IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2015 05336
S CI 2015 05338

VERSA-TILE PTY LTD (ACN 000 987 002) — Plaintiff (Applicant)

v

101 CONSTRUCTION PTY LTD (ACN 124 812 139) (in Liquidation) — Defendant (Respondent)

and

DANNY RAIZ — Plaintiff (Applicant)

v

101 CONSTRUCTION PTY LTD (ACN 124 812 139)(in Liquidation) — Defendant (Respondent)

JUDGE:	Ginnane J
WHERE HELD:	Melbourne
DATE OF HEARING:	1 September 2016
DATE OF JUDGMENT:	28 February 2017
CASE MAY BE CITED AS:	Versa-Tile Pty Ltd v 101 Construction Pty Ltd
MEDIUM NEUTRAL CITATION:	[2017] VSC 73

DOMESTIC BUILDING CONTRACTS — Decision of VCAT — Application to appeal on questions of law — *Domestic Building Contracts Act 1995* s 53, *Victorian Civil and Administrative Tribunal Act 1998*, s 148

DOMESTIC BUILDING CONTRACTS — Written contract — Repudiation — Assessment of damages — Whether contract contained a 'time is of the essence' condition — Scope of contract building works — Whether oral term that building work would create watertight roof – Order setting-off the damages orders in two proceedings – Whether jurisdiction to make set off order when person affected not a party to both proceedings

PROCEDURAL FAIRNESS — Finding that contract contained a mutual mistake as to parties to contract — Finding that party to contract an agent for undisclosed principal —

Subsequent order setting-off of damages ordered in two proceedings — Parties not heard on the possibility of the findings or resulting set-off order — Denial of procedural fairness

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APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr H Forrester	Collins & Collins
For the Respondent	No appearance	

HIS HONOUR:

Introduction

1 These two proceedings arise from a building dispute about a warehouse in Victoria Street Fitzroy, which had been converted into a two level residential dwelling, with provision for retail or commercial offices on the ground floor, but which had suffered significant water entry, causing consequential damage to the ceilings and other parts of the building. The Builder, 101 Construction Pty Ltd ('101 Construction', 'the Builder') and the Owner, Versa-Tile Pty Ltd ('Versa-Tile', 'the Owner') both commenced applications, which I will call proceedings, which were heard together in the Victorian Civil and Administrative Tribunal. The two proceedings before the Court, which were also heard together, are applications for leave to appeal from VCAT's decisions on questions of law pursuant to s 148(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*. The question of leave to appeal in each proceeding was referred to the Court which would hear the appeal if leave was granted.

2 The parties filed consent minutes dated 16 August 2016 stating that the respondent, that is, 101 Construction had 'abandoned its participation in this above proceedings with the consent of the Plaintiff'. The minutes also reserved costs.

3 As mentioned, the two proceedings were heard together by a Senior Member of VCAT. In the first proceeding, the Owner sued the Builder seeking compensation of $176,446 being the amount assessed by its building consultant as the reasonable cost of repairing and completing the internal and external works.[1] In the second proceeding, the Builder sued Dr Danny Raiz, the director and sole shareholder and of Versa-Tile, which is the trustee of his family trust, for the outstanding amount owed under the Contract of $65,914.31 and liquidated damages for delay of $63,304.[2] The Tribunal delivered the same reasons in both proceedings.

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1 BP311/2014 *Versa-Tile Pty Ltd v 101 Construction Pty Ltd (Building and Property)* [2015] VCAT 1472 ('Reasons').

2 BP354/2014 *101 Construction Pty Ltd v Raiz (Building and Property)* [2015] VCAT 1473.

4 At the VCAT hearing, the Owner was represented by Counsel and the Builder was represented by its director Mr Daoud. The hearing took four days and the transcript ran to 600 pages. The Senior Member delivered 53 pages of detailed reasons.

5 After judgment was reserved, Mr Brendan Nixon wrote to the Court as joint and several liquidator of 101 Construction stating that he and Leon Lee had been appointed its joint and several administrators on 26 September 2016 and as its joint and several liquidators on 31 October 2016, referring to the two proceedings and to s 500(2) of the *Corporations Act 2001 (*Cth*)* and stating:

> We advise that we have admitted Versa-Tile Pty Ltd's proof of debt for $3,933.06 and notwithstanding the above, we do not intend to object to Versa-Tile Pty Ltd seeking confirmation of this debt via any VCAT proceedings.

6 The Senior Member found that the Owner had repudiated the contract but that the Owner's claims for breach of contract for defective work that pre-dated the repudiation survived against the Builder. Exercising the Tribunal's power under s 53(1) of the *Domestic Building Contracts Act 1995* to 'make any order it considers fair to resolve a domestic building dispute', the Senior Member awarded the sum of $39,597.89 to the Builder for loss and damage consequent upon the contract's repudiation; the sum of $43,530.95 to the Owner for the costs of rectifying defective work; and set the two amounts off, the result being that the Builder was ordered to pay the Owner $3,933.06.

7 The applicants ultimately raised five questions of law, questions of law five and six were abandoned.[3] The questions were the same in both proceedings.[4]

Legislation

8 Section 53 of the *Domestic Building Contracts Act 1995* confers wide powers to the Tribunal, providing:

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3 Transcript of Proceedings, *Versa-Tile Pty Ltd v 101 Construction Pty Ltd* and *Danny Raiz v 101 Construction Pty Ltd* (Supreme Court of Victoria, S CI 2015 05336 & 05338, Ginnane J, 1 September 2016) 32, 46 ('T').

4. The history of the proceedings is set out in the affidavits of Alexander Collins, the applicants' solicitor, sworn 23 December 2015 in proceeding SCI 05336 of 2015 and sworn 9 March 2016 in proceeding SCI 05338 of 2015.

53 Settlement of building disputes

(1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.

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

(a) refer a dispute to a mediator appointed by the Tribunal;

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

(i) found to be owing by one party to another party;

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

(iii) by way of restitution; …

9 In *Swinton Pty Ltd v Age Old Builders Pty Ltd* Chernov JA described s 53 as giving expression to the Domestic Building Act's purpose as follows:

> It is convenient to highlight briefly two aspects of the Act's policy. The first is the establishment of the tribunal as the principal forum for the resolution of disputes under domestic building contracts. This aim is made apparent by a number of sections in the Act. For example, s 1, which sets out the purposes of the Act, provides by para (b) that one of the purposes of the Act is to provide for the resolution of domestic building disputes by the tribunal. Similarly, s 4, which deals with the objects of the Act, provides by para (b) that an object of the Act is 'to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness'. Consistently with this purpose and object, s 53 confers on the tribunal wide powers to resolve such disputes, including the power to make an order in relation to them that it considers to be 'fair'…[5]

10 The application of a like provision granting discretion to the VCAT to 'make any orders it considers fair' was considered in *Christ Church Grammar School v Bosnich & Sehr*.[6] In that case, the consequence of enforcing a lawful contract was considered by the VCAT member to lead to some unfairness and so the member demurred from enforcing the contract. However, Sifris J found that that the effect of the discretion provided by the relevant Act, in that case the *Fair Trading Act 1999*, did not relieve the member from the duty to apply the law:

