evidence herself, and called as an expert witness Mr Clinton Buckwell. She also called as an expert her former husband and former business partner Mr Don Fode. Ms Fode called Mr Kevin Laws, of Halifax Vogel, the firm that supplied the HC Zenolite panels, and Mr Vince Paterno of Lincoln Sentry, the suppliers of the Blum products used in the kitchen. Ms Fode's daughter Nicole gave evidence on the last day, limited to comments on some of the Lincoln Sentry invoices.

### **EXCLUDED EVIDENCE**

- 15 Ms Fode in her final submission referred to a site visit conducted by a Blum representative, Mr Matthew Devanny. She had tried to introduce evidence about this site visit on the last day of the hearing, but said that she did not intend to call Mr Devanny. He would thus not be available for cross-examination. I was not prepared to admit her evidence about what he had said, as she had had ample time to call witnesses. And as the order made at the conclusion of the hearing granting leave to the parties to file written submissions expressly stated that the submissions may address the evidence which had been given, but may *not* introduce new evidence, no regard has been had to Ms Fode's reference to Mr Devanny's alleged comments.

### **THE ISSUES**

- 16 The headline issue in the case is whether the contract was terminated legally by the clients. If it was, then they are entitled to damages from Ms Fode. If it was not, then the clients are liable to their contractor.
- 17 In order to assess the clients' claim that the contract was breached by Ms Fode, it is necessary to identify the relevant terms of the contract. The relevant enquiries relate to the time for performance of the contract, and the required standards of workmanship and materials, and the manner of performance. Pursuing these inquiries involves an assessment of whether there were express terms of the contract, and whether there were implied terms. There is a related enquiry as to whether any statutory guarantees are relevant.
- 18 The clients insist that the contract contains terms implied by s 8 of the *Domestic Building Contracts Act 1995* ('the DBC Act'). They press an alternative claim under *the Australian Consumer Law* ('the ACL').<sup>3</sup> Ms Fode disputes that the DBC Act applies, but accepts that the ACL does.

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<sup>3</sup> Under s 7 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) the *Australian Consumer Law* text consists of:

- (a) Schedule 2 to the *Competition and Consumer Act 2010* of the Commonwealth; and
- (b) the regulations under s 139G of that Act.

## FORMATION OF THE CONTRACT

- 19 The contract formation process took a number of weeks, starting in August 2014. One of the issues was that neither party put forward a written set of terms and conditions, there was initially only a hand sketched design prepared by Mr West, and there was no written specification listing the proprietary components to be used. Ultimately, the final design, based on Mr West's sketched design and further instructions from the clients, was partially reflected in CAD drawings dated 27 October 2014 produced by Ms Fode and her employees, and was agreed on. A contract price of \$25,332 inclusive of GST was also fixed. A deposit was paid on 8 December 2014, and clearly from this point the parties were in contract.

### Evidence regarding formation of the contract

- 20 The parties agree that the clients met with Ms Fode and her foreman Mr Rick Burns on Saturday 2 August 2014 to discuss the project and product samples.
- 21 Mr West deposed that he and Miss Coombes told Ms Fode at this meeting that they expected a high standard of quality. Miss Coombes said it was made clear that the work had to be within tight tolerances, and if that could not be achieved, Ms Fode should not take the job on. Ms Fode disputes these statements.
- 22 On Wednesday 6 August 2014, Ms Fode provided her first quotation. The price proposed was \$24,497 inclusive of GST, and covered the following scope of work:
- To remove old kitchen and dispose
  - To deliver and install new kitchen with black carcasses, choice of tesrol doors,
  - Caesar stone bench tops Jet Black, Intevo black blum servo drive to all drawers and overhead with 6 servo drive drawers in pantry
  - As per plans provided and discussions [sic]
- 23 In the following weeks, emails were exchanged in which the scope of works, and the price, were adjusted accordingly. Significantly, it was agreed that the clients would remove their old kitchen and fit the new one. The contract became one for construction and delivery, but not for installation.
- 24 On 11 November 2014, Miss Coombes on behalf of the clients, sent a long email to Ms Fode seeking to clarify a number of issues. They included the contract price, as she was concerned no allowance had been made for the deletion of 'rip out' from the scope of works. She also queried whether Tesrol-Zenolite panels had been allowed for around the window, and whether an allowance had been made for lighting. She noted the colour of the carcass was not shown, and that the type of Blum drawers being used had not been noted. She observed that the Hafele 'magic corner' and the Blum under sink bins had to be included. Miss Coombes also asked about the start and completion dates. Significantly, in my view, quality was not mentioned.

- 25 On 25 November 2014, Miss Coombes sent an email to Ms Fode expressing her concern that several emails had gone unanswered, and telephone calls had not been returned, and accusing the contractor of unprofessionalism. On the same day Ms Fode apologised for the delay, but noted she had been sick. She denied being unprofessional. She confirmed her willingness to be involved in the project. Miss Coombes, on 26 November 2015, confirmed her concerns about lack of communication, and she noted “[o]ur email on the 11th November needs to be addressed in full, before we can even consider moving forward with S&D Cabinets”.
- 26 Miss Coombes emailed again on 28 November 2014 referring to the email of 11 November 2014. She confirmed the need to ensure that the matters outstanding were addressed and reflected in the revised invoice. She also emphasised the need to establish a start and completion date. It is to be noted that, as with the email of 11 November 2014, quality of workmanship was not mentioned.
- 27 Ms Fode responded by agreeing to send a revised invoice. A revised quotation was sent on 2 December 2014, receipt of which was acknowledged by Miss Coombes on that day. Acceptance of the invoice was evidenced by the payment of a deposit of \$10,000 on 8 December 2014. A further \$2,700 was sent on 9 December 2014, bringing the total deposit paid by the clients to \$12,700.
- 28 The original invoice was not put into evidence, but the invoice was issued again on 6 February 2015 acknowledging the deposits paid. This document indicated the agreed contract price was \$25,772. The clients queried this price on 11 February 2015, on the basis that it did not reflect an agreed reduction of \$440 to reflect that the ‘rip out’ had been excluded from the contract. They contended that the correct contract price was \$25,332. Ms Fode accepted this, and issued an amended quotation showing the deposit received of \$12,700, and confirming the contract price at \$25,332 inclusive of GST.

## **TERMS OF THE CONTRACT**

- 29 The essential terms of a contract of the type in question are the contract price (referred to above), the scope of works, the time for performance, and the standard to which the work is to be performed.

### **Scope of work**

- 30 The primary description of the scope of work can be found in the amended invoice issued by Ms Fode after 11 February 2015. The works were described as follows:

To supply deliver new kitchen with black carcasses (egger Black u999) Tesrol stylelite doors (carbon). Caesar stone bench tops (jet Black). Blum servo drive to all areas to all drawers & all overhead cupboards. Blum drawers to be intivo black with black glass sides to all pot drawers. Revision of six additional drawers to pantry unit making 12 drawers in total to pantries. Under cabinet lighting under either side of range hood metal extrusion sample has been pick up for your sight. Tesrol zenolite hc 4mm panel was not in our quotation but am happy to obtain a price for you.

Magic corner is to be fitted to corner cupboard and hafele under sink bin fitted to sink cabinet. Sub straight and Template will be supplied for stone mason. [sic]

- 31 At the hearing, it became clear that this was not a complete description of the works contracted for. Mr West had prepared a 5 page dimensioned hand drawn set of designs for the kitchen showing its layout. From this sketch, and with the benefit of instructions from the clients, Ms Fode's team had produced CAD drawings. The first set of 3 drawings was dated 17 October 2014. They were reviewed by the clients and revised by the contractor, and reissued on 27 October 2014. The parties agreed that the scope of work was substantially determined when they signed off on the second set of CAD drawings. The upshot is that although the drawings were not referred to in the receipt that acknowledged the deposit paid and stated the contract price correctly, which was ultimately issued in February 2015, they were clearly incorporated into the contract.

### **Start and completion dates**

- 32 Miss Coombes, in her emails of 11 November and 28 November 2014, noted the importance of agreeing a starting date and a completion date. It appears that no specific dates were agreed before the contract was formed. As the contract contained no express term regarding the time to complete, the parties are subject to any term regarding completion implied by the common law or by statute.
- 33 The common law will imply into a contract for performance of work, where no time for performance is stated, a term that the contractor will perform the required work within a reasonable time, provided certain circumstances exist.

### **Requirements for the implication of a term into a contract**

- 34 A leading case on the application of terms into a contract is the 1977 decision of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*<sup>4</sup> in which the majority said:

[F]or a term to be implied, the following conditions (which may overlap) must be satisfied:

- 1 it must be reasonable and equitable;
  - 2 it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
  - 3 it must be so obvious that "it goes without saying";
  - 4 it must be capable of clear expression;
  - 5 it must not contradict any express term of the contract.
- 35 The High Court of Australia has repeatedly adopted these criteria.<sup>5</sup> They are accordingly the principles to be borne in mind in assessing whether a term is to be implied into the cabinet contract regarding the time for completion.

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<sup>4</sup> [1977] UKPC 13, (1977) 180 CLR 266.



- 36 In the present case, there can be no doubt that it is reasonable and equitable that a term regarding the time for completion should be implied into the contract. The clients expressly asked for a start date and for a completion date to be stated. Ms Fode agreed that the contract was not open ended, although she disagreed with the clients as to what the construction period was.
- 37 I consider that an implied term regarding time for completion was necessary to give business efficacy to the contract. From the clients' point of view, the need for completion of the kitchen was both obvious and pressing. They had demolished their existing kitchen in preparation for the installation of a new kitchen. As they said in their amended points of claim, without a kitchen they had no oven, no stove and no sink. It follows that from their point of view, the delivery of a kitchen at a completely indefinite date in the future was of no use to them.
- 38 Looking at the issue from Ms Fode's point of view, she was well aware from her discussions with the clients at the outset that they were seeking to have the kitchen built in conjunction with the renovation of their house. The interconnection between the construction of the kitchen and the clients' renovation project was acknowledged by her when she stated in evidence that the construction of the kitchen could not get underway until the final measurements had been taken after the new floor for the kitchen had been laid down.
- 39 The term to be implied is capable of clear expression. The kitchen cabinets were to be completed 'within a reasonable time'. Admittedly, this expression does not connote a date certain, but it is not meaningless either. Ms Fode did not have an infinite amount of time in which to complete the job. She was not entitled to complete it merely at her own convenience.
- 40 For all the reasons that I consider that the implication of the term was required to give business efficacy to the contract, I also consider that the contractual requirement to complete the cabinets within a reasonable time was so obvious that it went 'without saying'.
- 41 The final criterion for the implication of a term into a contract identified by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* is met precisely because the implied obligation to complete within a reasonable time fills a gap in the contract. The clients had repeatedly sought a definite construction timeframe, but none had been agreed by the time the formation of the contract was concluded.

