

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP825/2016

CATCHWORDS

Domestic Building: claim by owners against first respondent for return of progress payments made other than in accordance with s 40(2) of the *Domestic Building Contracts Act 1995* (Vic); claim by first respondent that the claim is an apportionable claim under Part IVAA of the *Wrongs Act 1958* (Vic) and that liability should be apportioned to the second respondent; claim for contribution by the first respondent against the second respondent under s 23B of the *Wrongs Act 1958* (Vic).

FIRST APPLICANT	Mr Stephen Bartolic
SECOND APPLICANT	Mrs Vasilka Bartolic
FIRST RESPONDENT	Prestige Home Builders Pty Ltd (ACN 081 377 639)
SECOND RESPONDENT	Mr Tim Smith
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	3 July 2017
DATE OF ORDER	31 July 2017
CITATION	Bartolic v Prestige Home Builders Pty Ltd (Building and Property) [2017] VCAT 1102

ORDERS

- 1 The first respondent, Prestige Home Builders, must pay to the applicants, Mr Stephen Bartolic and Mrs Vasilka Bartolic, the sum of \$257,500.00.
- 2 The applicants have leave to make an application for interest, such application to be made within 60 days.
- 3 The applicants have leave to make an application for costs, and for reimbursement of any filing fee or hearing fee paid under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), such applications to be made within 60 days.
- 4 The first respondent's claim for indemnity or contribution against the second respondent is dismissed.

Member C Edquist

APPEARANCES:

For Applicants:	Mr M Settle of Counsel.
For First Respondent:	Mr R Jankulovski, director.
For Second Respondent:	No appearance.

REASONS

INTRODUCTION

- 1 The applicants, Stephen Bartolic and Vasilka Bartolic ('the owners'), in or about 2013 decided to construct a substantial dwelling on land they owned in Shearwater Drive, Mount Martha, Victoria. Between 21 and 24 August 2013 they went through the process of signing a contract for those works with the first respondent Prestige Home Builders Pty Ltd ('Prestige Home Builders') for a contract sum of \$515,000.00. The contract was signed on behalf of Prestige Home Builders by Tim Smith.
- 2 The owners claim against Prestige Home Builders is simply put. It is alleged that Prestige Home Builders claimed \$77,250.00 for the frame stage under the contract, and that sum was paid in two tranches. It is also alleged that Prestige Home Builders invoiced \$180,250.00 for the lock-up stage, and was duly paid that amount. It is alleged that the contract was validly terminated by reason of Prestige Home Builders' failure to complete the works in a timely manner. Finally, it is alleged that in breach of s 40 of the *Domestic Building Contracts Act 1995* (Vic) ('the DBC Act') Prestige Home Builders has demanded, recovered and retained more than the percentage of the contract price at the completion of the base stage for a contract to build all stages, and the owners seek the return of the total of \$257,500.00 they have paid in respect of the frame stage and the lock-up stage. They also seek costs and interest.
- 3 Prestige Home Builders' defence to the claims entails the following propositions:
 - (a) it did not enter into a contract with the owners;
 - (b) if the owners entered into a contract it was with Mr Smith in his personal capacity;
 - (c) if the owners did enter into any contract they did so in circumstances where they knew or ought reasonably to have known that the contract was illegal and the contract as alleged is illegal and unenforceable;
 - (d) the owners did not pay Prestige Home Builder any sum at all, and any sums paid were paid, with the owners' knowledge, to Mr Smith in his personal capacity;
 - (e) Mr Smith is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act 1958* (Vic) ('the Wrongs Act'), and under s 24AI of that Act the claim against Prestige Home Builders is limited to an amount reflecting the proportion of the loss or damage claimed that the Tribunal considers just having regard to the extent of its responsibility for the loss or damage, if any.
- 4 The owners make no claim against Mr Smith.

- 5 Prestige Home Builders caused Mr Smith to be joined as respondent in order to press claims against him for indemnity or contribution pursuant to the provisions of s 23B of the Wrongs Act and for apportionment of liability under Part IVAA of that Act.