> In my opinion, although the matter is not free from difficulty, the Tribunal is

5 (2005) 13 VR 381, 387 [17].
6 [2010] VSC 476.

required, when deciding the merits of a case, to apply the law and not merely be guided by it. Any flexibility relates only to the **form** of the order and of course, to procedural and evidential matters. If this was not the case absurd results could follow. To the extent that the Supreme Court of Victoria has concurrent jurisdiction different results could follow. The Court, not having the benefit of s 109, would have to apply the law while the Tribunal could do what it considered fair even if the law was to the contrary. Further, such a result would encourage idiosyncratic notions of fairness and justice. If the intention was to exclude the operation of the law (as a matter of substance and not merely procedure or form) a specific section to such effect, clear and unambiguous, should have been inserted...[7]

Summary of facts

11 The Senior Member set out the introductory facts of the two proceedings as follows:

1. The applicant in proceeding BP311/2014, Versa-Tile Pty Ltd (**'Versa-Tile'**), is the registered proprietor of a property located in Fitzroy (**'the Property'**). Dr Danny Raiz, the respondent in proceeding BP354/2014, is the director of that corporate entity.

2. The Property comprises a warehouse which has been converted into a two level residential dwelling, with provision for retail or commercial offices on the ground floor (**'the Premises'**). In 2011, the Premises suffered significant water ingress, causing consequential damage to the ceilings and other parts of the building. As a consequence, Versa-Tile or Dr Raiz made a claim on their building insurance policy. That claim was accepted and a scope of work was approved by the loss adjuster acting on behalf of the relevant insurance company. That scope of work is set out in a report from *Sergon Building Consultants* dated 13 September 2012. It is also set out in a quotation provided by *Built in Style* dated 8 October 2012 for $66,450 plus GST.

3. Prior to the internal remedial work being undertaken, Versa-Tile or Dr Raiz entered into a contract with Darren Hay, a licensed plumber, to undertake remedial work to the roof of the Premises. The purpose of this work was to ensure that water ingress could be arrested before internal remedial work was undertaken. The scope of that roof plumbing work was, to some extent, based upon an earlier quotation obtained by Dr Raiz in late November 2011 from *Elliott Roofing Pty Ltd*, although the scope of work set out in that quotation was far more extensive than the work which Mr Hay was to perform. In particular, the *Elliott Roofing Pty Ltd* quotation contemplated that all of the roof cladding was to be removed and replaced. However, the scope of work to be undertaken by Darren Hay was limited to replacing only some of the rusted roof cladding sheets, some flashings and box gutters, with a view to arrest water ingress at minimal cost.

4. Darren Hay commenced the roof plumbing work but ran into financial difficulties and was unable to complete that work. As a result, a claim was made on Darren Hay's warranty insurer, which

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7 *Christ Church Grammar School v Bosnich & Sehr* [2010] VSC 476, [40] (citations omitted).

was accepted in favour of Dr Raiz or Versa-Tile.

5. Following acceptance of that insurance claim, Versa-Tile or Dr Raiz entered into negotiations with 101 Construction Pty Ltd, the respondent in proceeding BP311/2014 and applicant in proceeding BP354/214, with a view to engaging it to carry out not only the remedial work set out in the *Build in Style* quotation, but also complete the roof plumbing work in order to make the premises 'watertight'.

6. A number of draft building contracts were forwarded by 101 Constructions Pty Ltd (**'the Builder'**) for consideration by Dr Raiz. Eventually, a building contract dated 20 September 2013 was signed by Dr Raiz and Mr Daoud, the director of the Builder (**'the Contract'**). The Contract price was $130,914.30 and purported to reflect what the parties had, over the preceding months, discussed as being the scope of the work to be undertaken by the Builder.

7. According to Dr Raiz, the written terms of the Contract do not accurately reflect the extent of the work that the Builder had agreed to undertake. In particular, the parties disagree as to the extent of roof plumbing work that was to be undertaken by the Builder. Dr Raiz contends that the roof plumbing work contemplated by the Contract is extensive because the Builder had promised to make the Premises 'watertight'. According to Dr Raiz, that entailed making the whole of the roof compliant with the current *National Building Code* and applicable Australian Standards. By contrast, the Builder contends that the scope of the roof plumbing work was limited to replacing only one section of roof cladding, located above the cathedral ceiling, together with other minor repairs and adjustments, in order to arrest water ingress at minimal cost.

8. The discourse between the parties over this issue created conflict, which was exacerbated when further water ingress occurred during the period that the Builder was performing its internal remedial work. Further conflict also arose in relation to the quality of the internal remedial work undertaken by the Builder and the time taken to complete the works under the Contract. In early February 2014, this conflict culminated in an altercation between the parties and, ultimately, the termination of the Contract between them..

9. Proceedings were subsequently issued by Versa-Tile seeking compensation from the Builder in the amount of $176,446, being the amount assessed by Versa-Tile's building consultant as the reasonable cost of repairing and completing the internal and external works.

10. An application was subsequently filed by the Builder, in which it claimed $129,218.31, which is made up as follows:

    (a) the outstanding amount under the Contract of $65,914.31; and

    (b) liquidated damages for delay of $63,304.[8]

8. Italics in the Reasons.

Questions of law

12 The appellant stated seven questions of law in the Proposed Notice of Appeal, namely:

> 1. Whether the Tribunal has misapplied the test for validly terminating a contract following breach of an essential term of that contract.
>
> 2. Whether the Tribunal Member misapplied the doctrine of repudiation by wrongly failing to assess the question of repudiation on an entirely objective basis.
>
> 3. Whether the Tribunal Member failed to take into account relevant evidence of what was agreed between the parties as to the scope of the roofing works, and took into account irrelevant opinions of the Defendant's roofing subcontractor, when constituting the terms of the relevant contractor.
>
> 4. Whether it was open to the Tribunal to find that the Defendant suffered loss and damage in the absence of any evidence to that effect.
>
> 5. Whether the Tribunal member failed to properly apply the test for determining whether the Owner was the undisclosed principal of its agent the plaintiff.
>
> 6. Whether s 53 of the Domestic Contracts Act 1995 applies to allow the Tribunal Member to treat the claim made in proceeding BP 354/2014 by the defendant against Dr Raiz as being a claim made against the plaintiff and then to set one claim off against the other.
>
> 7. Whether the Tribunal Member failed to afford the Plaintiff procedural fairness.

13 As previously mentioned, questions of law five and six were not pursued.

14 Each of the questions is answered below in the order of their argument at the hearing, commencing with question of law two.

Question of law two – repudiation of the contract

15 This question was: whether the Tribunal Senior Member misapplied the doctrine of repudiation by wrongly failing to assess the question of repudiation on an entirely objective basis? The key grounds of appeal associated with this question was whether the Tribunal Member erred at law in finding that there had not been a breach of an essential term of the Contract by the Builder which allowed the Plaintiff or the Owner to validly terminate the Contract. Secondly, whether the Senior

Member erred at law in failing to consider whether the accumulation of conduct by the Builder, by reference to the effect it would have on a reasonable person, amounted to a repudiation of the Contract. Thirdly, whether having regard to particular facts found by the Senior Member, he ought to found that the cumulative effect of those matters constituted a repudiation of the Contract by the Builder.

