

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING & PROPERTY LIST**

VCAT REFERENCE NO. BP1895/2018

**CATCHWORDS**

Contract between a developer and a cabinet maker for joinery components in a showroom – breach of contract – issues about the scope of work agreed under the contract – claim by the cabinetmaker for payment on completion of the works – counterclaim by the developer for incomplete and defective works.

<b>APPLICANT</b>	Wisway Pty Ltd
<b>RESPONDENT</b>	70 High St Preston Project Pty Ltd ACN 617 774 295
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member S. Kirton
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	31 January, 15 March 2019
<b>DATE OF ORDER</b>	5 April 2019
<b>CITATION</b>	Wisway Pty Ltd v 70 High St Preston Project Pty Ltd (Building and Property) [2019] VCAT 486

**ORDERS**

1. The applicant must pay to the respondent \$9,654.11.
2. Having regard to section 115B(1) of the *Victorian Civil And Administrative Tribunal Act 1998* and being satisfied that the respondent has substantially succeeded in its counterclaim, the Tribunal orders that the applicant must reimburse the respondent for its filing fee of \$679.20.

**SENIOR MEMBER S. KIRTON**

**APPEARANCES:**

For the Applicant

Ms A. Koh and Ms Q. Zhang in person

For the Respondent

Mr R. Li, Mr L. Barresi and Mr J. Martin in person

## REASONS

### BACKGROUND

1. The respondent is the developer of the Due North project in High Street, Preston, which will include 99 residential apartments and commercial spaces when complete. The launch of the project was to be in October 2018, with the option then for potential purchasers to buy an apartment off-the-plan.
2. In order to market the apartments, the developer set up a showroom at a nearby location. The showroom included a number of innovative ways of demonstrating the finishes and fittings available, including hanging a number of large boxes from the ceiling which would be clad in examples of the various materials available, such as tiles, stonework, carpet and floorboards. As well as the suspended boxes, there were also several displays of four boxes threaded vertically on a pole so that each box could spin independently of the others. Each face of each spinning box was to be clad variously with the tiles, stonework, carpet and floorboards. The suspended and spinning boxes act as a three-dimensional mood board, ranging in size from approximately 0.5m<sup>3</sup> to 2m<sup>3</sup>, and purchasers are able to walk among them to get an idea of the options available for their apartment.
3. In September 2018 the developer engaged the applicant (KC) to construct the various joinery components for the showroom, including the suspended boxes, the spinning boxes, a sales desk, pamphlet stations/storage unit, computer station, seats, plant boxes and plinth. KC trades under the name of Kitchen Classics.
4. KC alleges that it carried out all of the agreed work, and is entitled to be paid the full amount of the contract price. The developer says that the work carried out by KC was defective and incomplete. The proceeding came before me as a claim by KC for the balance of the unpaid contract price, of \$10,823.00 (plus fees), and a counterclaim by the developer for the cost to rectify and complete of \$19,573.11 (plus management costs).
5. For the reasons set out below, I dismiss KC's claim and find in favour of the developer on the counterclaim.

### THE HEARING

6. During the hearing, evidence was given by Ms Ashley Koh and Ms Quian Zhang for KC, and for the developer by Mr Lauri Barresi (the construction director), Mr Ryan Li (the assistant project manager), and Mr Joel Martin (the project manager).

7. The hearing commenced on 31 January 2019, when I heard evidence from all the witnesses and reviewed the documents provided as part of the claim and the counterclaim. One document relied on by the developer is a series of WeChat messages passing between the parties. Mr Li advised that the originals of these messages were in Chinese but that he had translated them and typed them into one document. After approximately two hours of hearing time, Ms Koh advised that she did not necessarily accept that Mr Li's translations were accurate, and she requested to see the original Chinese messages. I adjourned the hearing to allow KC time to review and interpret the WeChat messages.
8. The hearing resumed on 15 March 2019. KC took no issue with the translation of the WeChat messages. I heard further evidence at the resumed hearing, and then reserved my decision. I also allowed KC to send to the Tribunal copies of its telephone records in order to answer the developer's telephone records tendered that day.