THE MAIN ISSUES

- 6 The primary issue I have to decide is whether the owners entered into a contract with Prestige Home Builders or with Mr Smith. If I decide the contract was with Mr Smith, then the claim against Prestige Home Builders must be dismissed and I will have to decide what liability, if any, Mr Smith has to the owners in circumstances where they have pleaded no case directly against him.
- 7 If I decide that the owners did enter into a contract with Prestige Home Builders, then I will have to determine a secondary issue, which is whether the contract is legal and enforceable. If the contract is legal and enforceable, then I must also determine the factual questions concerning whether Prestige Home Builders issued progress claims, and received and retained payment, in breach of s 40 of the DBC Act.

THE HEARING

- 8 The proceeding came on before me for hearing on 3 July 2017. Mr Mark Settle of Counsel appeared on behalf of the owners. Only Mr Bartolic gave evidence on behalf of the owners. Prestige Home Builders was represented by its director, Mr Riste Jankulovski. He was the only witness for the company. Mr Smith did not appear, and was not represented, and the hearing took place in his absence.

THE EVIDENCE CONCERNING FORMATION OF THE CONTRACT

- 9 Mr Bartolic gave evidence on behalf of the owners. He explained, by way of background, that he and Mrs Bartolic knew Mr Smith because he had been married to Mrs Bartolic's cousin. They were close. They would have liked him to build the house for them but they knew there was an issue because he was a commercial builder and not a domestic builder. They accordingly asked him if he knew a domestic builder who could become involved.
- 10 Mr Bartolic deposed that by 21 August 2013 Mr Smith had identified Prestige Home Builders as suitable, and prepared the contract in the name of that company. On that day Mr Smith presented the contract to them and they went through it page by page. They signed the Instrument of Agreement in the contract on 21 August 2013, and Mr Smith signed at the same time. However, they could not sign the check list set out in the contract until it had been verified by Prestige Home Builders. One of the questions on the checklist was whether an insurance policy or certificate of currency for builder's insurance had been issued and provided to the owners. As it happened, insurance for the project was not confirmed until a

certificate of insurance was issued by VMIA/QBE on 22 August 2013. Mr Bartolic confirmed that the checklist was signed by the owners and countersigned by Mr Smith on 24 August 2013. The owners contend that the contract was effective from this date.

- 11 It is not disputed by Prestige Home Builders that Mr Smith had authority to sign the contract on behalf of the company. Mr Jankulovski was shown and confirmed the authenticity of an exchange of SMS's which passed between himself (addressed as 'Chris') and Mr Smith. Relevantly these included an email dated 19 August 2013 in these terms:

Hi Chris

I hope your well, I hear your on Holidays,

I have the Project ready for Insurance We had discussed, wondering whether We are able to do anything understanding your away maybe I can email docs if possible, or you can instruct me from there or..

(Sic)

- 12 Mr Jankulovski responded in these terms:

Hi Tim

I am having a very good time thank you for asking.

For the warranty insurance could you call Victor on [number omitted] Tell him I told you for him to issue the Certificate for you. could you pay him .

If you have any issue you could ask him to write to me.

Thank you

Chris

(Sic)

- 13 On 20 August 2015 Mr Smith sent a further SMS to Mr Jankulovski, which relevantly stated:

Thank you for that... what is the name of the building company to go on the contract and your DB Number are you happy for me to sign the contract...

Thanks Tim

- 14 On the same day Mr Jankulovski responded in these terms:

Hi Tim

My Company Name is Prestige Home Builders PTY LTD I. Don't have any numbers with me. You could sign the Contracts

Thanks

Chris

(Sic)

- 15 On the basis of this exchange, it appears that Mr Jankulovski on behalf of Prestige Home Builders expressly authorised Mr Smith to contact his insurance broker, Victor, in order to arrange for the issuing of the relevant insurance certificate, and expressly authorised Mr Smith to sign the contract on behalf of his company. Mr Jankulovski confirmed in his evidence that this was the effect of these SMS's.