### **Findings as to implied term**

- 42 For these reasons I find that the contract was subject to a term implied as a matter of law that the contract works were to be completed within a reasonable time.

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<sup>5</sup> See *Secured Income Real Estate v St Martin's Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596 and *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982)149 CLR 337.

43 I find further that the term was a fundamental one. As noted, the clients made it clear prior to the formation of the contract that they sought a clear timeframe for the construction of the kitchen. Its completion was critical to them. The upshot is that, as a matter of law, the clients were entitled to terminate the contract once the contractor breached the term.

### **What is a reasonable time for completion?**

44 In assessing what a reasonable time for the completion of the kitchen cabinets might be, it is appropriate to have regard to such evidence as exists regarding the parties' respective expectations. The clients referred to a 'delivery note' issued by Ms Fode on 28 December 2014 which recited the scope of work in terms identical to those set out in the accepted quotation. This document said this about delivery:

Not sure when tesrol are back from Christmas break but will be approx. 2 to 3 weeks after this date. (To be confirmed) [sic]

45 Ms Fode, in the hearing, gave evidence that the proposed construction time was 6-8 weeks after the final measurement had taken place. There is clearly a large discrepancy between that estimate, and that indicated by the delivery note. An explanation of sorts appears in Ms Fode's response to the clients' amended points of claim, in which she says:

An estimated 2-3 week timeframe for the Testrol acrylic was provided, as stated in the letter dated 28/12/2014. As mentioned the timeframe had to be confirmed, pending availability from supplier.<sup>6</sup>

46 When questioned at the hearing, Ms Fode agreed that allowing for the Christmas shutdown, a time frame of 6-8 weeks indicated delivery would be at the end of the first week in March. Early in the hearing, the clients appeared to accept that delivery on or about 8 March 2015 reflected their expectations, but in their final submissions they disputed this, and maintained they expected completion at an earlier point.

47 As the evidence came out during the hearing, it became clear that the date that the supplier Tesrol returned from holidays after Christmas was not an appropriate starting date for the works. At the hearing, Ms Fode gave evidence that the construction of the cabinets could not get underway until detailed measurements were taken at the clients' house, with the new kitchen floor down. The importance of this was that the floor had been taken up, and had not been replaced when Ms Fode made visits to the clients' house prior to 25 November 2014.<sup>7</sup> Ms Fode deposed that Mr Burns went to the clients' residence several times to take measurements. Mr Burns gave consistent evidence.

### **Findings regarding time for completion**

48 The clients did not dispute that the works could not start until final measurements had been taken. I accordingly find that the starting date should be

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<sup>6</sup> Ms Fode's response to the Amended Points of Claim, paragraph 2c.

<sup>7</sup> This is evident from Ms Fode's email to the clients dated 25 November 2014.

fixed as the time that final measurements were taken. Identifying that date is addressed below.

- 49 Furthermore, adopting the most generous interpretation of the time frame suggested by Ms Fode, I find that a reasonable period in which to construct the kitchen cabinets was eight weeks from the date that final measurements were taken by the contractor of the space for the new kitchen in the clients' house.

### **Adjustments to the construction period as a result of acts or omissions of the clients**

- 50 As a matter of law, this reasonable construction period was subject to adjustment in circumstances where the progress of the work was delayed by certain circumstances. Whether Ms Fode would have been entitled to an extension of time in which to construct the kitchen cabinets by reason of every delay beyond her control is a matter which may be debated. However, it is beyond doubt that at common law she was entitled to an extension of the construction period where the works were delayed by an act or omission of the clients, by reason of the so called 'prevention principle' identified by the Courts in cases such as *Peak Constructions (Liverpool) Ltd v McKinney Foundation Ltd*,<sup>8</sup> a decision of the Court of Appeal in England.
- 51 The application of this principle underpins a large part of the dispute about delay between the clients and Ms Fode.

### **Standard of work**

- 52 As to the standard to which the works were to be constructed, the parties have strongly opposed views. On the one hand, Mr West was adamant that he expected a 'perfect' job. He asserted this on the opening day of the hearing, and repeated it in final submissions. He saw nothing unreasonable in this, and said that he delivered perfection in his own job. The clients' position is that this expectation was incorporated into the contract.
- 53 As noted, the clients say that the high level of workmanship expected was discussed at the first meeting in August. This is rejected by Ms Fode. She deposed that the clients' very high expectations regarding the quality of the work only became apparent during the construction phase, after the contract had been formed. She said that the contract was subject to 'industry standards', and added that if a higher standard was to apply, she would not have taken the job on.
- 54 During the first day of the hearing, when the absence of any reference in the emails to a higher than usual standard of care was raised by me, Ms Coombes conceded that the higher standard which was sought had not been put in writing, but had been made clear verbally. She added that in any event, the 'statutory standard' had not been met.
- 55 However, on the second day of the hearing, Ms Fode conceded that very tight tolerances had been reflected in the agreed drawings, and that her draughtsman

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8 (1970) 1 BLR 111.

'Roger' had set out some concerns in notes on the plans. Ms Fode said that Roger had advised her not to take the job on because there were 'no tolerances', and the clients' standards 'couldn't be achieved'.

- 56 Mr West disputed that he had asked for 'zero' tolerances, but confirmed that he expected 'tight tolerances'. He deposed: "I expected accuracy. Something I haven't got."
- 57 In these circumstances, I find that there were express terms of the contract relating to tolerances, as reflected in the plans. I also find that, apart from these specific directions, there were no express requirements that Ms Fode perform to a standard of workmanship higher than the industry standard. In particular, I find that there was no contractual obligation on Ms Fode to perform 'perfect' work.
- 58 It follows that the standard of workmanship that the clients were entitled to expect under the contract – save for where tolerances were explicitly set out in the approved plans – was the standard ordinarily to be implied into a contract of this nature, either by the common law or under statute. This brings us to the question of whether the contract was subject to the warranties implied by s 8 of the DBC Act or the consumer guarantees created by the ACL.

#### **DOES THE *DOMESTIC BUILDING CONTRACTS ACT 1995* APPLY TO THE CONTRACT?**

- 59 The clients contend that as the contract was for the construction of kitchen cabinets, the work was *domestic building work* for the purposes of the DBC Act. Furthermore, they assert that as the contract sum was more than \$5,000, the contract ought to have been a major domestic contract for the purposes of that Act. They also argue that Ms Fode had to be registered as a domestic builder.
- 60 The clients base their submissions on the application of the DBC Act on advice they say they have received from the Victorian Building Authority. They do not base their contentions on any analysis of the relevant provisions of the Act.
- 61 In her written submissions, Ms Fode referred to an opinion expressed by the 'Victorian Building Association' regarding the application of the DBC Act to the off-site manufacture and delivery of kitchen cabinets. The clients justifiably objected to this, on the basis that this was new evidence, and was therefore outside the permitted scope of the written submissions.
- 62 I am not influenced by the opinion of the Victorian Building Authority quoted by either party. Neither party called a witness from that organisation, and there was accordingly no opportunity to learn who had given an opinion, what their expertise was, what they had been asked to opine on, and what information they had been given. The fact that two diametrically opposed views were attributed to the VBA about the application of the DBC Act highlights how important an examination of these issues would have been.
- 63 The issue of the applicability of the DBC Act in the proceeding is to be determined by a consideration of the relevant provisions of the legislation.

64 In the present case the parties agree that the scope of the work included the construction by Ms Fode of the kitchen cabinets in her factory, and their delivery to the clients' house. The contract did not include installation of the cabinets. Mr West was to undertake the installation himself.

### **Section 5 of the *Domestic Building Contracts Act***

65 Section 5 of the DBC Act defines work to which the Act applies as follows:

- (1) This Act applies to the following work—
  - (a) the erection or construction of a home, including—
    - (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and
    - (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;
  - (b) the renovation, alteration, extension, improvement or repair of a home;
  - (c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;
  - (d) the demolition or removal of a home;
  - (e) any work associated with the construction or erection of a building—
    - (i) on land that is zoned for residential purposes under a planning scheme under the **Planning and Environment Act 1987**; and
    - (ii) in respect of which a building permit is required under the **Building Act 1993**;
  - (f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);
  - (g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);
  - (h) any work that the regulations state is building work for the purposes of this Act.
- (2) A reference to a home in subsection (1) includes a reference to any part of a home.

66 I consider that the construction of kitchen cabinets in a factory is not of itself work involved in the erection or construction of a home, simply because the

work is being carried out remotely from the home. I accordingly find that subs 5(1)(a) does not apply.

- 67 Subsection 5(1)(b) warrants close examination, because the kitchen cabinets were clearly being constructed for the ultimate purpose of a renovation, alteration, extension, improvement or repair of a home. However, I consider that the work of constructing cabinets in a factory – where the intention is for the cabinets to be delivered to, but *not* installed in, the home – gives the contract its essential characteristic. It is a contract for the construction of a set of cabinets suitable for installation in a domestic kitchen, but it is not a contract for ‘the renovation, alteration, extension, improvement or repair of a home’. It is therefore not a contract falling within subs 5(1)(b).
- 68 I consider that subs 5(1)(c) is not engaged as it is concerned with landscaping and other outside works carried out in conjunction with the renovation on a home. Subsection 5(1)(d) does not apply as it is concerned with the demolition or removal of a home. Subsection 5(1)(e) relates to work associated with the construction or erection of a building, and so it does not apply. Subsection 5(1)(f) is involved with site work, and is clearly not applicable. Subsection 5(1)(g) is concerned with the preparation of plans and specifications for the carrying out of work referred to in subs 5(1)(a)-(f), and so it cannot apply. Subsection 5(1)(h) refers to any work that the regulations state is building work for the purposes of the Act. Reference to the *Domestic Building Contracts Regulations 2007* indicates that there is no work specified as building work for the purposes of the Act, and accordingly that subsection is also inapplicable.

### **Finding as to the applicability of the DBC Act**

- 69 The upshot is that I find that the construction of the cabinets in Ms Fode’s factory is not work covered by the DBC Act. In making this finding, I acknowledge that my finding may well have been different had the contract called for the cabinets to be installed in the clients’ home, because the process of installation may well have been considered to be renovation, extension or improvement of the home.