Applicants' submissions

16 The applicants submitted that the Senior Member had erred in finding that the Builder had not repudiated the contract by applying a legal test of repudiation by reference to the subjective intentions of the Builder, rather than the objective test of what a reasonable person in Versa-Tile's position would have taken the Builder's conduct to mean.[9]

17 In written submissions, the applicants pointed in particular to the following paragraphs of VCAT's reasons:

> 42. As noted above, the written statement makes no mention of Mr Daoud saying that the Builder was *not coming back to the job*. Although it does state that the dispute was to become a legal matter. The written statement is contemporaneous with the events which occurred on that evening. Therefore, balancing the fact that the Builder did return on the following morning, coupled with the contemporaneous statement and the evidence of Mr Daoud against the evidence of Dr Raiz, I find that the more likely scenario is that Mr Daoud did not say that he or the Builder were *not coming back to the job*.
>
> 43. Even if those words were said, I am of the opinion that they must be viewed in context. No doubt, the assault on Mr Daoud was a traumatic experience and words spoken at the heat of the moment do not always reflect the true intentions of the person uttering them. In my view, it is difficult to discern that those words, even if spoken, seriously evinced an intention by the Builder that it no longer intended to be bound by the terms of the Contract. In my view, such words would have more gravitas if supplemented with conduct such as the Builder not returning to the Property. However, that did not occur. The Builder returned on the following morning and there is no evidence to suggest that it was not prepared to continue to perform its obligations under the Contract. In those circumstances, I am not persuaded that the words, even if spoken, evinced an intention on the part of the Builder not to be bound by the terms of the Contract.
>
> 44. Therefore, I find that the exchange between Mr Daoud and Dr Raiz,

9 T 9.

> which occurred as Mr Daoud left the Property, does not constitute or evidence repudiation on the part of the Builder.[10]

Analysis

18 To succeed in this Court, the applicants must establish an error of law by the Tribunal that affected its decision. I am not persuaded that the Senior Member failed to apply an objective test, in determining whether repudiation had occurred. Before embarking on his analysis of the facts, the Senior Member set out the relevant legal test of repudiation in the following passages by reference to authority:

> 17. In *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*, Deane and Dawson JJ summarised the concept of repudiation as follows:
>
> > ... repudiation turns upon objective acts and omissions, not on uncommunicated intention, and it is sufficient that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.
>
> 18. Similarly, in *Kane Constructions Pty Ltd v Sopov*, Warren CJ stated:
>
> > Gibbs CJ in *Sheville & Anor v The Builders Licensing Board* likewise observed that a contract may be repudiated where one party renounces their liabilities under it, evincing any intention to no longer be bound by the contract. His Honour further observed that repudiation may also occur when one party demonstrates an intention to fulfil the contract, but in a manner "substantially inconsistent with his [or her] obligations and not in any other way..."

19 These passages identify the relevant legal test as contained in High Court authority that makes clear that the proper test is an objective one. The applicants' counsel in fact relied on *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* as containing the correct test.[11] There is no indication that the Senior Member failed to apply the objective test that he had previously identified in determining whether repudiation of the Building Contract had occurred. The Senior Member's reference to the facts that led to the cessation of the Builder's work does not suggest, when read in the context of his statement of legal principle, that he failed to apply an objective test.

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10 Italics in the Reasons.

11 T 15.

20 There is a second reason why this alleged error of law has not been established. It is clear that the Senior Member found, on the balance of probabilities, that the Builder never said words to the effect that he would not return to the job. The Senior Member was entitled to make that finding. He heard from witnesses and received evidence. The applicants provided no basis for this Court to interfere with the Tribunal's findings of fact on this point.

Question of law four –the Builder's loss and damage

21 The fourth question of law was:

> Whether it was open to the Tribunal to find that the Defendant (the Builder) suffered loss and damage in the absence of any evidence to that effect.

22 The primary proposed ground of appeal connected to this question of law was:

> Whether the Tribunal Member erred at law in finding that the Builder suffered loss and damage in the absence of any evidence to that effect in circumstances where:
>
> i. the Tribunal Member found that the Builder failed to properly set out the basis for its claim in its 'Points of Claim' [Reasons at 135-146];
>
> ii. the Builder's claim for $65,914.30 was not an amount due and payable under the Contract [Reasons at 146];
>
> iii. a claim for damages for breach of Contract had not been made [Reasons at 145-149];
>
> iv. no evidence had been led by the Builder to prove it suffered any loss or damage [Reasons at 152];
>
> v. there was no evidence available to prove the Builder's actual loss or damage, if any [Reasons at 152];
>
> vi. it was not possible to determine whether the Builder would have made any profit or loss under the contract; and
>
> vii. the Tribunal Member utilised the Plaintiff's evidence of its own costs of rectification and its costs of completion in order to determine the Builder's loss and damage [Reasons at 152],
>
> the Tribunal Member erred at law in determining that the Builder suffered loss and damage in the absence of any evidence to that effect.

23 In oral submissions, the applicants did not press an argument that the Tribunal's method of assessing damages had denied them procedural fairness.[12]

Applicants' submissions

24 The applicants attacked the Senior Member's assessment of the Builder's damages on the ground that there was no evidence, or insufficient evidence before him to support the sum that he awarded. In particular, counsel submitted that the following passages in the Reasons revealed error:

> **Claim for work completed**
>
> 145. The *Points of Claim* filed by the Builder have not been prepared by a legal practitioner. Regrettably, those *Points of Claim* fail to clearly set out how the Builder contends that it is entitled to the balance of the Contract price. In other words, it is unclear whether the amount of $65,914.30 is a claim for loss and damage suffered; or whether the claim is simply grounded upon a contractual entitlement to recover that amount, such as the payment of a staged progress claim.
>
> 146. In my view, the claim cannot be founded on the basis that the $65,914.30 is an amount that is due and payable under the Contract. This is because the terms of the Contract and the evidence before the Tribunal make it clear that the time for paying any of the outstanding progress claims had not crystallized as at the date when the Contract came to an end.
>
> 147. The Contract provided for staged progress claims as follows:
>
> (a) $6,545.72 for the *Deposit* progress claim;
>
> (b) $58,911.44 for the *Payment on initial ordering progress* claim;
>
> (c) $52,365.72 for the *Payment on completion* progress claim; and
>
> (d) $13,091.42 for the *Handover* progress claim.
>
> 148. It is common ground that the works had not reached *Completion* stage. Indeed, that was the basis upon which the Builder argued that it was not liable for many of the items in Mr Lorich's report.
>
> 149. Accordingly, and having regard to s 53 of the *Domestic Building Contracts Act 1995*, which states that *the Tribunal may make any order it considers fair to resolve the domestic building dispute*, I will proceed to determine the Builder's claim on the basis that it constitutes a claim for damages at common law for breach of contract.