FINDING REGARDING FORMATION OF CONTRACT

- 16 I accordingly find that the contract partially executed on 21 August 2013 and finally executed on 24 August 2013 was executed by the owners on their own behalf, and by Mr Smith on behalf of Prestige Home Builders with the express authority of a director of that company. The contract was accordingly made between the owners and Prestige Home Builders.
- 17 I find also, that as Mr Smith acted as the agent of a disclosed principal, he has no personal liability under the contract.

IS THE CONTRACT FORMED BETWEEN THE OWNERS AND PRESTIGE HOME BUILDERS ENFORCEABLE?

- 18 In its defence dated 27 September 2016, Prestige Home Builders contends that if the owners did enter into any contract with it they did so in circumstances where they knew or ought reasonably to have known that the contract was illegal, as it authorised Mr Smith to undertake or arrange the undertaking of residential building works with the knowledge that he was not qualified to do so. It says the alleged contract was illegal and unenforceable.
- 19 The context in which this contention is made is that it is common ground between the owners and Prestige Home Builders that Mr Jankulovski allowed Prestige Home Builders to enter into a domestic building contract with the owners utilising the company's domestic building insurance in order to enable them to build their house with the assistance of Mr Smith, who was not a registered domestic building practitioner.
- 20 In this connection it is relevant to note that the owners' counsel drew my attention to an affidavit sworn by Sasha Kate Roberts on 14 June 2017. Ms Roberts is a solicitor employed by the owners' solicitors HDL Legal and Consulting Pty Ltd. The affidavit is annexed as an exhibit to the transcript of a directions hearing in the Tribunal which took place on 12 April 2017 before Senior Member Walker ('the transcript'). According to the transcript, the solicitor for the owners, Mr Lippner, (spelt in the transcript Lipne) told Mr Walker that Mr Jankulovski 'loaned his builder's licence'.¹ Mr Jankulovski did not deny this. On the contrary, when Senior Member Walker put it to him that he didn't build this house and that it was Mr Smith who built the house, Mr Jankulovski confirmed that this was

¹ Transcript, page 8, line 27.

‘Correct’.² And when Senior Member Walker stated to Mr Jankulovski ‘He just used your licence’, Mr Jankulovski responded ‘Yes’.³

- 21 At the hearing before me, Mr Jankulovski gave evidence that after he authorised Mr Smith to arrange insurance through his broker, and authorised Mr Smith to sign the contract on behalf of his company, he had nothing to do with the job. He disputed that he had authorised Mr Smith to claim progress payments on behalf of Prestige Home Builders. He also said on several occasions that Prestige Home Builders had received no payments from the owners, and that each of the four payments made by the owners had gone to Mr Smith.
- 22 Because he insisted that Prestige Home Builders had received no payments, Mr Jankulovski contended that the contract that it had signed was of no effect, and that the company was ‘absolved from responsibility’.
- 23 Counsel for the owners contended that the argument that the contract was unenforceable ‘had no legs’ as it had been entered into with a registered domestic builder. It was because the owners appreciated that Mr Smith was a commercial builder and was not registered for domestic building that they asked Mr Smith to identify a domestic builder who could become involved. When Mr Smith identified Prestige Home Builders, they used that company’s insurance and entered into a contract for the purposes of obtaining a building permit and ultimately obtaining bank finance for the project. It was because Prestige Home Builders was a domestic builder that the contract was entered into, otherwise there would have been no point. Unless Prestige Home Builders had signed, the owners could have entered into a contract with another domestic builder.

Discussion

- 24 I note that it is not disputed that Prestige Home Builders had the standing to enter into a major domestic building contract. It held the relevant domestic building insurance.
- 25 I consider that it is not to the point that a director did not execute the contract, because a director, Mr Jankulovski, had expressly authorised Mr Smith in writing to sign the contract on behalf of the company.
- 26 The fact that Mr Jankulovski was not to be directly involved in the works did not of itself, in my view, make the contract a sham because it is not unknown for a domestic builder to engage a subcontractor to carry out works on its behalf. Accordingly, I find that the contract is not unenforceable only because it was the intention of each of the owners, Mr Jankulovski and Mr Smith, that Mr Smith would actually carry out the works.