### **DOES THE AUSTRALIAN CONSUMER LAW APPLY?**

- 70 The ACL applies as a law of Victoria.<sup>9</sup> The contract between the clients on one part and Ms Fode on the other is a contract between a purchaser and a supplier for the provision of goods and services. Accordingly, the dispute between them is a consumer and trader dispute as defined in s 182(1) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (‘the ACLFT Act’). The Tribunal has jurisdiction to determine the dispute under s 184(1) of that Act.

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<sup>9</sup> As provided in s 7 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) the *Australian Consumer Law* text is found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and in the regulations made under s 139G of that Act. The *Australian Consumer Law* text applies as a law of the State of Victoria pursuant to s 8(1)(a) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

71 As the contract had a value of under \$40,000, each of the clients is a consumer within the meaning of that term given in s 3 of the ACL. Moreover, if the contract is characterised as a contract for the purchase of goods, the relevant goods, namely kitchen cabinets, are goods which are inherently of a kind acquired for personal, domestic or household use or consumption. If the contract is characterised as a contract for the purchase of services, the relevant services, being the construction of kitchen cabinets, are also of a kind acquired for personal, domestic or household use or consumption. For these reasons, the definition of consumer in s 3 is enlivened. The clients are therefore potentially entitled to the protection available in respect of consumer transactions in the form of guarantees created under Division 1 of Part 3-2 of the ACL.

### **Warranties relevant to the supply of services in s 60, s 61 and s 62 of the ACL**

72 The clients contend that the contract can be characterised as a contract for the supply of services, with the result that s 60, s 61 and s 62 of the ACL are engaged.

73 Section 60 says:

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

74 Section 61 provides a guarantee to fitness for a particular purpose, which mirrors the guarantee as to fitness for disclosed purpose of goods created by s 55.

75 Section 62 creates a guarantee relating to time for performance, in these terms:

If:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and
- (b) the time within which the services are to be supplied:
  - (i) is not fixed by the contract for the supply of the services; or
  - (ii) is not to be determined in a manner agreed to by the consumer and supplier;

there is a guarantee that the services will be supplied within a reasonable time.

76 I have considered the clients' contention that Ms Fode's conduct is subject to the ACL guarantees governing a contract for the supply of services. I do not accept it.

77 The starting point for any discussion of the issue must be the definition of *services* contained in s 2(1) of the ACL. *Services* are there defined to include:

- (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
- (b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

- (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or
- (ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
- (iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
- (iv) a contract of insurance; or
- (v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
- (vi) any contract for or in relation to the lending of money;

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

- 78 Of the sub-definitions of *services* contained in s 2(1)(b) of the ACL, I consider the only potentially relevant one is that in s 2(1)(b)(i). The other sub-definitions are by their terms obviously not applicable. Thus, the relevant enquiry is whether Ms Fode's was providing rights, benefits, privileges or facilities under a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods.
- 79 In the present case Ms Fode must have undertaken a series of activities including purchasing raw materials and specialist components for installation in the cabinets, creating CAD drawings from the clients' instructions, and then either personally or by her employees cutting, fitting and fastening materials, and placing and fastening components to create the kitchen cabinets. The end result of Ms Fode's endeavours is, in my view, a set of products or goods.
- 80 Ms Fode's work is not to be equated with, say, the services of an architect who carries out design services. Those design services ultimately may result in the construction of a building, but the building process will be undertaken by another party. The designer's services are not services which of themselves create products or goods.
- 81 I do not think that the fact that Ms Fode produced CAD drawings based on the clients' design documents and oral instructions alters the characterisation of her work. I am satisfied, on the evidence, that the dimensions, layout and appearance of the kitchen cabinets, including their colour, were all determined by the clients, not by Ms Fode. She was to construct the kitchen cabinets to the clients' specifications, not her own. I consider that in producing the CAD drawings she was producing a set of working drawings from which she could construct the cabinets in the way that many experienced contractors do. The production of the CAD working drawings did not, in my view, convert the contract from one for construction only into a design and construct contract.



- 82 I accordingly consider that Ms Fode was contracted to supply goods, rather than provide rights, benefits, privileges or facilities under a contract for the performance of work, ie, provide *services*.
- 83 The fact that upon completion of the kitchen cabinets in her factory Ms Fode was to deliver them to the clients' residence does not, in my view, alter the nature of the contract. Delivery of the kitchen cabinets is consistent with the notion of a contract for the supply of goods.
- 84 For these reasons, I find that the contract was not a contract for the supply of services, with the result that s 60, s 61 and s 62 of the ACL do not apply.

## **GUARANTEES RELATING TO THE SUPPLY OF GOODS IN SS 54 AND 55 OF THE ACL**

### **Section 54**

85 Section 54 of the ACL provides:

- (1) If:
  - (a) a person supplies, in trade or commerce, goods to a consumer; and
  - (b) the supply does not occur by way of sale by auction;there is a guarantee that the goods are of acceptable quality.

86 As the contract is a contract for the supply, in trade or commerce, of goods, namely kitchen cabinets, to two consumers, and the supply does not occur by way of sale by auction, I find that the supply is subject to s 54 of the ACL. The upshot is that once the cabinets had been completed, there would have been a guarantee that they were of acceptable quality.

### **Section 55**

87 Section 55 of the ACL relevantly provides:

- (1) If:
  - (a) a person (the **supplier**) supplies, in trade or commerce, goods to a consumer; and
  - (b) the supply does not occur by way of sale by auction;there is a guarantee that the goods are reasonably fit for any disclosed purpose, and for any purpose for which the supplier represents that they are reasonably fit.
- (2) A **disclosed purpose** is a particular purpose (whether or not that purpose is a purpose for which the goods are commonly supplied) for which the goods are being acquired by the consumer and that:
  - (a) the consumer makes known, expressly or by implication, to:
    - (i) the supplier; or

- (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made; or
  - (b) the consumer makes known to the manufacturer of the goods either directly or through the supplier or the person referred to in paragraph (a)(ii).
- (3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier, the person referred to in subsection (2)(a)(ii) or the manufacturer, as the case may be.

88 As the contract is a contract for the supply of kitchen cabinets to two consumers, in trade or commerce, for the disclosed purpose of being installed into a kitchen, and the supply did not occur by way of by way of sale by auction, I find that the supply is subject to the guarantee created by s 55 of the ACL. This means that once they were completed, the cabinets would have had to have been reasonably fit for their disclosed purpose.

#### **Standard implied by common law**

89 Rather than fall back on the standard of workmanship implied by the common law in a contract of this nature, the clients have invoked the statutory guarantees arising under the ACL. At common law, the clients may well have been entitled to expect that the cabinets would be of acceptable quality, and would be reasonably fit for their disclosed purpose, when completed. This would put them in the same position they would have been under s 54 and s 55 of the ACL, but it would not put them in any better position.

#### **SUMMARY OF TERMS OF THE CONTRACT**

90 In summary, my findings are that the relevant terms of the contract are as follows:

- (a) the contract price was \$25,322;
- (b) the scope of work was as set out in the CAD drawings approved on 27 October 2014, and in the accepted quotation;
- (c) Ms Fode was obliged to complete the kitchen cabinets within a reasonable period, assessed at eight weeks from final measurement, but this period was subject to extension where Ms Fode's progress was delayed by an act or omission of the clients;
- (d) as to the standard of work, the clients were entitled to expect the cabinets to be built to the specific tolerances called up in the approved plans. They could also expect that when the cabinets had been completed, that they would be of an acceptable quality, and fit for their disclosed purpose, as guaranteed respectively by s 54 and s 55 of the ACL.

## WAS THE TERMINATION OF THE CONTRACT LAWFUL?

91 On 3 December 2015 the clients sent an email to Ms Fode which relevantly stated:

On the 28th **October 2014** we placed [an] order with you for our kitchen, for which we have paid more than 50% deposit (\$12,700). The kitchen has still not been delivered.

Under the Consumer Rights Act [sic] goods must be delivered within the timeframe agreed with the supplier, which is both realistic and achievable- this has not been met.

As this timeframe continues to be missed, you have failed to fulfil the statutory requirement and are therefore in breach of contract. Considering that there have been several attempts at rectification to areas of this kitchen, up to 3 times due to errors made by S & D Cabinets- We have been nothing but patient, and you would have to agree we have been extremely generous with the timeframe. In accordance with the Regulations we are providing you with a further and final reasonable deadline by which the goods must be delivered.

If you do not complete and deliver to the agreed quality the kitchen by **18/12/2015** we will consider our contract at an end, as we are entitled to do under the Regulations, and will expect you to deliver the kitchen in its current state (this includes all servo drives and correct pantry drawers) with no further payment to be made...

Alternatively we terminate this contract with S and D Cabinets, having S and D Cabinets refund in full payments made, with a further \$2000 compensation for time lost, aggravation and the added cost in seeking out another company to complete our kitchen.

Refund to be made no later than the 9th December 2015, and paid directly in to [account nominated]. For the total amount of: \$14,700.

If refund is not made and no resolution can be agreed upon by Wednesday, 9th December 2015, we will be taking legal action and further compensation will be demanded.

92 The email of 3 December 2015 did not come quite out of the blue. Ms Fode agreed that the clients had become angry by the end of November. She deposed that she spoke to them outside the factory and attempted to get things 'back on track'.

93 By its terms, the email appeared to be a combination of a notice to show cause why the contract should not be terminated, an offer, and a letter of demand. It operated a show cause notice because it gave Ms Fode an opportunity to complete the kitchen to the agreed quality, and deliver it by 18 December 2015. It operated as an offer as it gave Ms Fode an alternative of bringing the contract to an end by making payment of \$14,700 by 9 December 2015. And it operated as a letter of demand because, if the option of making a refund was not taken up, and 'no resolution' had been agreed by Wednesday, 9 December 2015, legal action would ensue.