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12 T 47.

150. In *Gates v City Mutual Life Assurance Society Limited*, the High Court observed that:

> In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract being performed - he is entitled to damages for loss of bargain (expectation loss) and damages suffered including expenditure incurred in reliance upon the contract (reliance interest).

151. That said, I am of the opinion that the amount of $65,914.30 claimed by the Builder cannot constitute the Builder's actual loss and damage consequent upon the Owner's breach. This is because that amount would have been received by the Builder only when the works had been completed and handed over. Moreover, that amount is inclusive of GST, which means that the actual amount in the hand of the Builder is $59,922.09, after remittance of GST to the Australian Taxation Office. However, the Builder would have still had to expend its own money in order to achieve the stages of *Completion and Hand-over*. That expenditure needs to be taken into account and deducted from the $59,922.09 in order to arrive at a net figure that the Builder would have had in hand.

152. It is not entirely clear how the experts have distinguished between the cost of rectification and the cost of completion. According to Mr Lorich, the aggregate cost to rectify and complete is $104,263.55, excluding margin and GST. Although Mr Lorich has not specifically distinguished between completion costs and rectification costs, I have made findings to that effect. In particular, I found that some work was still required to complete the roof plumbing, further work was required to complete the plastering in the garage area, painting was required and final cleanup was also to be done. Doing the best I can with the evidence before me, I assess the Builder's cost to complete the Works, based on Mr Lorich's and Mr Quick's costings to be as follows…[13]

25 The Senior Member then proceeded to assess the Builder's costs to complete particular works.

26 The applicants submitted that the Senior Member, in exercising the discretion contained in s 53 of the *Domestic Building Contracts Act 1995*, was still obliged to assess damages according to law and accepted practice. They argued that this was not a case where the Builder was unable to lead evidence of its damages. Rather, the Builder had chosen not to adduce evidence of his actual loss and damages and the Court was therefore not obliged to attempt to assess damages to which the Builder may have been entitled. As a result, the Builder was only entitled to nominal

13 Italics in the Reasons.

damages, if it otherwise proved its case.

27 The applicants also attacked the Tribunal's use of the Owner's experts' reports in determining the amounts to deduct from the contract price in calculating the sum owed to the Builder.

28 The authorities on which the applicants relied suggest that in situations where a plaintiff cannot adduce precise evidence of loss, the Court may engage in some guesswork in assessing damages.[14] Cases where a party *cannot* adduce evidence of loss are distinguished from cases where a party could have, but *has not* adduced such evidence.[15] In the latter case where a party has not, and should have, produced evidence, difficulties in the assessment of damages may be resolved against that party.[16] The applicants submitted that the Builder bore the onus of proving actual loss and damage, but had failed to do so. Moreover, the use of the contract price, which the Senior Member identified as neither suitable as a figure of actual loss nor as a contractual entitlement, was an erroneous starting point for the assessment of damages.

29 The legal principles for assessing damages for breach of contract, including proof of loss and damage were summarised by Robson J in *NCON Australia v Spotlight Pty Ltd*[17], who concluded:

> In my opinion, these authorities establish that the plaintiff is obliged to call such evidence as can be reasonably expected in the circumstances to establish the damages which the plaintiff claims. The court's obligation to estimate damage as best it can is only triggered where the circumstances are such that the plaintiff is unable to reasonably establish the damage. *McGregor on Damages* states that the word 'reasonable' is the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data.[18]

Analysis

30 The Senior Member correctly applied the test for determining expectation damages

14 *Longdon v Kenalda Nominees Pty Ltd* [2003] VSCA 128, [33] (Chernov JA).
15 *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257, [38] (Hayne J).
16 *NCON Australia Ltd v Spotlight Pty Ltd* [2012] VSC 604, [291] (Robson J).
17 [2012] VSC 604, [281]-[296].
18 Ibid, [295]. Emphasis added.

where a proprietor repudiated a building contract, making it impossible for the builder to complete its obligations under a building contract.

31 In calculating the Owner's damages, the Senior Member referred to the evidence called by each side. There was no error in that approach as all of that evidence was before him. Evidence led cannot be quarantined and restricted to being used only by the party leading it. The Senior Member calculated damages in respect of particular areas of work, such as plumbing and plastering.

32 The Senior Member considered that he should adopt the costings of the experts without adding an amount in relation to contingencies or margins as the risks or contingencies and profit had not been added as a cost against the Builder when the sum required to rectify its own work was determined. He deducted the fixed expenses including Builder's Margins, overhead costs, but added 15% allocated to fixed overheads and supervision. He did not add GST.[19]

33 The Senior Member noted that the Builder claimed the balance of the contract price in the amount of $65,914.30, plus damages because of delay caused to the building work in the amount of $63,304. He dismissed the delay claim. He stated that:

> 'Doing the best I can with the evidence before me, I assessed the Builder's cost to complete the Works, based on Mr Lorich's and Mr Quick's costings.'[20]

34 The Senior Member then found the cost of that work as $20,803.50, to which he added a margin of 15%, deducting the GST. He concluded:

> Therefore, $23,924.03 is to be deducted from $59,922.10 to arrive at a net figure of $35,998.07, exclusive of GST. To this amount, GST is re-added to arrive at a final figure of $39,597.89. I find this amount to represent the Builder's claim for loss and damages, ignoring any cross-claim against the Builder.[21]

35 Assistance on the present point is found in standard texts on the assessment of damages for breach of building contracts. *McGregor on Damages* states:

> On the measure of damages where the owner acts so as to bar completion

19 Reasons [102]-[103].
20 Reasons [152].
21 Reasons [162].

> there is, surprisingly, a dearth of authority. **General principles would put the normal measure at the contract price less the cost to the builder of executing or completing the work.** In calculating the builder's costs the indirect as well as the direct costs must be included, especially overheads. This measure, however, should be subject to reduction if the defendant can show that the time made available to the claimant by the breach has been, or could have been, used by him in executing other profitable contracts with which he would not otherwise have been able to contend. This is analogous to the cases of manufacturing and erecting machinery dealt with under sale of goods.[22]

36 *McGregor* does discuss alternative methods of assessing damages to the basic measure outlined in the passage that I have set out. They are the net profit which the builder could have made on the whole contract plus his expenditure in part performance and, secondly, for the work done, such proportion of the contract price as the cost of the work done bears to the total cost of the whole contract, plus, for the work remaining, the profit that would have been made upon it. [23]

37 *Brooking On Building Contracts* explains:

> Where the proprietor repudiates, the builder may have suffered several losses. Having lost the benefit of the contract, the builder may have suffered a loss of profits on the job. Perhaps the builder had expended moneys in advance on purchases made for the purposes of the contract. In having lost the benefit of the contract, the builder may have lost a commercial advantage which would have been gained had the contract been performed.
>
> Damages for loss of profits and damages for expenditure reasonably incurred were said by Mason CJ and Dawson J in *Commonwealth v Amann Aviation Pty Ltd* to be simply two manifestations of the general rule stated by Parke B in *Robinson v Harman*. As the decision in the *Amann Aviation* case shows, the builder may recover so-called reliance damages — 'that is to say, damages equivalent to the wasted expenditure which has been reasonably incurred in reliance upon the assumption that the contractual promises of the [principal] would be honoured'…
>
> It is made clear by the judgments in the *Amann Aviation* case that recovery of reliance damages is not dependent upon whether the contract, if not repudiated, would have resulted in a profit. But loss of profits is a well-established head of damages. Having found him discharged by breach by a total prevention of performance, Lusher J in *Gabriel v Sea & Retaining Wall Constructions Pty Ltd* held that the plaintiff in that case was entitled to the damages resulting from the loss of the benefit of the contract — 'ie, the contract price less the cost to him of executing or completing the work … that is to say, the value of the work performed together with profit lost on the

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22 Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009), 995-6 [26-022] (emphasis added).