² Transcript, page 8, lines 42-44.

³ Transcript, page 9, lines 1-3.

27 Furthermore, I do not accept Mr Jankulovski’s contention that the contract was rendered unenforceable only because of the fact that the company did not directly receive payments from the owners, and that the payments were made directly to Mr Smith. As was pointed out by the owners, Mr Smith was described as ‘project manager’, and from the owners’ point of view, he might well have been authorised to receive payments of behalf of builder.

Conclusion

28 Accordingly, I reject Prestige Home Builders’ argument that the contract is unenforceable. I accept the owners’ contentions, and find that the contract was validly entered into, and is enforceable

29 I now turn to the remaining issue, which is whether s 40 of the DBC Act is applicable, with the result that Prestige Home Builders must disgorge the frame stage and lock up stage payments made by the owners.

SECTION 40 OF THE DOMESTIC BUILDING CONTRACTS ACT 1995 (VIC)

30 The owners in their Points of Claim demand repayment of the frame stage progress payment of \$77,250.00 and the lock-up stage progress payment of \$180,250.00, a total of \$257,500.00, on the basis that Prestige Home Builders is:

...in breach of s 40 of the Act...has demanded, recovered and retained more than the percentage of the contract price at the completion of the base stage for a contract to build all stages...⁴

31 Section 40 of the DBC Act governs the progress payments which can be claimed by a builder under a major domestic building contract. It is not in issue that the contract made between the owners and Prestige Home Builders is a major domestic contract, and that the provision must be considered.

32 In s 40(1), definitions are set out for *base stage*, *frame stage*, *lock-up stage* and *fixing stage*. Section 40(2) goes on to relevantly provide:

(2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.

Penalty: 50 penalty units.

TABLE

Column 1	Column 2	Column 3
<i>Type of contract</i>	<i>Percentage of contract price</i>	<i>Stage</i>
Contract to build to lock-up stage	[Not relevant]	
Contract to build to fixing stage	[Not relevant]	
Contract to build all	10%	Base stage

⁴ Owners’ Points of Claim dated 24 June 2016, paragraph 10.

stages			
"	15%		Frame stage
"	35%		Lock-up stage
"	25%		Fixing stage

Imerva Corporation Pty Ltd v Kuna

- 33 *Imerva Corporation Pty Ltd v Kuna* ('Imerva')⁵ is a recent Supreme Court of Victoria decision which considered the operation of s 40 of the DBC Act. Neither party referred to the decision at the hearing, but I mentioned it because it involved the determination of an appeal to the Supreme Court from a decision of the Tribunal in a proceeding that involved progress payments made other than in accordance with the schedule of progress payments prescribed by s 40(2) of the DBC Act.
- 34 The owners did not expressly state what provision of the DBC Act in their Points of Claim they relied on in seeking a refund of the two payments complained of, and they did not address this point in the hearing. However, Prestige Homes Builders did not contend that the owners would not be entitled to recover moneys which were paid other than in accordance with the prescribed payment schedule.
- 35 The issue of the entitlement of an owner to be repaid progress payments to the extent to which they have been paid in excess of the payments set out in the schedule in s 40(2) was considered by Senior Member Walker in *Imerva*.⁶ When he came to address the consequences of failing to comply with s 40 of the DBC Act, Senior Member Walker said, at [54]:
- By s. 40(2) the Builder must not retain under the Contract more than the percentage of the Contract price listed in the Table. Its entitlement to payment must therefore be assessed in accordance with that table and the amount to which it is entitled must then be deducted from the total that it has received and the balance refunded to the Owners.
- 36 Senior Member Walker did not identify the legislative source of the Tribunal's power to make orders reflecting the owners' entitlement to receive a refund of monies paid other than in accordance with s 40. However, when his orders were appealed, they were not challenged on the basis that he had no power to make them.
- 37 When McDonald J in the Supreme Court determined the appeal from Senior Member Walker's decision in *Imerva*, he concluded that the owners were entitled to rely upon s 40(2) of the DBC Act, and dismissed the application for leave to appeal.⁷
- 38 McDonald J's decision in *Imerva* was itself appealed, and was upheld by the Court of Appeal.⁸ Relevantly, the Court Appeal made comments about the civil consequences of non-compliance with s 40(2). Having referred to

⁵ [2016] VSC 461.