- 94 Revealingly, in my view, Ms Fode did not dispute the clients' entitlement to write to her in these terms. In particular, she did not question that she had missed an agreed timeframe for completion. She did not enquire what 'Consumer Rights Act' was being referred to. She did not challenge the clients' right to set an ultimate deadline of 18 December 2015 by which she was to complete the kitchen. Nor did she question that the clients were entitled to ask her to consider terminating the contract and refund the deposit paid of \$12,700, plus damages of \$2,000.
- 95 On the contrary, she sent an email to the clients in these terms:
- Your kitchen section for the oven and hotplates run is ready and working for you to see tomorrow morning and will be ready for delivery by next Friday. Would you please bring the bins in that you have purchased for fitting
- We would like to confirm that the rest of the kitchen will be ready for delivery prior to the 18/12/2015.
- 96 This response must be read, in my view, as an acceptance by Ms Fode of three things, namely:
- (a) the clients' entitlement to write to her in the terms in which they did on 3 December 2015;
  - (b) an election by her to deliver the kitchen by the demanded date, rather than 'buy' her way out of the contract; and
  - (c) a representation that the rest of the kitchen would be ready for delivery prior to 18 December 2015.
- 97 Ms Fode's acceptance of the clients' entitlement to issue a show cause notice requiring completion of the kitchen by 18 December 2015 is strong evidence, arguably the strongest possible evidence that, as at 3 December 2015, she was in breach of the contract because she had by that date not completed the kitchen cabinets to the required specifications and quality.
- 98 I consider that if the clients can demonstrate that Ms Fode:
- (a) was in breach of the contract because she had by 3 December 2015 not completed the kitchen cabinets; and
  - (b) showed by 12 December 2015 that she was not going to complete the kitchen cabinets by 18 December 2015;
  - (c) then they will have demonstrated that they were entitled to terminate the contract in the manner in which they did on 12 December.
- 99 Accordingly, I turn to examine the question of whether Ms Fode was in breach of the contract because she had not completed the kitchen cabinets by 3 December 2015.

## **WAS MS FODE IN BREACH OF THE CONTRACT FOR FAILING TO COMPLETE BY 3 DECEMBER 2015?**

100 In their Amended Points of Claim, the clients say:

- (a) In February March 2015, no progress had been made on the cabinets.
- (b) After the work started, repeated errors were made, and “in some cases cabinetry were remade up to 4 times. Measurements had been incorrect...”
- (c) The foreman, Rick Burns, advised the clients on Saturday, 21 November 2015 that he had left Ms Fode’s firm 2 weeks earlier, and would only be working on Saturdays on the kitchen.
- (d) A visit to Ms Fode’s factory on 28 November 2015 indicated that Rick was not there, and no progress had been made.
- (e) The following Monday Ms Fode confirmed to the clients that Mr Burns was working only every second Saturday.

101 In their Points of Defence to the Counterclaim, the clients fleshed out their allegations about delay by alleging that Ms Fode first purchased material for the carcass on 6 May 2015, first purchased gloss boards on 27 August 2015 and first purchased components on 4 September 2015. They asserted that there was no commencement until early May 2015, five months after the deposit had been paid.

### **Ms Fode’s contentions about the construction program**

102 In her response to the Amended Points of Claim,<sup>10</sup> Ms Fode said:

- (a) No delivery date was set at the outset because the clients had to complete other works including flooring. The only advice from the clients was that delivery was to be ‘sometime in the New Year’.
- (b) The only stipulated completion date was 18 December 2015, which was required in the clients’ email of 3 December 2015.
- (c) The clients’ contention that no progress was made on the kitchen in February/March 2015,<sup>11</sup> was disputed on the basis that an email dated 28 January 2015 suggested that Mr West had spoken to Rick Burns regarding the job. Furthermore an email dated 30 March 2015 showed that Mr West had been to the factory in mid-March, which suggested progress at that point. The email of 30 March also referred to a discussion regarding the clients changing the specification from Caesar stone to granite.
- (d) The clients’ ‘numerous, unrealistic demands’ including a demand that the kitchen be built with ‘no tolerances, which is not to industry-standard’ made the manufacturing process ‘tedious’.

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<sup>10</sup> Ms Fode’s response to the clients’ Amended Points of Claim was filed on 11 August 2016, after the start of the hearing.

<sup>11</sup> Clients’ Amended Points of Claim filed 15 February 2016, paragraph 3a.

103 The clients' objective of achieving perfection could not be achieved "by anyone or anything. The cabinet making industry, as most other industries, have acceptable tolerances and variations."

104 Ms Fode, at the hearing, contended a reasonable timeframe can only be achieved when clients provide all necessary specifications. Although she agreed completion of the kitchen by March 2015 was a reasonable timeframe, she couldn't complete by that date. She said that as soon as she had sufficient information the relevant material was ordered, and the works commenced immediately. She repeatedly said that final measurements were required before work could start, and that Mr Burns was unable to take the measurement when there was no floor in the kitchen. She again highlighted Mr West's 'unrealistic expectations'.

105 In her written submissions, Ms Fode remarked that the fact that it took approximately two months between the time the clients first sought her services to the production of drawings was 'significant and highly unusual'. She said the project began on 8 December 2014 when the first deposit was paid. She went on:

From the beginning of the project the clients were heavily involved in the construction of the kitchen. They made numerous visits to the factory citing the kitchen and its progress. Many variations, changes and reworks were requested by the client, as highlighted by Rick Burns' statement...

Rick Burns' statement also highlighted that the clients had to finish their home renovations, in order for them to provide accurate measurements, as there were no walls and floors... Production of cabinetry could not commence until final measurements were received.

106 Ms Fode then went on to list a set of emails from the clients which she said evidenced client changes after the 'agreed time frame to complete the kitchen under normal circumstances' of March 2015. Particularly relevant communications appearing in this list, or highlighted earlier by Ms Fode, included emails dated:

- (a) 30 March 2015, showing the clients were still clarifying whether the benchtops would be Caesar stone or granite.
- (b) 11 May 2015, in which the clients instructed a hold on the ordering of stone, as granite was being investigated, and that shelf positions, flue hole shape, Zenolite thickness, hinges and depth of the overhead above the oven were still to be clarified.
- (c) 21 August 2015 in which she sought confirmation of measurements for the pantry, and confirmation of an order for the pot drawers.
- (d) 31 August 2015, in which the clients confirmed hardware and thickness of Zenolite.
- (e) 21 September 2015, in which the clients confirmed the use of frosted glass in the Intivo drawers in place of black glass, which had been specified but was not available.

- (f) 23 September 2015, in which the clients provided further specifications for the oven.
- (g) 9 October 2015, in which the clients confirmed the height from the hot plate to the rangehood, after the clients had been warned that it did not comply with recommended height requirements.
- (h) 30 October 2015, in which the clients provided a photo showing the overall look of the microwave/coffee machine tower.
- (i) 4 November 2015, in which the clients advised her to hold off on purchasing the 'magic corner' and that they wanted to check colour availability and drawer styles, and requested changes to the coffee machine tower after the unit had been built.
- (j) 4 December 2015, in which she requested that the clients bring their nominated bin in for fitting.
- (k) 11 December 2015, in which she requested Mr West to make contact to discuss the positions for the wiring so that holes could be drilled for the Aventos system.

#### **The evidence of Mr Burn concerning delays**

107 Ms Fode's foreman Rick Burns gave evidence on the second day of the hearing. He had been with Ms Fode for 10 years, and had been in the industry for 25 years. He gave extensive evidence about the job. He said that production program was affected because the clients made 'change after change'. When pressed by the Tribunal for details, he listed the following:

- (a) the overheads, which the clients asserted in early 2015 were 'too small';
- (b) 10 to 15 conversations he had had with the clients concerning the placing of the bins;
- (c) the pantry, which had to be rebuilt after it had been constructed, because the plan was wrong;
- (d) the overheads, which had been built to the incorrect height taking into account that 4mm Zenolite had to be added;
- (e) the overhead above the refrigerator had to be heightened, and he had sought instructions by text from Mr West;
- (f) the tower for the coffee machine had 'multiple builds', and had no tolerances on the plan;
- (g) the need to remake cupboards with a rebate of 40mm;
- (h) the need to change screw positions at Mr West's insistence.

108 Mr Burns also said that the pace of construction was affected because the clients wanted to inspect the work progressively. He said there were meetings on 'maybe' 10 Saturdays. He said Mr West would come at 9.30am and talk for three hours.

- 109 Mr Burns was subjected to extensive cross-examination. From his answers it became clear that some of the delays could not necessarily be attributed to late changes directed by the clients. For instance:
- (a) Mr Burns had constructed the pantry drawers according to a handwritten plan provided by Mr West, but had to remake them so that they would fit into the allocated space.
  - (b) On the second of the plans approved on 28 October 2014 a printed dimension of 350mm on one of the overhead cupboards had been changed by hand to 400mm.<sup>12</sup> Mr Burns had initially built the cabinet to 350mm. The clients said that the error arose even though Mr Burns had been instructed at their place that the overhead had to be deepened to 400mm to accommodate the rangehood. Mr Burns disputed this, and said that his recollection was that the change was made when the rangehood ‘came down’.
  - (c) The overhead cupboards were to be constructed to allow for the placement of a 4mm Zenolite panel immediately below the overhead, and should have been built accordingly. Mr Burns did not concede this.
  - (d) In respect of the coffee tower, it is questionable whether any delay was caused by any change by the client, because Mr Burns agreed that the tower had to be built ‘just once’.
- 110 Mr Burns was asked in cross-examination when the works began. He deposed that he could not say. When he was shown a photograph showing the state of the carcasses as at 9 May 2015 and was asked what the cause of delay between 8 December 2014 and May 2015 was, he said it was ‘not my department’.

### **Invoices produced by Ms Fode**

- 111 Ms Fode was compelled by an order of the Tribunal to produce all invoices relating to the acquisition of materials required for the construction of the cabinets. Those invoices were made available prior to the last day of the hearing.
- 112 Included in these invoices were a set of invoices from Nikpol Pty Ltd dated 6 May 2015, 1 June 2015, 5 October 2015, 5 November 2015 and 7 December 2015 evidencing the purchase by Ms Fode of black Egger products on those dates.
- 113 Also put in evidence by Ms Fode were a bundle of invoices issued by Mitchell Laminates dated respectively 27 August 2015, 19 November 2015 and 16 December 2015. These invoices demonstrate that Ms Fode began ordering Stylelite for the kitchen cabinets no earlier than 27 August 2015.
- 114 Ms Fode also put into evidence a set of invoices issued by Lincoln Sentry dated respectively 27 August 2015, 19 October 2015, 7 December 2015, 7 December 2015 (second invoice), 7 December 2015, (third invoice), 7 December 2015

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<sup>12</sup> Exhibit R6, sheet 2 of 3.



(fourth invoice), 7 December 2015 (fifth invoice), 7 December 2015 (sixth invoice) and 16 December 2016. The Lincoln Sentry invoices demonstrate that as early as 27 August 2015 Ms Fode acquired Intivo drawers and accessories and Blum components; on 19 October 2015 she acquired a servo drive and more Intivo components; on 7 December 2015 she acquired Aventos, Intivo components, tip-ons and a servo drive and accessories; and on 16 December 2015 she acquired an Aventos HK cover set.