23 Ibid, [26-023].

> uncompleted work, credit being given for payments … made'.
>
> In *Foley Bros v McIlwee*, the Judicial Committee affirmed the decision of the British Columbia Court of Appeal. It held that the measure of damages is the difference between the amount payable to the contractor under the terms of the contract and the amount it would have cost the contractor to carry out the work if the contract had not been cancelled.[24]

38 Far from supporting the applicants' submissions, these passages explain that the starting point for the consideration of a builder's damages claim was the contract price.

39 The Senior Member in assessing damages sought to reach a fair resolution of the dispute as he considered s 53 of the *Domestic Contracts Act* empowered him to do. The contract price was, albeit hypothetical, a sum that represented what would have been paid to the Builder had the Contract been performed. The Senior Member acknowledged the limitations attaching to the use of that price. [25]

40 The Builder was represented by its director at the VCAT hearing, whereas the Owner was represented by counsel. The material before the Senior Member was not ideal, and, on occasions, he prefaced his assessment with the words: 'Doing the best I can with the evidence before me…'.[26] However imperfect, the contract price was evidence in the dispute and the Senior Member was entitled to use it in his evaluation.

41 The key question is whether the damages awarded by the Tribunal were assessed according to law? The damages awarded were compensatory, in the Builder's case, they were expectation damages and sought to place the Builder in the position he would have enjoyed had the contract not been repudiated. The Senior Member was entitled to have regard to the contract price and the experts' reports, both the Owner's and the Builder's. The Senior Member correctly recognised that to award the full contract price to the Builder would have given it a windfall, because it would have included expenditures and taxes that were not incurred.

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24 Damien Cremean et al, *Brooking On Building Contracts* (LexisNexis, 5th ed,2014) 282-283.
25 Reasons [145]-[151].
26 Reasons [85(d)].

42 I do not consider that the Senior Member made the errors in assessing damages that the applicants allege. In the case of the Owner, he considered the amount of damages that it claimed being losses alleged to flow from breach of the contract prior to termination and stated:

> Therefore, any assessment of the cost to make good defects found to exist in the works undertaken by the Builder are to be assessed on the basis of what it would cost the Builder. In my view, the most appropriate way to assess the Builder's costs is to subtract GST in the b*uilder's margin* or a portion of b*uilder's margin,* from the aggregate cost in order to arrive at a figure that best represents what it would have cost the Builder.[27] What follows are my findings as to whether the works undertaken by the Builder are defective or not, having regard to the evidence before me.[28]

43 Both parties relied on the evidence of their building experts in order to prove or disprove whether the works were defective and the cost of particular works.

44 As mentioned, the applicants originally contended, but did not press in final submissions, that the Tribunal had denied them procedural fairness by his method of assessing the Builder's damages. For the sake of completeness, I add that I consider that there was no such denial of procedural fairness, rather the Senior Member applied accepted principle, by reference to all of the evidence that before him.

Question of law seven – denial of procedural fairness

45 The seventh question of law was: Whether the Tribunal Member failed to afford the applicant procedural fairness?

46 The proposed grounds of appeal accompanying this seventh question of law, included some that were really connected with the procedure by which damages were calculated, but, as mentioned, those grounds were not pressed separately as a procedural fairness breach.[29] Save for paragraphs vii and viii and the concluding paragraph, I have set the proposed grounds out as part of question of law four – that related to the assessment of damages. As the procedural fairness question was not

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27. Reasons [58] (Italics in the Reasons).
28 Reasons [59].
29 T 47.

pressed in respect of the assessment of damages, I will not set out paragraphs vii and viii and the concluding paragraph.

47 The procedural fairness question, as developed in oral submissions[30], was based upon the Senior Member's determination of the undisclosed principal issue. The determination was that Versa-Tile was an undisclosed principal and that the description of the parties contained in the contract was affected by a mutual mistake. The applicants contended that they had not been given notice of or, the chance to call evidence on, this issue.

48 The proposed grounds of appeal that appear to relate to the Tribunal's dealing with the issue of an undisclosed principal and thus to the procedural fairness ground developed in the hearing, appeared to be stated under the heading 'Wrong Party'. They were:

> Whether the Tribunal Member failed to properly apply the test for determining whether the Owner was the undisclosed principal of its agent the Plaintiff.
>
> a. The Tribunal Member ignored or failed to consider evidence before the Tribunal that the Builder was aware at the time of issuing invoices at the commencement of the Contract that the Plaintiff was acting as agent for the Owner;
>
> b. The Tribunal Member ought to have found that the Owner was not an undisclosed principal of the Plaintiff; [Reasons at 165];
>
> c. The Tribunal Member ought to have found that the Plaintiff was not a party capable of being sued by the Builder for breach of contract or otherwise.

49 The procedural fairness ground had been outlined in the applicants' written submissions which were prepared some weeks before the hearing in this Court.

50 Question six, which was not pressed by the applicants, might also have been relevant to the undisclosed principal issue. It stated:

> Whether section 53 of the *Domestic Contracts Act 1995* applies to allow the Tribunal Member to treat the claim made in proceeding BP 354/2014 by the Defendant against Dr Raiz as being a claim made against the Plaintiff and then to set one claim off against the other.

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30 T 34-45.

51 The applicants did not ultimately contend that VCAT could not make a final combined order by setting one order off against another when two related proceedings were heard together.

52 The Senior Member sought to identify the parties to the contract because there was an issue whether one party was Dr Raiz or Versa-Tile. The Building Contract described the parties as Dr Raiz and 101 Construction. However, the registered proprietor of the property, and thus the correct contracting party on the Tribunal's findings, was Versa-Tile. The Builder's claim against Dr Raiz was a separate proceeding to that brought by Versa-Tile against 101 Construction. In making final orders, the Senior Member found Versa-Tile to be an undisclosed principal in the proceeding brought by the Builder. In paragraph 14 of the Reasons, the Senior Member found that Dr Raiz's inclusion in the Contract as a party was a 'mutual mistake':

> 14. In my view, it was always the intention of the parties prior to the Contract being executed that the registered proprietor of the Property should be the relevant contracting party. That being the case, the naming of Dr Raiz, as the *OWNER* in the Contract is a mutual mistake. Therefore, I find that the contracting parties were Versa-Tile and the Builder. The involvement of Dr Raiz, was as director, officer and agent of Versa-Tile, rather than being the contracting party.