⁶ [2015] VCAT 2058.

⁷ [2016] VSC 461.

⁸ [2017] VSCA 168.

s 40(4) of the DBC Act, which permits the parties to contract out of s 40(2) if there has been compliance with regulation 12(a), the Court of Appeal said that, at [98]:

Non-compliance with reg 12(a) carries both criminal and civil consequences. As mentioned, non-compliance means that, pursuant to s 40(2), Imerva was not entitled to demand, recover, or retain more than the percentage of the contract price specified in the prescribed payments regime on pain of exposure to a criminal pecuniary penalty. However, as the Tribunal acknowledged and the judge confirmed, Imerva remains entitled to the sequence of payments specified in the prescribed payments regime under s 40(2) of the Act, insofar as the stages of construction identified under the Act were completed. In other words, the non-compliance does not invalidate the Contract as a whole. The adoption of Method 2 in the Contract is void, pursuant to s 132, because it seeks to ‘annul, vary or exclude’ the prohibition in s 40(2). For the reasons given, Imerva cannot rely upon s 40(4) to avoid the prohibition in s 40(2). However, s 133 preserves the validity of the Contract given that no contrary intention appears in s 40; the Contract price remains and the progress payments revert to the statutory regime as expressed schematically in the Contract in Method 1. The Tribunal’s finding that Imerva owed a refund to the Kunas was made within that context.

- 39 As the power of the Tribunal to order a refund of payments made other than in accordance with s 40(2) of the DBC Act was upheld by both the Supreme Court and the Court of Appeal in *Imerva*, there can be no doubt that I have the power to order a refund if I find that payments have been demanded, recovered or retained by Prestige Home Builders other than in accordance with s 40(2).

Section 40(4) of the Domestic Building Contracts Act 1995 (Vic)

- 40 Before I now turn to the factual questions underpinning the issue of whether Prestige Home Builders has demanded or recovered or retained more than the percentage of the contract price allowed by the prescribed schedule, it is necessary to address the issue of whether the parties effectively contracted out of s 40(2), under s 40(4).
- 41 It was not argued by any party that the parties had agreed that s 40(2) was not to apply, and certainly there was no evidence that they had followed the procedure mandated in regulation 12 to achieve such a result. I accordingly proceed on the basis that s 40(2), in so far as it applies to a contract to build all stages, governs the situation.

Has Prestige Home Builders demanded or recovered or retained more than the percentage of the contract price allowed by s 40(2)?

- 42 I now turn to the issues of whether Prestige Home Builders has demanded or recovered or retained more than the percentage of the contract price allowed by s 40(2).

- 43 At the hearing Mr Bartolic gave evidence that the owners had paid a deposit, and then made a second payment in relation to the base stage. The owners make no complaint about this and do not seek disgorgement of these two payments from Prestige Home Builders.
- 44 Mr Bartolic also gave evidence that the owners had received an invoice from Mr Smith on the letterhead of Prestige Home Builders seeking payment of the frame stage payment being 15% of the contract sum of \$515,000.00, namely \$77,250.00 (inclusive of GST). This invoice was paid. Mr Bartolic further deposed that the owners had received an invoice from Mr Smith on the letterhead of Prestige Home Builders seeking payment of the lock-up stage payment being 35% of the contract sum of \$515,000.00, namely \$180,250.00 (inclusive of GST). This also was paid.

Was the frame stage complete?