### **Date of commencement**

- 115 At the hearing, Ms Fode talked about the impossibility of getting the work underway until a final measurement had taken place at the clients' house with the new kitchen floor down. It is not clear to me when the final measurement took place, and it may be that it was the impossibility of taking the final measurement at the client's house which prevented Ms Fode from commencing work on the kitchen cabinets and until 6 May 2015. In his final submissions, Mr West said that at an inspection on 28 March there had been no progress. Mr Burns interjected by asking how the kitchen could be laid out in the absence of floor measurements. This suggests the final measurement had not been carried out by that date.
- 116 The Nikpol invoices prove the clients' contention that Ms Fode first ordered materials (specifically black Egger) for the construction of the cabinets on 6 May 2015. Ms Fode, at the hearing, acknowledged this was the case. On the basis of this, I find that work on the kitchen, other than planning, layout and ordering of materials and components, could not have been before 6 May 2015.

### **Interruptions to the construction program**

- 117 If 6 May 2015 is taken to be the starting date for the construction period, and if the evidence of Ms Fode that the cabinets should have been completed within 6-8 weeks but for interruptions to the program is accepted, then at the latest the cabinets have been complete by 1 July 2016, unless interruptions are demonstrated to have occurred.
- 118 I accept that the emails referred to by Ms Fode demonstrate that the clients made multiple modifications to plans for the kitchen. However, it is notable that one of Ms Fode's last requests for information was her email dated 21 August 2016 in which she sought confirmation of pantry measurements, and confirmation of an order for the pot drawers. On 31 August 2016 the clients confirmed some hardware, and the thickness of Zenolite required.
- 119 After this, the communications from the clients were limited. Specifically, apart from an email of 10 September 2016 when the clients asked for an update, there was an email of 21 September 2016 confirming use of frosted glass in the Intivo drawers in place of black glass, an email of 23 September 2016 providing further specifications for the oven, an email of 9 October 2015, confirming from the hot plate to the rangehood, an email of 30 October 2016 showing the look of the microwave/coffee machine tower, and an email of 4 November 2016 advising Ms Fode to hold off on purchasing the 'magic corner'; and that the clients

wanted to check colour availability and drawer styles, and were requesting changes to the coffee machine tower.

- 120 The relevance of these observations is that it appears that as at the end of August 2016 the plans and specifications for the kitchen had been very substantially settled. Certainly there were some details to be confirmed, but in the context of a kitchen which – in Ms Fode’s own opinion ought to have taken no more than eight weeks to construct – it would be surprising if any of the change from black glass to frosted glass in the Intivo drawers, the amendment of the specifications for the oven, the late decision as to the type of ‘magic corner’ to be purchased, and a requirement to rebate an angle support in the coffee machine tower were significant.
- 121 Ms Fode made general assertions about the impact of the clients’ modifications to the construction program, but she said nothing specific about the impact of the design decisions taken after the end of August on the progress of the works.
- 122 Furthermore, I consider that Ms Fode sought to overstate the impact of the clients’ late provision of instructions or tardy delivery of components to be fitted on the progress of the works. For instance, in her summing up, she said “we can only build when things are set”. She went on to give an example that the sink was never provided, and the template was never supplied.<sup>13</sup> She added: “We would never cut stone without the sink”. The clients’ response to this was to demonstrate that the cutting of the stone had been removed from the contract.

### **Relevance of Mr Burns taking employment elsewhere**

- 123 Furthermore, there was clear evidence of a factor which must have affected the progress of the works. This was the decision of Mr Burns to obtain employment elsewhere from a point in November 2015. As noted, the clients contend that Mr Burns informed them that he had left Ms Fode’s firm 2 weeks prior to the date that he told the clients of his departure, which was Saturday, 21 November 2015. This pinpoints his departure as 7 November 2015.
- 124 Ms Fode’s written response to the clients’ allegation that Mr Burns had left full-time employment with her firm on 7 November 2015 was:
- Rick moved from a full-time position to part-time role, approximately 14 hours a week. S & D Cabinets allocated the work to Rick on the days he was working. S & D cabinets reserves the right to allocate appropriate staff when needed.
- 125 In their Amended Points of Claim, the clients say that they did not request Ms Fode to make her foreman Rick Burns the sole builder of the kitchen. This was a decision made by Ms Fode, as it was a ‘complex build’.
- 126 Ms Fode’s written response was:
- S & D Cabinets reserves the right to allocate any available staff member to carry out any works required. At the time, Rick was the most qualified and

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<sup>13</sup> This example was also referred to in Ms Fode’s response to the Amended Points of Claim, paragraph 11.

experienced cabinetmaker to undertake the project. His experience included working with servo drive kitchens.<sup>14</sup>

- 127 These passages establish that Mr Burns was the employee of Ms Fode who had responsibility for the construction of the clients' kitchen, and that he left her full-time employment on or about 7 November 2015.
- 128 There is a dispute as to the hours that Mr Burns continued to work for Ms Fode. In their Amended Points of Claim, the clients assert that when they enquired why Mr Burns had not been present on Saturday 28 November 2015, they were informed that he only worked every second Saturday. This allegation appears to conflict with proposition advanced by Ms Fode that Mr Burns was working approximately 14 hours a week, which equates with 2 days a week.
- 129 Even if Ms Fode's statement that Mr Burns was working 14 hours a week is correct, and even accepting that he worked all those hours on the clients' kitchen, the fact that he was working a maximum of 14 hours a week provides an explanation as to why the progress on the clients' project was so slow in the final weeks, given that Ms Fode advanced no evidence that she had allocated any other staff member to assist Mr Burns.
- 130 Any impact on the program caused by Mr Burns' limited ability to work on the project from 7 November was an issue for Ms Fode, rather than for the clients.
- 131 I have found that the cabinets should have been completed by 1 July 2015, save where progress was interrupted by the clients. Design changes and other instructions from the clients up to the end of August 2015 may well have had an impact on the construction program, but Ms Fode made no effort to explain in any detail what their impact on that program had been. In my view, she did not demonstrate that the impact of client generated delays was such that the cabinets could not have been completed at some point in November 2015.

### **Finding as to breach as at 3 December 2015**

- 132 In these circumstances, and given that Ms Fode has conceded that Mr Burns was not available to work more than 14 hours a week after 7 November 2015, I find that the failure by Ms Fode to have completed the cabinets by 3 December 2015 must be regarded as a breach of contract.
- 133 I further find that the clients were entitled to issue their email on 3 December 2015 in the terms in which they did.

### **HAD MS FODE, BY 12 DECEMBER 2015, DEMONSTRATED SHE WAS NOT GOING TO COMPLETE THE KITCHEN CABINETS BY 18 DECEMBER 2015?**

- 134 As noted, Ms Fode's response to the clients' ultimatum of 3 December 2015 was to advise that:

[T]he oven and hotplate run is ready and working for you to see tomorrow morning and will be ready for delivery by next Friday.

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<sup>14</sup> Ms Fode's response to the Amended Points of Claim, paragraph 11a.

135 The clients, on Monday 7 December 2015, sought to make a time for inspection on late Thursday afternoon to check the finished ‘oven side and overheads’ prior to having them delivered ‘along with our rangehood, microwave and coffee machine’ on Friday 11 December 2015.

136 Ms Fode, on Wednesday, 9 December 2015 advised:

That should be fine the bottom section is complete and rick is working on the rangehood section at the moment installing the aventos. [sic]

137 Ms Fode, later in the morning of 9 December 2015, asked if it would be possible ‘to book the transport for delivery Saturday morning’. The clients agreed to delivery on Saturday, but an argument by email ensued about who was to transport the cabinets. Ultimately, Ms Fode agreed to deliver the cabinets personally, rather than using a carrier.

138 The clients contend that by pushing the first delivery date out by a day Ms Fode failed to meet the deadline of 11 December 2015. The clients also assert in their Amended Points of Claim that when they inspected the kitchen on 11 December 2015 they discovered that the cabinets were not square, were damaged, and were not to measurement. They then say [at 13c]:

We were told by Sheena of S & D Cabinets all these issues would be fixed by the following day prior to delivery.

139 On 12 December 2015, the clients again attended at Ms Fode’s factory and found:

[A]reas not fixed/finished and told there was no way it was going to be delivered that day. On top of this further damage was found on panels.<sup>15</sup>

140 It was at this point that the clients requested their appliances back. They say they told Ms Fode that:

[T]his was not at all acceptable and we would be now taking legal action  
S & D Cabinets were not producing the kitchen with good workmanship and to the high-quality standard that had always been expected.<sup>16</sup>

141 This articulation of Ms Fode’s alleged breach highlights the clients’ contention that it was her failure to complete the cabinets to the standard required by the contract that justified its termination.

### **Defects existing as at 12 December 2015**

142 On the first day of the hearing, Mr West gave evidence regarding a large number of defects which he said existed as at 12 December 2015 when the contract was terminated. He referred to the list of defects set out in section 6 of the clients’ Amended Points of Claim. That list included the following:

- (a) the pantry drawers placed were not as quoted, and were incorrect in style and not to measurements provided;

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<sup>15</sup> Amended Points of Claim, paragraph 13d.

<sup>16</sup> Amended Points of Claim, paragraph 13e.

- (b) overheads on the oven side allowed for a 19mm bass panel not a 4mm bass panel as discussed;
- (c) there was random placement of screws, without uniformity or quality;
- (d) there were scratches on the cabinets;
- (e) the cabinets had been made out of square.
- (f) tape had not been placed on all edges.

143 In addition to addressing these issues, Mr West in his evidence also deposed:

- (a) that 5 of the overhead cupboards in the cabinets to be delivered on 12 December were to be 'powered', but switches for the upper servos had not been installed;
- (b) the Zenolite HC panels had not been cut to size and placed, indeed, had not even been purchased at this stage;
- (c) the under sink bins were not completed because they had not been constructed to allow for the sink waste pipe;
- (d) standard runners for the bins could not be installed as they would clash with the drawer above, which needed to be shallower.
- (e) venting for the microwave and not been completed;
- (f) routing for wires had not been completed.

#### **No inspection of cabinets as at date of termination possible**

144 Mr West contended that Ms Fode had worked on the cabinets after the termination, and she agreed that she had. I comment that this was not surprising as she had agreed to do so as part of the settlement agreement reached in the mediation in February 2016.

145 The fact that Ms Fode worked on the cabinets after the termination has significance. One practical outcome is that I was deprived of the opportunity to inspect the cabinets in the state in which they were at the date of termination, 12 December 2015. The upshot is that I am left with the task of assessing the state of the cabinets as at 12 December 2015 on the basis of the contemporary evidence and on the basis of the relevant expert evidence.