53 The Senior Member then purported to correct the mutual mistake that he had identified, by finding that at all relevant times, Versa-Tile was the undisclosed principal of Dr Raiz, stating under the heading 'Conclusions on Claims':

> 163. In proceeding BP311/2014 I found that Versa-Tile's loss and damage is $43,530.95. In proceeding BP354/2014, I found that the Builder's loss and damage to be $39,597.89.
>
> 164. However, the Builder's claim is made directly against Dr Raiz in his personal capacity, rather than against Versa-Tile, notwithstanding that I have found Versa-Tile to be the actual contracting party. As previously indicated, Mr Daoud was not aware of Versa-Tile at the time when the Contract was entered into. Nevertheless, I found that the intention of the parties prior to the Contract being executed was that the actual registered proprietor of the Property was to be the contracting party. That was not Dr Raiz. Indeed, Dr Raiz contended that he was, at all relevant times, merely acting as an agent of Versa-Tile.

165. That being the case, I find that Versa-Tile was the undisclosed principal of Dr Raiz. In *Maynegrain Pty v Compafina Bank*, Hope JA explained the doctrine of undisclosed principal in the following terms:

> A person may sue or be sued upon a contract although the other party to the contract did not know that the person with whom he was contracting was acting as an agent, if in fact that person was acting as agent for an undisclosed principal, unless the terms of the contract are inconsistent with the known person being an agent. Either principal or agent may sue or be sued ... The rights and obligations of principal and agent are not joint, but, subject to the superior right of the principal, alternative.

166. The corollary of the above dicta is that any defence which a third party may have against an agent is available against that agent's principal. Therefore, to the extent that the Builder claims against Dr Raiz, that claim may also be set off by way of defence against the claim made by Dr Raiz's principal; namely Versa-Tile, in proceeding BP311/2014. Having regard to s 53 of the *Domestic Building Contracts Act 1995*, I consider that the fairest way to resolve the domestic building dispute between all parties is to treat the claim made by the Builder against Dr Raiz as a claim made against Versa-Tile and then to set one claim off against the other.

167. As I have already indicated, the Owner's rights in relation to breaches of the Contract which existed prior to termination survive termination, such that the cost of repairing defects, based on what it would have cost the Builder, is to be balanced against the Builder's claim for loss and damage. That being the case, I find that the Builder's loss and damage of $39,597.89 is deducted from what I have determined to be the cost of rectification of $43,530.95, such that the net outcome is that the Builder is to pay the Owner $3,933.06.

Applicants' submissions

54 The applicants claim that they were not informed that the Tribunal might apply the undisclosed principal rule or make findings that Dr Raiz was an undisclosed principal. Those matters were not raised in the Builder's points of claim and the applicants were not given an opportunity to be heard on those matters and thus denied procedural fairness. Mr Daoud's case was that Dr Raiz was named in, and was a party to, the Building Contract.

55 The applicants submitted that as Dr Raiz was not a party to the Building Contract, the Builder could not claim against him and therefore the Builder's proceeding against Dr Raiz should have been dismissed as the Builder had not sued Versa-Tile.

56 The applicants abandoned the challenge foreshadowed in question of law five to the Senior Member's statement of the undisclosed principal doctrine or its application, but the applicants argued that the Tribunal's application of the doctrine was procedurally unfair.

Analysis

57 While the concept of 'undisclosed principal' was not directly referred to, the issue of who were the contracting parties was clearly before the Tribunal. Indeed, the first issue the Senior Member identified in the Reasons was: 'Who are the contracting parties?'[31]

58 Because the Builder did not participate in the proceedings in this Court, no one submitted that the Tribunal erred in finding that Versa- Tile and not Dr Raiz was the 'Owner' party to the Contract.

59 Versa-Tile's claim in both VCAT proceedings addresses the issue of who were the contracting parties. In its Points of Claim in proceeding BP311/2014, Versa-Tile referred to the Building Contract and stated:

> The [Building Contract] was entered into by Dr Danny-Glen Raiz, on behalf of [Versa-Tile]. Dr Raiz is the sole director and sole shareholder of [Versa-Tile].[32]

60 In his Points of Defence to proceeding BP354/2014, Dr Raiz, in response to 101 Construction's reference to the Building Contract stated:

(a) He denies that he is a party to the [Building Contract].

(b) He says that in entering into the [Building Contract], he did so on behalf of, and in his capacity as, the sole director of Versa-Tile Pty Ltd.

(c) He admits that Versa-Tile Pty Ltd entered into a contract with [101 Construction]…[33]

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31 Reasons, [12]-[14].
32 BP311/2014 Points of Claim, [3] Particulars.
33 BP354/2014 Points of Defence, [3].

61 At the commencement of the Tribunal hearing, the identity of the contracting parties was raised as follows:

> MR RYDE: …Perhaps it is relevant to start by saying whether the tribunal has had an opportunity to look through these documents but although there are two claims here. They really were talking about the one dispute. The reason, as I understand it, that Mr Daoud brought a separate proceeding is that he brought the proceeding against Dr Raiz in his personal capacity rather than against the company.
>
> SENIOR MEMBER: Yes.
>
> MR RYDE: So really for the purpose of this hearing - - -
>
> SENIOR MEMBER: This is a dispute, isn't it, as to who the contracting party is, whether it is Versa-Tile Pty Limited or whether it is Dr Raiz.
>
> MR RYDE: Dr Raiz. Yes, sir. I must say on that point that it is not clear to us yet what the issues in dispute are. This is no criticism of Mr Daoud, given he is representing himself but as I said, his pleadings were filed there has been some movement… [34]

62 Similarly, during examination-in-chief, Dr Raiz gave evidence about signing the contract:

> MR RYDE: (To witness) Doctor Raiz, I'd just like to ask you about entering into the contract with Mr Daoud in relation to the work that was done at your premises at Fitzroy?---Yes.
>
> Who entered into that contract?---My company did, and I did as a director of my company.[35]

63 Given that Dr Raiz admitted that he was acting on behalf of Versa-Tile and that Versa-Tile 'pleaded' a contract with 101 Construction, Versa-Tile's case in respect of question of law seven was really directed to a perceived deficiency in 101 Construction's points of claim and its failure to sue Versa-Tile. However, the reason why 101 Construction, represented by Mr Daoud, sued Dr Raiz, is clear enough - the Building Contract named 'Danny Raiz' as Owner and not Versa-Tile, who is not mentioned in it.

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34 T 2.

35 T 144.

64 Where there is an issue about the identity of the parties to a contract and who the plaintiff should have sued, the court can make findings that depart from the pleading of the claim. Wilson J in *Reardon v Stokes Contractors Pty Limited*,[36] dealt with an appeal on the ground that:

> The learned Magistrate entered judgment against the plaintiff, notwithstanding the contract pleaded to have been breached was between the defendant and [the plaintiff's company].