### **THE ISSUE FOR DETERMINATION**

9. The issue before me is whether or not the scope of works agreed under the contract required KC to supply and install all the finishing materials as part of the contract price, or whether this was the responsibility of the developer.
10. KC says that the agreement between the parties was that they would provide the labour and materials to construct the various components shown on the drawings, but that the developer would provide the labour and materials to attach the carpet, floorboards, tiles and stonework to the suspended boxes and the spinning boxes, and to the bench tops where these are porcelain tiled or stonework. On the other hand, the developer says that they always understood that KC was to supply and install all materials.

### **THE AGREEMENT BETWEEN THE PARTIES**

#### **Discussions prior to KC's quote**

11. On 29 August 2018 the parties had a meeting face-to-face, when they discussed the scope of works. Following that meeting, Mr Li sent KC by email the plans and a Schedule of Finishes, with the following comment:

“... The 70 High Street Preston (Due North) project is on our top priority list in the following month, so if you could assist us in quoting before next Monday, that'll be great! Please find attached a copy of the files we discussed this morning.”
12. On 3 September 2018, Ms Zhang of KC sent a quote in the amount of \$41,800. On 4 September 2018 at 10:55am, Mr Li replied, saying:

“... Thanks for your quote. I have also listed few dot points that we think might be involved in the quote. Can you please confirm if your quote covers them? Thanks!

- Box 01 (wall tile finish)
- Box 02 (carpet finish)
- Box 03 (paint finish)
- Box 04 (Tile finish)
- Box 05 (Timber floorboards finish)
- Box 06 (Coloured MDF finish)
- Pot planter boxes (Mosaic tile finish)
- Model plinth (Gold mirror laminate finish)
- Spinning boxes
- Computer station (Floating fixed shelf)
- Kitchenette (Timber Floorboards finish) – Bar fridge inside
- Sales corner joinery
- Sales desk (Tiled)
- Supply and install of all works
- Supply and install of all suspended boxes from ceiling – boxes will be heavy please advise fixing type and cable
- Suspended boxes to be clattered with specified material which is specific to joinery (i.e. not tiled box)
- Frame circular seat to column (clattered by others)
- Framed square box to column (clattered by others)”

13. On 4 September at 4:44 pm Mr Li sent a further email, in which he said:

“... Please confirm that pot plant boxes and model plinth are included in your original quote is attached. Also, as discussed, please apply different materials onto those boxes... If you could provide us the quote at the end of today, that’ll be great.”

**KC’s quote**

14. KC then provided an updated quotation on 4 September 2018 at 5:07 pm, for the amount of \$42,345. All parties agreed that this was the relevant quotation, however KC says that the wording used in the quotation does not reflect the agreement as they understood it to be. The quotation says:

“We are pleased to provide the following quotation based on the information provided...”

<b>JOB DETAILS</b>	
<b>CEILING BOX</b>	
CEILING BOX 01 F-05	SUPPLY AND INSTALLATION AS PLAN
CEILING BOX 02 F-02	SUPPLY AND INSTALLATION AS PLAN

CEILING BOX 03 DULUX	SUPPLY AND INSTALLATION AS PLAN
CEILING BOX 04 F-04	SUPPLY AND INSTALLATION AS PLAN
CEILING BOX 05 F-03	SUPPLY AND INSTALLATION AS PLAN
CEILING BOX 06 F-10	SUPPLY AND INSTALLATION AS PLAN
<b>CABINETES [sic]</b>	
PAMPHLET STATIONS/STORAGE	SUPPLY AND INSTALLATION AS PLAN
SALES DESK	SUPPLY AND INSTALLATION AS PLAN
COMPUTER STATION	SUPPLY AND INSTALLATION AS PLAN
SEATS	SUPPLY AND INSTALLATION AS PLAN
SPINNING BOX	SUPPLY AND INSTALLATION AS PLAN
POT PLANT BOXES F-14	SUPPLY AND INSTALLATION AS PLAN
MODEL PLINTH F-13	SUPPLY AND INSTALLATION AS PLAN
<b>EXTRA WORK</b>	
<b>DELIVERY</b>	INCLUDED
<b>RUBBISH REMOVAL</b>	INCLUDED
<b>PLUMBING</b>	NA
<b>ELECTRICAL</b>	NA
<b>BULKHEAD</b>	NA
<b>SUBTOTAL</b>	\$
<b>GST</b>	\$3,845.00
<b>TOTAL</b>	<b>\$42,345.00</b>