#### **Mr Limburg's evidence**

146 During the hearing, the clients placed great weight on the report prepared on their behalf by Mr Peter Limburg. As noted, Mr Limburg inspected the cabinets on 28 April 2016 and prepared a report dated 4 May 2016 which was relied on by the clients when they successfully impugned the report prepared by Mr Phillip Naughton.

147 I note in passing that Ms Fode's expert Mr Buckwell made an attack on Mr Limburg's capacity as an expert witness during the hearing on the basis that although he was a building consultant, he had declared no particular experience in cabinet making.

- 148 This attack was, in my view, unjustified as Mr Limburg had stated in his report that he held a bachelor of economics degree, a bachelor of business degree, and a graduate certificate in management. He was a member of the Housing Industry Association. His stated area of expertise was ‘inspecting new homes and extended and renovated homes, detailing visible and audible defects and/or outstanding works’. He added that he had 26 years of experience in the residential building industry both building and renovating homes, and had inspected and reported on approximately 5000 homes, and had ‘considerable experience assisting clients prepare cases’ before the Tribunal. He disclosed that he had taken into consideration in the preparation of this report, in addition to the CAD drawings prepared in October 2014 and the terms of settlement signed by the parties on 17 February 2016, the Housing Industry Association Guide to Kitchen & Bathroom Construction (Edition 2), and the Victorian Building Authority Guide to Standards and Tolerances, 30 March 2015.
- 149 In these circumstances I find that he has relevant expertise, and I am prepared to accept his report as a report prepared by suitably qualified expert.
- 150 Mr Limburg identified defects and incomplete work when he inspected the cabinets on 28 April 2016, that is to say about 5 months after termination. He listed the following defects:
- (a) The servo drive used to operate the top drawer of the kitchen sink cabinet was installed in such a way that it would clash with the waste pipes directly below the sinks. Accordingly, the servo drive could not function.
  - (b) A number of fittings/items were either missing from the cabinets or were not made available for sighting at the time of the inspection:
    - (i) 2 transformers for the LED strip lighting;
    - (ii) the black coloured cover caps for all drawers and doors;
    - (iii) the tip ons for the kitchen pantry doors;
    - (iv) the Blumotion Soft Close Mechanisms on the pantry doors;
    - (v) the Blum distance bumpers for the kitchen pantry doors, the sink overhead cabinet and the rangehood door;
    - (vi) the edging tape was missing from the top RHS of the cabinet above the stove/oven;
    - (vii) the hinges for the kitchen pantry doors were not as specified;
    - (viii) the hinges had dented the edge of the pantry doors when the doors fully opened;
    - (ix) the angle stops were not fitted to the hinges on the kitchen pantry doors;
    - (x) a cruciform mounting plate had been used when a horizontal mounting plate should have been used.

151 Mr Limburg also found the cabinets were damaged or not fully completed in the following respects:

- (a) there were scratches on the face of the kitchen pantry drawers and kitchen pantry doors;
- (b) the edge of the kitchen pantry doors were dented by the hinges;
- (c) there were scratches on the top LHS and top RHS of the kitchen pantry cabinet;
- (d) there was a large and deep gouge out of the dishwasher panel;
- (e) there was a mark on the LHS of the top drawer above the space for the refrigerator;
- (f) there were two dents in the rear of one of the cabinets;
- (g) a few screws had been roughly inserted into the cabinetry and consequently had damaged the cabinetry;
- (h) a re-used panel had been installed in the coffee machine/microwave tower cabinet and multiple screw holes were visible;
- (i) the kitchen cabinet that will accommodate the oven was out of square by 6mm at the front and 6mm at the rear;
- (j) the width of the gaps between the overhead doors (above the sink and above the oven) was not consistent, as they range between 2mm and 4mm;
- (k) the above-sink overheads had insufficient height to allow for the installation of the Stylelite Zenolite HC Panel underneath. The sizing of the cupboard carcass was therefore incorrect;
- (l) the above-sink overhead cabinet doors did not open and close smoothly because the doors were not fully aligned and the distance bumpers were not fitted;
- (m) although the Stylelite HC panel was in the warehouse at the time of the inspection it had not been cut to size to fit the underside of all the overhead cabinets, and there was insufficient panelling to cover all relevant areas.

### **Mr Buckwell's evidence**

152 Ms Fode called as an expert Mr Clinton Buckwell, a former president of the Cabinet Makers & Designers Association. Mr Buckwell gave evidence that he had been a cabinet maker for 38 years. I accept that he is well qualified to give expert evidence.

153 At the hearing, Mr Buckwell contested a number of Mr Limburg's statements. In particular, he said that a number of the alleged defects were not defects at all because the issues could be attended to, and would ordinarily be attended to, after the installation of the cabinets. The defects in this category included:

- (a) the placement of drawer cover caps, tip ons (the mechanism to push open a door), the Blum soft close mechanism, and distance bumpers;

- (b) the levelling of the cabinets;
  - (c) the width of the gaps between the cabinets, noting that it was a matter of adjustment to get them within the industry standard of 3mm;
  - (d) the cutting and placement of Zenolite.
- 154 Mr Buckwell also gave evidence that some alleged scratches were not defects because they were made in the protective covering placed over the cabinets. Also, at least one scratch could be attributed to a glue mark, rather than a scratch.
- 155 Some alleged deficiencies, where screws had ‘blown’ chipboard by being inserted too close to the edge were not defects because they would not be visible when the cabinets were installed. He disagreed with the clients’ contention that such screw placement would affect the integrity of the cabinets.
- 156 Mr Buckwell also said that a number of the alleged scratches or pinch marks caused by hinges were not defects because they could not be seen at normal viewing distance as defined in the ‘relevant guidelines at 1.4.3’.
- 157 Mr Buckwell did not name the guidelines he had in mind but Mr Limburg in his report had quoted the Housing Industry Association Guide to Kitchen & Bathroom Construction at section 1.4.3, as follows:
- If minor scratches, chips and other markings on the surfaces of the **cupboard carcass** are clearly visible in direct view of the observer (at a minimum distance of 1500 mm from the service) in normal daylight conditions, they are considered a defect.
- 158 No doubt this is why Mr Buckwell observed that if a defect “can’t be seen in daylight at 1.5m, it’s not a defect”.
- 159 While it is clear, on the basis of this summary of the evidence, that Mr Buckwell succeeded in demonstrating that a number of the complaints raised by Mr Limburg were not proper complaints, Mr Buckwell’s evidence was to a large degree irrelevant. This was simply because, as the clients emphasised at the hearing, the relevant question is not what the state of the kitchen cabinets was in April 2016, but their state on 12 December 2015.
- 160 Under cross-examination Mr Buckwell stated that he had only met Ms Fode recently and had seen the kitchen cabinets for the first time only on 7 August 2016. He agreed he was not in a position to say what the condition of the kitchen was before then.

### **Defects conceded by Mr Buckwell**

- 161 While Mr Buckwell’s evidence regarding defects which were alleged to exist on 12 December 2015, but which were no longer identifiable, is accordingly not relevant, his evidence of defects which continue to exist clearly is.
- 162 Mr Buckwell conceded that one door face was defective, because the top edge tape was missing. He also conceded that there was a gouge in the dishwasher



panel, and that this would have to be replaced. He estimated the cost of doing this at \$80.

- 163 Furthermore, Mr Buckwell acknowledged that the above-sink overheads had insufficient height to allow for the installation of the specified Zenolite HC panel underneath, but he argued that this was ‘not integral’ and ‘not visible’.
- 164 More significantly, Mr Buckwell also conceded that the servo drive in the lower drawer under the sink would not be fit for purpose once the sinks and waste pipes below the sinks were installed, although he had earlier said the drawer could be fixed at the time of installation.

### **Mr Don Fode’s evidence**

- 165 As noted, Ms Fode called as an expert witness her former husband and former business partner, Mr Don Fode. Putting aside for present purposes any concern about his independence arising from that status – which was an issue understandably raised by Mr West in cross-examination – I accept that as a veteran with 38 years as a cabinet maker he had the experience to qualify as an expert.
- 166 Mr Fode confirmed the appropriateness of having regard to the Housing Industry Associations Guide to Kitchen and Bathrooms (Edition 2), which had been referred to expressly by Mr Limburg and impliedly by Mr Buckwell. He also confirmed that when kitchen cabinets were installed they could be adjusted, and when they were ‘plush and true’, defects could be addressed. However, like Mr Buckwell, he could not give evidence as to the state of the cabinets as at the date of termination. Accordingly, his evidence as to what he saw at his inspection – which he agreed had been after the termination, indeed, after Mr Limburg’s inspection – was largely irrelevant. However, he did acknowledge the missing edge tape was a defect. He also agreed a mark on a door and a scratch on a drawer were potentially defects depending on whether they could be seen at 1500mm in daylight.

### **Ms Fode’s evidence about defects**

- 167 Ms Fode declined the opportunity to cross-examine Mr West about this evidence, but she did give evidence in response. She disputed the existence of some of the defects, and contended that a number of others had been completed. When questioned by me about the state of the cabinets, she asserted that with some minor modifications, as outlined by the clients’ expert Peter Limburg, the cabinets were complete. Notably, she agreed that the Zenolite HC panels had not been cut and placed, but said that this would be done at the time of installation because of the brittle nature of the material. She said the bins had never been delivered, so they had not been fitted.
- 168 Importantly, in my view, Ms Fode, did not directly dispute, in her response to the Amended Points of Claim, the clients’ statement that she agreed at the inspection on 11 December 2015 that the cabinets were not square, were damaged and not to measurement, and that all these issues would be fixed by the

following day.<sup>17</sup> Mr West, at the hearing, deposed that when they attended again on 12 December 2015 the method of rectification was to hit the cabinets with a hammer or similar instrument, but the cabinets remained out of square. Ms Fode did not dispute this either. Furthermore, I note that Mr Burns, in his evidence, contested the allegation that the oven carcass was uneven, and explained that the floor was not level. This supports the view that the cabinets, at least, looked out of square at the time of termination of the contract.

### **The issue of the under sink drawer**

169 In their final submissions the clients particularly referred to the failure of Ms Fode to construct the under sink drawer in such a way that it could accommodate the placing of the servo drive in the middle of the drawer so that it would clear the waste water pipes behind the drawer.