65 In dismissing this ground, Wilson J noted that the Magistrate 'identified the issue of the contracting parties as a primary issue of concern'.[37] Later, her Honour explained:

> The identities of the contracting parties was clearly an issue in the proceedings before the Magistrate and, despite the imprecision of the original pleading[38], the issue appears to have been recognised by both the court and the parties. Indeed, the matter was conducted by the parties on that basis.
>
> Despite that, Mr Reardon relies upon the failure to plead an action in contract against him in the pleadings filed by Stokes as a basis upon which to impugn the conclusions of the Local Court.
>
> …
>
> In oral submissions in court, the plaintiff stated:
>
> 'I should say, your Honour, as a matter of frankness, that it wasn't disputed ultimately that there was a contract as between the plaintiff and the second defendant; what was disputed was whether the plaintiff had brought any action in respect of that contract.'
>
> The present plaintiff also relies upon the failure of Stokes to make an application to amend the pleadings so as to bring an action against Mr Reardon for breach of contract.[39]

66 Her Honour then said:

> Where there is a contention that a matter was determined on a basis other than one raised in the pleadings, attention must be given to both the pleadings and the manner in which the case was conducted.
>
> Whilst the pleadings may be determinative of the matter, that is not always the case. Where neither the pleadings nor the evidence advanced and argued by the parties gives rise to determination of the matter on a basis other than that which was pleaded, there is likely to be a denial of procedural fairness to one or both parties in determining the trial by reference to a matter not

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36 *Reardon v Stokes Contractors Pty Ltd* [2015] NSWSC 960.
37 Ibid, [20].
38 Which only pleaded an action against the company.
39 Ibid, [31]-[32] and [34]-[35].

> argued before the court. That will not be the case, however, where the evidence adduced by the parties and the issues argued by them legitimately gives rise to determination of the matter pleaded on a different basis to that pleaded, and upon which the trial may be determined.
>
> As stated in *Gould v Mount Oxide Mines Ltd* (in liq)]:
>
> > Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.
>
> See also *Banque Commerciale SA (in liq) v Akhil Holdings Ltd; Dare v Pulham*; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets*.
>
> Here, his Honour clearly took the view that, whilst breach of contract was pleaded against Nessfield[40] alone, the evidence adduced by both Stokes and Mr Reardon established the existence of a contract between the two at the material time, and the parties had argued the matter in a manner consistent with that evidence.
>
> That conclusion was, in my view, open to his Honour, and does not represent a denial of procedural fairness to Mr Reardon.[41]

67 However, in that case the party found to have been a contracting party was a co-defendant to the proceeding. That was a critical feature not present in this case as 101 Construction did not sue Versa-Tile, but sued Dr Raiz.

68 The applicants' submissions contained suggestions that Mr Daoud knew that Dr Raiz was the agent for Versa-Tile, but 101 Construction only named Dr Raiz as the contracting party in its proceeding. It is unclear if Mr Daoud, for 101 Construction, did argue in the Tribunal hearing that Versa-Tile was the 'Owner' party to the building contract, but the question is not whether 101 Construction was denied procedural fairness, but whether Versa-Tile was.

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40 The company.

41 Ibid, [36]-[41] (citations omitted).

69 A case based on a denial of procedural fairness can only succeed if the claimant establishes that it has suffered a practical injustice.[42]

70 VCAT is not a Tribunal of pleadings, although points of claim and defence are commonly ordered by VCAT, and it:

> must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.[43]

71 In performing that statutory role and in exercising the jurisdiction conferred by s 53 of the *Domestic Contracts Act* insofar as it was relevant, VCAT had to act in accordance with procedural fairness.

72 The identity of the contracting parties was raised as an important issue. Versa-Tile could not have obtained the Senior Member's order in BP311/2014 without his finding that it was the real contracting party, because the contract only named Dr Raiz. If 101 Construction had sued Versa-Tile being the entity that Dr Raiz contended was the party to the contract, then on the Tribunal's findings, which I have not disturbed, Versa-Tile would still have been held liable to 101 Construction in the amount of $39, 597.89.

73 The Senior Member, in performing the Tribunal's obligations to a self-represented litigant, in this case the Builder, may have been able to inform Mr Daoud, the director who was representing the Builder, of its right to apply, if it so chose, to join Versa-Tile to the proceeding and of the possible consequences for it, if he found that Versa-Tile was the 'Owner' party to the Building Contract, when it had not been joined as a party.[44] It is likely that any such application would have been granted. One feature of the proceeding was that submissions were made in writing including by the self-represented Builder and as a result, the Tribunal was unable to raise with the parties orally during submissions the orders that it might make.

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42 *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 214 CLR 1, 14 [38] (Gleeson CJ).

43 *Victorian Civil and Administrative Tribunal Act* 1998 s 98 (1)(d).

44 See the VCAT *Fair Hearing Obligation Practice Note.*

74 The practical reasons for the Tribunal's orders are apparent, but, in my respectful opinion, before making any such orders, it should have first informed the parties that, if it found that Versa-Tile was the other or 'Owner' party to the Building Contract and not Dr Raiz, that it might make an order against it in the Builder's proceeding. While procedural fairness is a practical matter, the outcome of the Builder's proceeding is that the Builder obtained an order against Versa-Tile although it was not a respondent to the Builder's proceeding and the Builder had never sued it. Versa-Tile was before the Tribunal as an applicant in its own proceeding and it was not sued by the Builder. The fact that the two proceedings were heard at the same time does not alter the fact, that if Versa-Tile was to be found liable to the Builder in its proceeding, it needed to be joined as second respondent, perhaps in the alternative, in that proceeding. This is not a mere technical issue, as neither a Court nor a Tribunal can make an order for damages against a person who is not a party to the proceeding in which the damages are ordered. This is a matter of jurisdiction, as well as in the circumstances of this case, a matter of procedural fairness. I do not consider that this deficiency can be corrected in this Court on these applications for leave to appeal as they are limited to consideration of questions of law, in circumstances where the Builder is not represented and in now in liquidation. It is possible to speculate what, if any, difference, would have resulted from the Tribunal providing the applicants with notice of the course that it proposed to follow, but I do not consider that it is appropriate to do so on an application for leave to appeal on questions of law.

75 Question of law seven is established. The proposed grounds of appeal that relate to this question are those that appear under the heading 'Wrong Party'.

Question of law one – breach of an essential term

76 Question of law one was whether the Tribunal has misapplied the test for validly terminating a contract following the breach of an essential term of the contract. This question was connected with the second question of law which concerned repudiation. The Grounds of Appeal connected with this question were whether the

Tribunal Member had failed to apply the test for breach of an essential term of the Building Contract:

a. Having regard to the fact that the Tribunal Member found that:

   i. time was of the essence under the Contract [Reasons at 24];

   ii. the building works had not been completed by the due date [Reasons at 20];

   iii. the Defendant ('the **Builder**') caused delays in progressing the building works [Reasons at 20, 24 and 25];

   iv. any delay caused by the Plaintiff did not affect the Builder's ability to complete [Reasons at 22-23 and 143];

   v. the building works had not been completed on termination, being 2 months after the due date for completion [Reasons at 146];

   vi. there were significant defects caused by the Builder [Reasons at 135]; and

   vii. time had not been extended under the Contract [Reasons at 142],

   the Tribunal Member erred at law in finding that there had not been a breach of an essential term of the Contract by the Builder which allowed the Plaintiff or the Owner to validly terminate the Contract.