15. As can be seen, the quotation refers extensively to “supply and installation as plan”. I was provided with a copy of the 12 pages of plans. These show in great detail the various pieces of joinery required, together with notations for their surface treatment. The notations refer to the description of finishes in the 4 page Schedule of Finishes, which was also provided to me. For example, ceiling box 1 is marked as clad in F-05, which is described in the Schedule as ‘Johnson’s wall tiles neutral white gloss, size 100 x 300 x 8, grout Mapei, colour 110 Manhattan’. Ceiling box 5 is marked as clad in F-03, which is described in the Schedule as ‘timber floorboards, European oak floorboards, blonde, 189W x 1860L x14H, brushed finish’. The spinning boxes are described as being finished in a variety of materials, including Terrazzo tile (‘Monte Carlo 148 honed, 400 x 400 x 20, with Mapei grout, colour 112 grigio medio’), carpet (‘Bay of Islands, colour Ocean 50 2536’), and large format porcelain tiles (‘Artetech Pietra Brecciata 2500×1000×6mm, with Mapei grout, colour 112 grigio medio’).

### **What was the scope of work agreed by the parties?**

16. The submission put by KC was that the wording of the written updated quotation was incorrect, and although it says that KC had offered “supply and installation as plan”, this was not what was agreed by both parties.
17. The evidence of both Ms Koh and Ms Zhang during the first day of hearing was that at the meeting on 29 August 2018, they agreed with Mr Li that KC would not provide some of the finishing materials listed in the Schedule. Instead, the developer would supply and attach them to the joinery being constructed by KC.
18. On the second day of hearing, they added to their evidence and said that following the meeting on 29 August, Ms Zhang telephoned Mr Li and confirmed that agreement. They then said that Ms Zhang called Mr Li again on 3 September 2018 and double checked if they would provide the materials as she was going to email the quotation to them on that day.
19. On the other hand, the evidence of Mr Li, Mr Ryan and Mr Barresi was that there was never any agreement to remove certain finishing materials from KC’s scope of works. Mr Li said that he showed KC the plans and Schedule at the meeting on 29 August 2018, and followed up by emailing them. He said there were no phone calls between him and Ms Zhang between 29 August and 3 September 2018, and no discussion at all about varying the scope of works. He produced his telephone and WeChat records which corroborate that evidence.
20. At the end of the second day’s hearing, KC was given the opportunity to produce their telephone records in order to establish there had been a telephone conversation between 29 August and 3 September 2018 as Ms Koh and Ms Zhang had alleged. They sent the Tribunal a copy of Ms Zhang’s mobile telephone records, and advised that they wish to change their evidence, as the records indicated that there were no successful telephone calls made to Mr Li between 28 August and 3 September 2018. Instead, Ms Koh’s evidence now is:

“What appears from the records is that calls on 4, 5 and 6 September were of longer durations and were the calls between the parties’ representatives that clarified the works. By way of clarification it appears that we were mistaken in terms of the timing of the calls believing that the matters were in fact dealt with and confirmed on 3 September. The correct position is that Ms Zhang spoke with Mr Li before submitting the revised quotation in a number of telephone calls confirmed that materials would be supplied by the respondent and that items would therefore be excluded from the quoted cost.”