170 In her statement of contentions in reply, Ms Fode conceded:

The top drawer will need to be cut out for the plumbing once the kitchen has been installed, once kitchen is installed and pipework in place we are happy to cut the drawer to accommodate the pipework. Marked by client and provided dimensions.<sup>18</sup> [sic]

171 Notwithstanding this concession, Ms Fode still contested the point at the hearing. One of the witnesses called by her was Mr Vince Paterno from Lincoln Sentry. He deposed that he had inspected the drawers in the morning before he gave his evidence. He had noted the correct Blum equipment was in place and was correctly installed.

172 When he was asked where the waste pipe was to go, he answered:

Nine out of 10 times the cabinet maker will cut out [the drawer] on the spot.

173 When it was put to Mr Paterno by Miss Coombes that the servo drive was in place in accordance with the Blum specification, but was not fit for purpose because the placement did not allow for the plumbing, Mr Paterno conceded that all he had been asked to do was confirm that the servo system had been put in correctly. He agreed that he was not aware of the conversation between Mr West and Ms Fode concerning the plumbing, and didn't know the full situation.

174 Like Mr Paterno, Mr Buckwell, had also suggested that the drawer could be cut out, and the components fitted, at the time of installation.

175 The relevance of the evidence of Mr Paterno and Mr Buckwell came into question when Mr Burns testified about the under sink drawer. He deposed he was aware of the plumbing as he had been to the clients' house four or five times to do measurements. A decision was made early in the year to modify the drawer from 500mm to 450mm to accommodate the waste. He said the drawer was fit for purpose because he had followed instructions from Mr West. However, under cross-examination, he conceded that he made the decision to install two 500mm Intivo drawers beneath the sink even though a specification

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<sup>17</sup> Clients' Amended Points of Claim, paragraph 13c.

<sup>18</sup> Ms Fode's Statement of Contentions in Reply filed 20 April 2016, page 3, paragraph A.

for the Spazio waste pipe had been provided and a hand drawn plan for the waste area allowing for the servo drive had also been provided. He agreed that he had assumed the waste was to go through the wall.

### **Finding as to defects as at 12 December 2015**

#### Under sink drawer

176 On the basis of all the evidence concerning the under sink drawer, I find that the clients' complaint is justified. It is apparent that the lower under sink drawer had not been appropriately constructed to allow both of the placing of the Blum servo drive to specification, *and* for the necessary plumbing. The upshot is that I find that the drawer was not fit for purpose, and constituted a defect as at 12 December 2015.

#### Construction of overheads

177 As noted, Mr Buckwell acknowledged that the above-sink overheads had insufficient height to allow for the installation of the specified Zenolite HC 4mm panel underneath. He argued that this was 'not integral' and 'not visible' and hence not a defect. I disagree. The evidence was that the cabinets had not been built to allow for the required 4mm panel. The requirement for a 4mm panel was reflected in the dimension of 229mm shown on the plan. It was accordingly an express requirement of the contract, and the failure to meet this requirement was, I find, a defect.

178 It follows that Ms Fode was in breach of the contract as at 12 December 2015 in respect of this item also.

### **DECLARATORY BREACH?**

179 The clients terminated the contract because they considered Ms Fode could not complete by 18 December 2015.

180 The clients' first contention regarding Ms Fode's inability to complete is that on 12 December 2015 they were told by Mr Burns that "there is no way in hell it would be completed by even next week."<sup>19</sup>

181 Mr Burns gave extensive evidence, and was cross-examined. He did not dispute he made the statement.

182 Ms Fode also did not dispute these words had been spoken. Tellingly, she contended that Mr Burns had spoken 'out of frustration'. This evidence confirms the statement was made.

183 On the basis of the evidence, I find on balance that Mr Burns did make the statement attributed to him by the clients to the effect that the kitchen was not going to be completed by 18 December 2015. I consider that there was no reason for this to be interpreted in any way other than as a simple statement of fact.

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<sup>19</sup> Clients' Points of Defence to Counterclaim, paragraph 5.

184 This statement, being made as it was by Ms Fode's foreman and agent Mr Burns, constituted a declaratory breach of the agreement by Ms Fode. She was in effect announcing that she would not complete the kitchen by the deadline of 18 December 2015. The result is I find that the clients were not obliged to wait until 18 December 2015 before accepting that Ms Fode would not meet that deadline.

## COMPONENTS

185 The clients also mount an argument based on the invoices tendered by Ms Fode which chronicle the purchase of components by her for the kitchen cabinets. In their Points of Defence to Counterclaim, the clients say [at 3]:

The sections due for delivery were not ready on the 5<sup>th</sup> Dec 2015, nor on the 11 December 2015. Avento's HK's had not been ordered, delivered or installed on the 5th December 2015. Nor installed on the 11th December 2015. The Servo Drives needed to complete this kitchen had never been ordered prior to the 18th December 2015, according to invoices provided by S& D Cabinets...

186 The clients then set out an extensive list of components which were required for the kitchen but had not been ordered by 'the relevant dates'.<sup>20</sup> These included:

- (a) none of the 23 Blum servo drive units;
- (b) 1 only out of 3 Blum servo drive transformers;
- (c) 1 only out of three Blum servo drive transformer cable and plug parts;
- (d) None out of 4 Blumotion parts No. 973A7000;
- (e) No Blum 450mm Intivo drawer (1 required);
- (f) No Blum 450mm runners (1 set required);
- (g) No Blum 450mm D-sides (1 set required);
- (h) No LED lighting;
- (i) No extrusion for LED lighting;
- (j) None out of 2 transformers for strip lighting;
- (k) No Zenolite panels purchased until 2 March 2016.

## Discussion

187 On the final day of the hearing Ms Fode:

- (a) Did not dispute that no servo drives had been ordered; but said that they had been taken out of stock.
- (b) Agreed that only one transformer had been ordered, on 7 December 2015.

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<sup>20</sup> Clients' Points of Defence to Counterclaim, paragraph 6.

- (c) Said that a number of items had been taken out of stock including the hinge clips (part 973A), motors, opening angle stops, and the balance of the required servo drive profile brackets.
- (d) Seemingly acknowledged the specified tip-ons were not available until 11 December 2015.
- (e) Seemed to dispute that a 450mm Intivo drawer was required, as she said she had recommended a 400mm drawer. She then acknowledged that a 450mm drawer had been installed, but when Mr West said it had not been purchased by 18 December 2015 she conceded she could not remember if it had been purchased by that date. Mr Burns said the drawer could have been swapped, but no documentation for this could be produced.
- (f) Produced no invoice evidencing the purchase of the Blum 450mm runners, but suggested they could have been bought in bulk.
- (g) Produced no invoice for the D-sides, but suggested she would have spoken to Vince (Paterno) about them. Mr Burns says there could have been a swap, and that the item was there by 'the due date'. However, Ms Fode could produce no invoice.
- (h) Contended that the required LED strip lighting transformer was available on the day Mr Limburg prepared his report, in a wooden box, and had been available prior to the termination.
- (i) Agreed that one Zenolite panel had been ordered on 2 March 2016 and the second ordered only on 17 May 2016, but explained that Zenolite could not be cut until delivery, in order to avoid damage.

188 I consider Ms Fode's evidence about the 450mm Intivo drawer, the runners and the D-sides to be unconvincing, and find that the required 450mm drawer was not available as at the day of termination and was not purchased by 18 December 2015. This means that the under sink drawer defect could not have been finished by 18 December 2015, even if the contract had not been terminated.

189 I consider that there is some doubt that, by 18 December 2015, Ms Fode had acquired all the necessary servo drives and ancillary equipment. She said she had supplied all the required 23 servo drives out of stock, but she produced no evidence regarding the initial acquisition of those servo drives. However, she had in an email dated 21 August 2015 stated:

We have ordered this week all the servo and drawer runners and the fittings required for your kitchen, the motors are already here.

190 This email suggests that the servo motors were in stock. On balance I accept Ms Fode's evidence on this point.

191 However, the invoices from Lincoln Sentry establish that the clients' contention about the last part of the Aventos system not being available in time is, on balance, made out. Although the invoices demonstrate that other Avento HK components were ordered and shipped on 7 December 2015, the final invoice evidences the purchase of an Aventos HK cover set on 16 December 2015. Ms

Fode did not dispute this part was necessary for the completion of the kitchen. Given that the part had to be shipped to Ms Fode's factory, and the invoice discloses that it was shipped by airbag – presumably from interstate – on 16 December 2015, it is hard to see how it could have been available in time to facilitate completion of the kitchen prior to 18 December 2015.

- 192 The clients also rely on an invoice which evidences that 12 'Inner Bkt, INTIVO' parts were shipped on 18 December 2015. Reference to Lincoln Sentry invoice No 10301951, dated 7 December 2015 confirms the clients are right.
- 193 Accordingly, I find that the clients have made out their contention that the invoices demonstrate that Ms Fode would not have been in a position to complete the entire kitchen prior to 18 December 2015.

### **Summary of findings as to lawfulness of termination**

194 I have found that:

- (a) the failure by Ms Fode to have completed the cabinets by 3 December 2015 was a breach of the contract;<sup>21</sup>
- (b) the clients were entitled to issue their ultimatum to Ms Fode in the terms they did, which included a deadline of 18 December 2015 by which to complete the works;<sup>22</sup>
- (c) Ms Fode was in breach of the contract as at 12 December 2015 because:
  - (i) the under sink drawer was defective; and
  - (ii) the overheads had insufficient height to allow for the installation of the specified Zenolite HC 4mm panel underneath;<sup>23</sup>
- (d) Ms Fode, through her foreman and agent Mr Burns, made a declaratory breach of the agreement with the result that the clients were not obliged to wait until 18 December 2015 before accepting that she would not meet that deadline;<sup>24</sup>
- (e) the invoices demonstrate that Ms Fode would not have been in a position to complete the balance of the kitchen prior to 18 December 2015.<sup>25</sup>

195 On the basis of these findings, I further find that the clients lawfully terminated the contract on 12 December 2015. I will make a declaration to this effect. The result of this finding is that Ms Fode is liable to the clients for damages.

### **BREACH OF DEADLINE BY THE CLIENTS?**

196 I have considered Ms Fode's argument that the clients, having given her a deadline of 18 December 2015, breached this deadline by terminating the contract on 12 December 2015.

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<sup>21</sup> See paragraph 132 above.

<sup>22</sup> See paragraph 133 above.

<sup>23</sup> See paragraphs 176-178 inclusive.

<sup>24</sup> See paragraph 182 above.

<sup>25</sup> See paragraph 193.

197 I reject the argument, on the basis that I have found that the declaration by Ms Fode's foreman and agent Mr Burns that she would not complete by 18 December 2015 put her in a position of declaratory breach, and that I have found that the clients were entitled to accept that repudiation of the contract on 12 December and bring the contract to an end.