- 45 The owners contend that the frame stage and lock-up stage payments were both claimed in breach of s 40(2) of the DBC Act because the frame stage was not complete. In support of this contention the owners called Mr Joseph Lawrence Spano, who holds a bachelor of engineering degree (civil). Mr Spano identified a report he had prepared on the letterhead of his firm Beauchamp Hogg Spano and it was put into evidence.⁹ At the hearing Mr Spano confirmed the opinions expressed in his report to the effect that the house was not at the point where the frame was complete and was not at lock-up stage. Mr Jankulovski elected not to cross examine Mr Spano, and he did not otherwise dispute Mr Spano's contentions.
- 46 I therefore find that the house was not at frame stage and was not at lock-up stage, and accordingly both the frame stage payment and the lock-up stage payment have been claimed before those respective stages were complete.
- 47 It remains to consider whether Prestige Home Builders has demanded, received or retained the frame stage payment and the lock-up stage payment, or whether those payments have been demanded, received or obtained only by Mr Smith.

Were payments demanded by Prestige Home Builders?

- 48 Turning first to the respective demands for payment, it is to be recalled that Mr Jankulovski disputed that because he had authorised Mr Smith to take out the insurance in his company's name, and authorised Mr Smith to execute the contract in the name of Prestige Home Builders, he had also authorised Mr Smith to claim progress payments on behalf of Prestige Home Builders. He also deposed that Mr Smith had created the progress payment claim form he had used (which was on Prestige Home Builders letterhead) and asserted that the company usually used the HIA standard payment claim form.

⁹ Exhibit A1.

- 49 The owners' counsel met this argument head on, arguing that because Mr Jankulovski had authorised Mr Smith to take out the required insurance and to execute the contract on behalf of Prestige Home Builders, he had armed Mr Smith with authority to represent Prestige Home Builders.
- 50 I accept the owners' contention. I find that as Mr Jankulovski deliberately put Mr Smith in a position where he could take out the relevant insurance and execute the contract, he put Mr Smith in a position where he could perform the contract using the name of Prestige Home Builders. Mr Bartolic deposed that until December 2015, his dealings were with Mr Smith. He did not speak to Mr Jankulovski until about 10 December 2015. He tendered text messages relevant to his communications with Mr Jankulovski at the time. I accept Mr Bartolic's evidence on this point. It follows that for at least the period between 24 August 2013 and about 10 December 2015 Mr Jankulovski held out to the owners that Mr Smith was the agent of Prestige Home Builders. There was nothing about the delegation of power to Mr Smith to indicate that the delegation was restricted in its nature.
- 51 It may well be, had Mr Jankulovski on behalf of Prestige Home Builders, at some point after 24 August 2013, notified the owners that Mr Smith's ability to represent the company was somehow limited, that Mr Smith's agency would have been revoked or restricted to the extent stated in that notice. However, there is no evidence that any such notice was given. On the contrary, Mr Jankulovski agreed that the first time he communicated with either of the owners was when Mr Bartolic called him in December 2015. Accordingly, I find that for more than two years Mr Smith had unlimited authority to represent Prestige Home Builders for the purposes of its contract with the owners.
- 52 The frame stage payment claim and the lock-up stage payment claim were both endorsed on documents that bore the letterhead of Prestige Home Builders. The frame stage payment claim was dated 31 March 2014. The lock-up stage payment claim was dated 5 May 2014. Both were accordingly claimed within the period in which I have found Mr Smith was acting as the agent of Prestige Home Builders. On these bases, I find that each claim was a demand made by Prestige Home Builders to the owners for the purposes of s 40(2) of the DBC Act.
- 53 I consider that to decide the matter in any other way would necessarily mean accepting that the authority to represent Prestige Home Builders granted to Mr Smith was in some way limited in an unspecified manner. It would follow that, even in circumstances where no notice of revocation or limitation of Mr Smith's authority had been given by Mr Jankulovski to the owners after 24 August 2013, Mr Jankulovski long after could retrospectively deny the efficacy of steps taken on behalf of Prestige Home Builders in connection with the contract. I consider that to accept such an argument would create an unworkable situation, and effectively give

Prestige Home Builders an ability to opt out of the contract it had willingly entered into through the agency of Mr Smith.

Were payments made to Prestige Home Builders?