21. I do not accept this revised version of what Ms Koh thinks Ms Zhang had done. Both witnesses gave sworn evidence during the hearing that the telephone calls took place between 29 August and 3 September. That

recollection was clearly wrong, as demonstrated by the telephone records. It is also significant that this version of their evidence was given after they had already said that the scope of work was agreed at the meeting on 29 August. They have offered three different versions of when and how the scope of work was agreed. It is not an acceptable excuse to say “we were mistaken”.

22. I note also that Ms Zhang’s evidence during the hearing was that she spoke to Mr Li on 3 September 2018. He provided me with evidence that he had taken leave that day to attend a funeral, and so I do not accept Ms Zhang’s evidence. She now admits that she did not speak to Mr Li that day. I do not find the evidence of Ms Koh and Ms Zhang on this issue to be credible.
23. Further, the contemporaneous documents do not support any of the three versions of their evidence. KC provided its updated quote on 4 September 2018. I have been provided with no explanation or reason why the written quote does not reflect the agreement that KC says was reached at the meeting on 29 August, or was reached over the telephone following the meeting and prior to 4 September. It is particularly noteworthy that KC was given the opportunity to clarify the terms of the agreement before providing its updated quote, by addressing the matters raised in Mr Li’s emails of 3 and 4 September.
24. It is equally implausible that KC should have subsequently telephoned Mr Li on 4, 5 or 6 September to renegotiate the scope of works, one day or two days after having provided the written quotation. Similarly, I consider it unlikely that the developer would have agreed to a revised scope of works one day or two days after having received and accepted a written quotation (which itself had already been amended by negotiation).
25. Based on the above findings, I do not accept KC’s contention that the scope of works excluded the supply and installation of the finishing materials.

#### **Was the scope of works varied by agreement?**

26. KC also relied on an email sent from Mr Li on 6 September 2018, which they submit confirms that the developer had agreed to limit KC’s scope of work. Ms Koh submitted that this email overrides the quote. In the email, Mr Li stated:

“Hi Quian,  
As discussed, we will supply carpet, floorboards, tiles etc for the boxes...”

27. Mr Li’s evidence was that this email was sent following a conversation on 6 September. He agreed that the developer had taken over the supply of some materials, and said this was done so that KC could focus on obtaining the shop drawings to keep the project moving forward. He says that the email does not say the developer will pay for the materials.



28. I accept Mr Li's evidence about the email. I found him to be a credible witness, and his version of the 6 September discussion is not inconsistent with the email sent that day. The email simply refers to the developer supplying materials. It makes no mention that the developer will pay for the supply, or installation of those materials.
29. Mr Martin said that he had always understood the quote was to be for a full supply and install. However once he realised that KC would be unable to meet the required timeframe, he arranged for the ordering of the materials and using other trades to complete the works. I accept Mr Martin's evidence, as it is supported by the contemporaneous invoices and receipts (details of which are provided below).

**Did the developer place orders for materials before KC's work was running late?**

30. KC argued that the invoices and receipts produced by the developer on the counterclaim showed that they had purchased materials before KC's work was delayed. They say that this shows that it was always agreed that the developer was to supply these materials. However, having reviewed the invoices and receipts provided, it is clear that these postdate KC's quote of 4 September 2018. Accordingly I do not accept this submission.

**Is the quoted price inadequate for the developer's scope of work?**

31. KC also submitted that the quoted price of \$42,345 was not enough to have included the finishing materials. They rely particularly on the cost of the supply of the porcelain tiles, being about \$10,000, and say they would not have been able to make a profit if the quoted price was to include the supply and installation of all such materials.
32. KC produced a one-page spreadsheet which Ms Koh said showed the amounts allowed by KC in their quote. I do not accept that this was a document prepared at the time of calculating the quoted price, as, on Ms Koh's own evidence, it included items they had paid to subcontractors and suppliers after the works had commenced.
33. Further, the spreadsheet does not provide sufficient detail to be able to calculate how much KC allowed for each item in the quote and for its profit. For example, there is a one line item in respect of the ceiling boxes, with a price of \$6300. Ms Koh's evidence was that this was the amount allowed to build the ceiling boxes. There are further items of \$1000 and \$660 and \$550 in relation to the hanging of the boxes. She was unable to say how the \$6300 figure was calculated: what amount had been allowed for each of labour, MDF, nails, glue, the hanging wires. As a result she was also unable to show that that amount did not include an allowance for the finishing materials such as tiles, floorboards and carpet.