### **ASSESSMENT OF DAMAGES**

198 The clients, as noted, are seeking damages of \$17,200 comprising:

- (a) \$12,700 being the deposit paid in respect of the works;
- (b) \$2,000 for 'time lost, aggravation and the added cost in seeking another company to produce our dream kitchen'; and
- (c) the cost of replacing the microwave and rangehood which were damaged.

### **Return of the deposit paid**

199 The clients paid deposits totalling \$12,700 in respect of the contract. They have lawfully brought the contract to an end, and will not be accepting the kitchen cabinets. I find that they are entitled to a refund of the \$12,700 they paid to Ms Fode.

### **Damages for 'time lost and aggravation'**

200 This claim was no afterthought, thrown in the end of the hearing. In their Amended Points of Claim filed in February 2016 the clients complained that they had at that point been without the kitchen for a year.

201 I consider that there is no reason as a matter of legal principle why the clients should not be compensated for any substantial physical inconvenience they have suffered as a result of Ms Fode's breach of contract.

202 As Senior Member Walker said in *Anderson v Wilkie* (Domestic Building) [2012] VCAT 432 (11 April 2012) [at 27-29]:

Where there is a breach of contract, the party in breach is only responsible for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result in [sic] his breach, or of which there was a serious possibility or a real danger (see *Halsbury Laws of England*, 4<sup>th</sup> edition, Vol 9, para 1174).

It has been held that substantial physical inconvenience and discomfort caused by a breach of contract will entitle the party to damages (see *Burke v Lunn* 59 at 285-286; *Clarke v Housing Guarantee Fund Limited* (1998) 13 VAR 19 at p 21-22).

203 In that case, the owners had claimed damages for having lived in a wet house for 2½ years. Senior Member Walker said that was a loss of amenity which was compensable. He noted that the owners also faced the inconvenience of having to move out while repairs were effected. Senior Member Walker assessed general damages at \$5,000.

- 204 In *Kounelis v Ross Horton Homes Pty Ltd* (Domestic Building) [2014] VCAT 319 (25 March 2014), Senior Member Walker awarded damages for loss of amenity of \$2,000 in circumstances where remedial work to a house had to be carried out.
- 205 In the present case, to emphasise the inconvenience they suffered, the clients say they have:
- no oven, no stove or sink and our last two Christmases have been without a kitchen.
- 206 When the clients lodged their final submissions in November 2016, they updated the claim in these terms:
- We-the applicants have endured 23 months of physical, emotional and financial strain that S & D Cabinets have put upon us. Nobody should be made to feel in this manner.
- 207 In these circumstances, I find the clients have suffered substantial physical inconvenience as a result of Ms Fode's breach of contract.
- 208 There is, in my view, a question as to whether the clients are entitled to recover damages for inconvenience arising from the lack of a kitchen for the full period of 23 months they claim. In the first place, Ms Fode contends, with some justification, that the clients made a decision to remove their existing kitchen prior to a delivery date for the new kitchen being confirmed.<sup>26</sup>
- 209 Ms Fode made no comment as to when it would have been reasonable for the clients to have demolished their original kitchen. However, given that she deposed that she began construction in early May 2015, it is fair to infer that the old kitchen would by then have had to come out sometime before that, because a new floor had to be installed.
- 210 Furthermore, the clients did not explain at the hearing why they took no steps to engage another contractor immediately after they had terminated Ms Fode. It may well be that the issue is one of money, and that they could not afford to pay for a new kitchen in circumstances where they had paid \$12,700 to Ms Fode. However, they gave no evidence about this, and I am not in a position to make any finding about the point.
- 211 If the clients had taken the decision to engage a new contractor to construct the kitchen straight after 12 December 2015, they would have faced the practical problem of the Christmas shutdown. Accordingly, it is very unlikely that they would have entered into a contract before the end of January 2016. Allowing for an eight week construction period, which is consistent with Ms Fode's own estimate of the length of the job, completion before some point in April 2016 would have been unlikely.
- 212 Accordingly, I consider that a conservative estimate of the period for which the clients were deprived of the use of a kitchen by reason of Ms Fode's breach of contract is 12 months. I find that the clients are entitled to damages for

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<sup>26</sup> Ms Fode's response to the Amended Points of Claim, paragraph 3.



substantial inconvenience in respect of this period. I assess those general damages at \$1,200.

### **The added cost of appointing an alternative contractor**

213 Part of the client's claim for general damages of \$2,000 included an allowance for the anticipated extra cost of appointing another contractor. Subject to proof, they are entitled to damages in respect of the loss of their bargain with Ms Fode, ie, they are entitled to be compensated if they can demonstrate that it will cost them more to have the cabinets built from scratch by someone else. While it might be expected that the cost of appointing a new contractor in 2017 would be higher than the sum of \$25,332 inclusive of GST quoted by Ms Fode in December 2014, no evidence was given by the clients about the cost of engaging another contractor. Accordingly, the clients have not proved this aspect of their claim.

### **Damage to appliances**

214 The third limb of the clients' claim for damages related to the cost of replacement of the microwave and the rangehood. The claim is articulated in this way:

Insufficient steps were performed by S & D Cabinets to prevent damage to our appliances. Two of the three appliances purchased ... and supplied to S & D for fitment only, were returned to us damaged, scratched and not in their original packaging as supplied.<sup>27</sup> [sic]

215 Mr West's evidence was that there were scratches on the microwave, and Miss Coombes also gave evidence that the microwave had been scratched prior to 12 December 2015.

216 Miss Coombes also gave evidence that there were many scratches on the rangehood, and that she and Mr West had photographs of it sitting on top of a cabinet carcass.

217 Ms Fode, in her final submission, raised some evidentiary issues with these claims. She said:

- (a) Mr West gave evidence that he personally had unpacked the appliances at his home prior to delivery to S&D Cabinets and the scratches could have been caused then.
- (b) Mr West gave no evidence that showed the condition of the appliances prior to delivery.
- (c) Appropriate care was taken by her firm when handling the appliances, as evidenced by photographs showing that they sat on white foam for protection.
- (d) Extra tape was added for protection to the coffee machine and the microwave.

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<sup>27</sup> Clients' final submissions, page 4.

(e) The coffee machine and the microwave were put into secure boxes for the purposes of transportation.

218 Ms Fode also made the observation that, even if the microwave and the rangehood had minor scratches, chips or markings on the surface, they were not clearly visible to the observer in normal lighting conditions. She noted that the relevant viewing position was a minimum of 1,500mm in normal daylight, and cited the Housing Industry Association's Guide to Kitchen & Bathroom Construction in support of this proposition. She said there was no photographic evidence of defects visible in these conditions.

### Discussion

219 While it is true that the clients were unable to produce photographic evidence regarding the state of their three appliances – the coffee machine, the microwave and the rangehood – prior to their delivery to Ms Fode's possession, I accept Mr West's evidence that the three items were not damaged when they were delivered to Ms Fode. Certainly, Ms Fode presented no evidence that any of the appliances were damaged when she received them, as she would be expected to have done had they been damaged.

220 I also accept Mr West's evidence, and that of Miss Coombes, that the microwave and the rangehood are now damaged. I find that the microwave and the rangehood have suffered minor damage for which Ms Fode is contractually responsible.

221 One of Ms Fode's defences was that there was no compelling evidence that either the microwave or the rangehood had been scratched or marked to such an extent that any such blemish would have been noticeable in normal daylight at a distance of 1,500mm, that accordingly, under the relevant guidelines they are not to be regarded as defects.

222 I reject Ms Fode's defence based on the application of the guidelines to the effect that a scratch or blemish which is not visible from 1,500mm in daylight is not a defect. I consider the HIA Guide to Kitchen & Bathroom Construction and the VBA Guide to Standards and Tolerances apply to new work performed by a cabinet maker, not to scratches to appliances caused by the cabinet maker.

223 For these reasons, I find that Ms Fode is liable to the clients in respect of the damage to their microwave and their rangehood. I turn now to the assessment of the relevant damages.

224 On the basis of the existence of alleged scratches and marks, the clients are claiming the full cost of replacement of both the microwave and the rangehood. However, they put forward no evidence in the form of quotations as to what the cost of replacement might be. They also did not address me as to why the appropriate measure of damage in each case was replacement of the item in question, rather than an allowance for diminution in value, or loss of amenity because the clients will have to live with blemished items if they are not replaced.

- 225 On the basis that there is no suggestion that either the microwave or the rangehood have been so damaged that they are no longer fit for purpose, I consider that the appropriate way to assess damages is to make an allowance for either diminution of damages or loss of amenity. And in the absence of any evidence that the clients propose to sell the microwave or the rangehood, or any evidence as to reduced value if they sought to do so, I find that the appropriate methodology is to assess damages for loss of amenity on the basis the clients will have to live with items which are now not in pristine condition.
- 226 I will allow, in respect of each appliance, a sum equivalent to 10% of the purchase price for loss of amenity. In the case of the microwave, the sum is thus \$82. In respect of the rangehood, the sum is \$144. The total award for general damages for loss of amenity is accordingly \$226.

### **Summary of findings regarding damages**

- 227 The clients are entitled to an award of **\$14,126**, comprising \$12,700 in respect of the deposit paid,<sup>28</sup> and \$1,200 general damages for substantial inconvenience arising out of delay,<sup>29</sup> and \$82 and \$144 in respect of damage to the microwave and the rangehood respectively.<sup>30</sup> The relevant order is that Ms Fode must pay the clients damages in the sum of **\$14,126**.

### **THE COUNTERCLAIM**

- 228 As Ms Fode's counterclaim is based on the proposition that the clients breached the contract rather than her, and as I have found the clients lawfully terminated the contract, the counterclaim must be dismissed.

### **COSTS**

- 229 The clients are seeking reimbursement of the sum of \$1,755 which they paid their expert Mr Limburg. They must do so as part of any claim for costs.
- 230 I will reserve costs, and grant liberty to the parties to apply for costs within 60 days. Any application for costs is to be referred to me, to enable me to make orders as to how the application is to be dealt with.

### **ORDER FOR REIMBURSEMENT OF FILING FEE AND HEARING FEES PAID**

- 231 I will reserve on the issue of reimbursement to the clients of the filing fee and any other hearing fees paid pursuant to s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*. Any such application is to be made within 60 days, and is to be referred to me so that orders can be made.

### **MEMBER C EDQUIST**

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<sup>28</sup> See paragraph 199 above.

<sup>29</sup> See paragraph 212 above.

<sup>30</sup> See paragraph 226 above.