- 54 Turning to the question of whether the payments were made to Mr Smith personally or Prestige Home Builders, I note the argument advanced on behalf of the owners was that it did not matter that the payments were paid into an account controlled by Mr Smith, as distinct from an account controlled by Prestige Home Builders, because Mr Smith was the company's agent. On the other hand, I acknowledge the argument advanced by Mr Jankulovski that as Prestige Home Builders did not receive the payments into its own bank account, it was not involved with the payments.
- 55 I consider that my finding above that Mr Smith had unlimited authority to represent Prestige Home Builders for the purposes of its contract with the owners in the period between 24 August 2013 and December 2015 means that the issue must be resolved in favour of the owners. I accordingly find that the payments made by the owners into a bank account nominated by Mr Smith and controlled by him were nonetheless payments made to Prestige Home Builders.

Were the payments made to Prestige Home Builders retained?

- 56 As it was not contended by Mr Jankulovski that Prestige Home Builders had refunded to the owners the frame stage payment and the lock-up stage payment, there can be no argument against me making a finding that those payments have been retained by that company. I make that finding.

Conclusion regarding breach of section 40(2)

- 57 I have found that Prestige Home Builders has demanded and recovered and also retained under a major domestic building contract the frame stage payment and the lock-up stage payment in circumstances where those stages had not been completed, and so the payments were demanded or recovered or retained in breach of s 40(2) of the DBC Act. Accordingly, it is fair for me to make an order that Prestige Home Builders refund \$257,500.00 to the owners, unless there is a basis for apportionment under Part IVAA of the Wrongs Act so that the order should be made in whole or in part against Mr Smith.

APPORTIONMENT UNDER PART IVAA OF THE *WRONGS ACT*

- 58 In its Points of Defence dated 27 September 2016, Prestige Home Builders pleads at [11]:

Further and in the alternative if, which is denied, [Prestige Home Builders] is liable to the Owners and the Owners have suffered loss, which is denied, then [Prestige Home Builders] says:

- (a) the claim pleaded against [Prestige Home Builders] [in] the [Points of Claim dated 24 June 2016] is an apportionable claim

within the meaning of sections 24AE and 24AF of the *Wrongs Act 1958 (Vic)*;

- (b) [Mr Smith] is a concurrent wrongdoer within the meaning of section 24AH of the *Wrongs Act 1958 (Vic)*;

Particulars

[Prestige Home Builders] relies upon its Points of Claim against [Mr Smith] filed (or to be filed) herein.

- (c) in the premises and pursuant to section 24AI of the *Wrongs Act 1958 (Vic)*, the claim against [Prestige Home Builders] is limited to an amount reflecting that proportion of the loss or damage claimed that the Tribunal considers just having regard to the extent of [Prestige Home Builder's] responsibility for the loss or damage, if any.

59 Section 24AE is relevant only in so far as it defines an *apportionable claim* to mean a claim to which Part IVAA of the *Wrongs Act* applies.

60 Section 24AF relevantly provides:

- (1) This Part applies to—
- (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a **failure to take reasonable care**;...

(My emphasis)

61 In respect of the proposition that the claim made against Prestige Home Builders is an apportionable claim, the owners' counsel referred to the language of s 24AF, and contended that the claim made was not a claim for failure to take reasonable care, as it was a claim for breach of contract.

62 I consider this point well made, and find that the claim is not a claim for failure to take reasonable care, and is accordingly not an apportionable claim for the purposes of Part IVAA of the *Wrongs Act*.

63 This finding is sufficient to dispose of this limb of Prestige Home Builder's defence, but by way of completeness, I make a further point concerning Mr Smith's status. This point arises from the operation of Part IVAA, s 24AI, which relevantly provides:

- (1) In any proceeding involving an apportionable claim—
- (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
- (b) judgment must not be given against the defendant for more than that amount in relation to that claim.

- 64 A concurrent wrongdoer, in relation to a claim, is defined in s 24AH as a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
- 65 In the present case, Mr Smith cannot be a concurrent wrongdoer with Prestige Home Builders, because he at all relevant times acted as the agent of Prestige Home Builders.
- 66 Accordingly, even if I had found that the claim was an apportionable claim, there would have been no scope for the operation of s 24AI.

Conclusion

- 67 As there is no basis to apportion any part of the liability to Mr Smith, Prestige Home Builders must reimburse to the owners the sum of \$257,500.00.