34. In any event, I agree with the developer's submission that \$6300 is a large amount to have allowed for labour and materials for building a simple MDF box. It is more likely than not that that amount would have included the materials to clad the box.
35. Mr Li also said that on 29 August, prior to KC preparing their quote, he had provided KC with the supply cost for each item of cladding material, and so they knew the cost of the stone, the tiles, the carpet and the floorboards when calculating the contract price. I have accepted his evidence, as it is supported by the contemporaneous emails, and so I do not accept KC's contention that its contract price did not include the materials.

### THE COUNTERCLAIM

36. The developer's defence to the claim is that the work carried out by KC was not carried out to a satisfactory standard or within the required timeframe. They have brought a counterclaim for the costs they have incurred in supplying materials and engaging other trades to install these.
37. The developer provided copies of WeChat and text messages sent mostly by Mr Li to Ms Zhang during the course of the job. The content of these messages shows that KC was running behind the agreed timeframe and that certain parts of the work had not been carried out to an acceptable standard. For example, the desk had to be remade when the joins were unacceptable. At various times, Ms Zhang sent messages to Mr Li agreeing that the developer should take over the carpet angles and the spray painting of the display panels, because they were unable to find someone reliable to deliver good quality.
38. Mr Martin gave evidence about the costs incurred in having the works completed. He also provided invoices and receipts for each of the items claimed. I accept these amounts, as follows:

<i>Item</i>	<i>Name of supplier</i>	<i>Amount</i>
Box 01	Johnson Tiles	\$217.88
	Installation cost	\$2618.00
Box 02	Colours Carpet Court	\$882.00
	D&D Parker installation	\$715.00
Box 03	Painting	\$400.00
Box 04	Multiform porcelain and installation	\$9014.00
Box 05	Embleton timber floor	\$1634.60
VR Station	Signorino Tile Gallery	\$986.83
Pamphlet	Vic Coats Painting	\$858.00
Round seat	D&D Parker Carpet install	\$110.00

Planter boxes		\$118.50
Spinning boxes	Please Please Please - cladding material, spinning shafts and part of installation	\$1275.00
Suspended boxes	lift hire for reinstallation	\$447.50
Materials for installation	tile angles, tile spaces, carpet angles, threaded rods, bolts and paint	\$295.80
<b>Total</b>		<b>\$19,573.11</b>

39. The respondent is entitled to be put in the position it would have been in had the contract been satisfactorily completed. Accordingly I will allow it \$9,654.11 on the counterclaim. This amount is calculated as follows:

a.	Cost of works completed by others	\$19,573.11
b.	Less balance of contract price due to the applicant (including extra \$1450 allowed for engineer to hang ceiling boxes)	\$9,919.00
c.	Total	\$9,654.11

40. The developer also claims \$3649.50 for the time spent by Mr Barresi and Kincaid (another entity related to the developer) in managing KC's works. I do not think this is an expense that would be reasonably foreseeable to KC, especially in circumstances where Mr Barresi's own evidence was that he had not been expected to be involved in this job, but had given assistance to Mr Li and Mr Martin once it was apparent that KC would not be able to finish in time.

## ORDERS

- 1 The applicant must pay to the respondent \$9,654.11.
- 2 Having regard to section 115B(1) of the *Victorian Civil And Administrative Tribunal Act 1998* and being satisfied that the respondent has substantially succeeded in its counterclaim, the Tribunal orders that the applicant must reimburse the respondent for its filing fee of \$679.20.

**SENIOR MEMBER S. KIRTON**