Applicants' submissions

77 The applicants argued that implied in the Senior Member's reasons was a finding that the building contract included a 'time is of the essence' clause, and thus, due to the delays in construction, an essential term of the contract had been breached entitling Versa-Tile to terminate the contract. The applicants claimed that paragraph 24 of the reasons, in particular the phrase 'especially where time is made of the essence', was a finding by the Tribunal that completing construction on time was an essential term of the building contract.

78 Paragraph 24 of the Tribunal's reasons and the associated paragraphs, which are contained in a section of the reasons dealing with 'Delays' are as follows:

> 23. Mr Daoud also gave evidence that further delay was caused by electricians engaged by Dr Raiz and by the fact Dr Raiz requested that the works be suspended over the Christmas period. Dr Raiz did not

deny that he requested that the work be suspended over the Christmas period.

24. I accept that significant delay on the part of a builder may amount to a repudiation of a contract, especially where time is made of the essence. In the present case, although no extensions of time were sought by the Builder, some explanation was given as to why the works were not completed prior to 7 December 2013 or even early January 2014. In my view, that militates against a finding that the delay in completing the works in the present case constitutes a repudiation of the Contract on the Builder's part.

25. Moreover, there is no evidence that the works were not being progressed during the period November 2013 to February 2014 (apart from when the works were suspended over the Christmas period at the request of Dr Raiz), notwithstanding that progress may have been slow during that period. In my view, the mere fact that the works were late does not amount to a repudiation of the Contract on the part of the Builder. I do not consider that mere delay in progressing the works evinces an intention on the part of the Builder that it no longer intends to be bound by the terms of the Contract or demonstrates that it is only willing to perform the Contract in a manner entirely inconsistent with its terms.

Analysis

79 The applicants have not established any error of law by the Tribunal in the terms raised in this question of law or the associated proposed grounds of appeal. First, the reasons themselves do not support their argument. A fair reading of the part of the reasons on which they rely reveals that the Senior Member did not consider that the contract contained a 'time is of the essence' condition. Secondly, the Senior Member on the evidence was entitled to make a finding that the term alleged by the applicants did not form part of the Building Contract.

80 Building contracts generally do not include 'time is of the essence' clauses because of the vicissitudes of construction.[45] Generally speaking, if that term is to be included in a building contract, it must be unequivocally expressed, and even then, courts may be hesitant to treat such clauses as making time of the essence.[46]

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45 Nicholas Dennys QC and Robert Clay (eds), *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 13th ed, 2015) 706 [6-006].

46 Ibid.

81 The terms and context of the Building Contract in these proceedings are consistent with the general approach that 'time is of the essence' clauses are not readily implied in domestic building contracts. In this case, of particular importance is clause 8.4 of the Building Contract, which refers to the Builder's rights to extend the completion date, whether 'entitled under the Contract *or otherwise*'.[47]

Question of law three – The 'scope of works' question

82 Question of law three was expressed as follows:

> Whether the Tribunal Member failed to take into account relevant evidence of what was agreed between the parties as to the scope of the roofing works, and took into account irrelevant opinions of the Defendant's roofing subcontractor, when construing the terms of the relevant contract.

83 The scope of works question depended on the Court upholding the question that challenges the Tribunal's finding about repudiation.[48]

84 The applicants contend that the Senior Member made an error of law in identifying the terms of the contract, by failing to find that they included an oral term that guaranteed that the roofing works to be performed by the Builder would be 'watertight'. The proposed grounds of appeal in respect of question 3 were that: The Tribunal Member failed to take into account relevant evidence of what was agreed between the parties as to the scope of the roofing works, and took into account irrelevant evidence of what the plaintiff's [builder's] experts said in their reports about the roofing works, when construing the contract.

(a) The Tribunal Member made an error of law when he determined the scope of the roof plumbing work required under the Contract by reference to the expert reports rather than evidence of what was agreed by the parties [Reasons at 61-62].

(b) The Tribunal Member ought to have found that it was a term of the contract or the collateral contract that the builder was to ensure that the roof of the

47 Contract Ex 13 – Dr Raiz affidavit.

48 T 66.

applicant's building would be 'water tight'.

(c) The Tribunal Member found, in reliance of the evidence of Mr Williams (being the builder's roofing subcontractor) rather than by reference to what the parties agreed that:

85 There then followed 14 subparagraphs that were not pressed. The matters contained in subparagraph 12(c) of the proposed grounds of appeal were not pressed in submissions.

Analysis

86 The Senior Member addressed the issue of whether a condition of 'watertightness' formed part of the Contract, and found that it did not in the following passage:

> 68. In Mr Quick's report, he makes reference to 28 items of defective (or incomplete) roof plumbing. What follows are my findings and observations relating to each item (adopting the same numbering). In arriving at those findings, I have had regard to the written terms of the Contract, which spells out with some certainty what work was to be undertaken in relation to the roof plumbing. In my view, the written terms of the Contract together with any regulatory requirements spell out and define the scope of the roof plumbing work. The general statement made by Dr Raiz that the Builder would make the roof *watertight* is too uncertain and ambiguous to define what actual work was to be undertaken, especially in circumstances where a large part of the existing roof was in need of repair or replacement. In other words, given the condition of the existing roof, making the roof watertight at a particular point in time was likely to only be a temporary measure. In those circumstances, it would seem that the only definitive measure to ensure the future integrity of the roof was to wholly replace the existing roof. However, as I have already found, the Contract makes no mention of replacing the whole of the existing roof. Although the Contract states under Item 22 of the particulars that *Replace roofing from existing insurance claim 1* was to be a provisional sum item, I do not interpret that to mean that the whole of the existing roof was to be replaced.[49]

87 Plainly evident in the above passage is a finding of fact by the Senior Member that the scope of works to be carried out by the Builder were contained wholly in the written terms of the Contract. That is hardly a surprising conclusion. The issue of whether a 'watertightness' condition was inserted by an oral variation of the written

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49 Italics in the Reasons.

terms of the contract was a question of fact and no question of law arises from the Senior Member's finding on that question of fact. It is unnecessary to decide whether a failure to take into account relevant evidence, as is alleged in question three, in the circumstances of these proceedings could be an error of law, as the evidence does not support the conclusion that the Tribunal did fail to take any such evidence into account.

Conclusion

88 The applicants have established an error of law by the Tribunal as described in their question of law seven. The other questions of law that the applicants pressed have not been established and do not identify any other error of law by the Tribunal.

89 The question then arises as to the order that the Court should make taking into account the liquidation of the Builder, the liquidators' admission of the amount of $3,933.06, which VCAT awarded against the Builder to Versa-Tile and the provisions of s 500(2) of the *Corporations Act* 2001 (Cth).

90 I will give the parties, or in the case of the Builder, its liquidator, the opportunity to make any submissions they wish about the form of orders.