CONTRIBUTION

- 68 I now turn to the final issue, which is whether Prestige Home Builders is entitled to a contribution from Mr Smith. The basis of liability for contribution was articulated by Prestige Home Builders in its Point of Claim against Mr Smith at [24] in these terms:

I[f] (which is not admitted but specifically denied) it is found that Prestige is liable to the Owners to any extent that they have claimed in this proceeding, then Prestige claims indemnity or contribution from Smith pursuant to the provisions of section 23B of the *Wrongs Act 1958* to such extent as the Tribunal finds to be just and equitable by reason of the matters aforesaid.

- 69 The key provision in s 23B is s 23B(1) which provides:

(1) Subject to the following provisions of this section, a person liable in respect of any damage suffered by another person may recover contribution **from any other person liable in respect of the same damage** (whether jointly with the first-mentioned person or otherwise).

(My emphasis)

- 70 Guidance as to the operation of s 23B(1) can be derived from s 23A(1) which relevantly provides:

(1) For the purposes of this Part a person is liable in respect of any damage if the person who suffered that damage... is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise.

- 71 Mr Smith did not file or serve any pleading rebutting the claim for contribution made by Prestige Home Builders. Nor, as noted, did Mr Smith appear at the hearing.

72 However, there is an issue as to whether the owners, who brought their claim only against Prestige Home Builders, have any claim directly against Mr Smith. In this regard it is relevant to note that in the transcript, the owners' solicitor indicated to Senior Member Walker that they had 'no interest in Mr Smith at all'¹⁰ and later said:

The second respondent has been joined by the first; we don't have a claim against the second respondent.¹¹

73 At the hearing, Mr Jankulovski did not convince me that an order for contribution should be made. However, as Prestige Home Builders was not legally represented at the hearing, it is fair that I should look at the pleading filed by Prestige Home Builders against Mr Smith, at the time that the company was represented by lawyers.

74 The Points of Claim against Mr Smith dated 27 September 2016 set out the context in which Prestige Home Builders made its claim for contribution under s 23B of the Wrongs Act. The context was that Prestige Home Builders was asserting that the owners had entered into a contract with Mr Smith on his own account; that Mr Smith was the entity responsible for managing and arranging the carrying out of the building works pursuant to the contract; that the owners had paid Mr Smith \$77,250.00 for the frame stage and \$180,250.00 for the lock-up stage; and that the payments made under the contract for the building works were made only to Mr Smith.

75 If I had found those facts have been established, then it is clear that the owners would have been entitled to claim recovery of the monies paid from Mr Smith directly. This liability of Mr Smith to the owners would have triggered a separate liability in Mr Smith to contribute to Prestige Home Builders in respect of any liability it had to the owners for the same damage.

76 However, in circumstances where I have found that Mr Smith was the agent of Prestige Home Builders in demanding the \$77,250.00 for the frame stage and \$180,250.00 for the lock-up stage, and in recovering and in retaining those payments, the owners cannot have a claim directly against Mr Smith. As the agent of a disclosed principal, Mr Smith has no separate liability to the owners.

77 For these reasons, I find that Prestige Home Builders has no entitlement to contribution under s 23B of the Wrongs Act against Mr Smith. As Prestige Home Builders advanced no other basis for claiming indemnity or contribution from Mr Smith, the claim against Mr Smith must be dismissed.

ORDERS

78 I will make orders that Prestige Home Builders must pay to the owners the sum of \$257,500.00.

¹⁰ Transcript, page 12, line 6.

¹¹ Transcript, page 13, lines 21-22.

- 79 As the owners have claimed interest pursuant to statute, I will give them leave to make an application for interest, provided such application is made within 60 days.
- 80 The owners have also sought costs. Liberty will also be granted to the owners to make an application for costs, and for reimbursement of any filing fee or hearing fee paid under s115B of the *Victorian Civil and Administrative Tribunal Act 1998*, provided such applications are made within 60 days.
- 81 The claim that Prestige Home Builders makes against Mr Smith for indemnity or contribution is dismissed.

Member C Edquist