VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D356/2014

CATCHWORDS

Domestic Building: identity of builder who entered into contract; issue as to whether contract was repudiated, terminated or abandoned; mutual assertions of repudiation of contract.

FIRST APPLICANT	Mr Michael Strong
SECOND APPLICANT	Mrs Michelle Strong
FIRST RESPONDENT	Eco Smart Concept Builders Pty Ltd (ACN 149 584 770)
SECOND RESPONDENT	Anthony Milanovic
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATES OF HEARING	25 June, 26 June, 22 October, 23 October, 6 November and 7 December 2015
DATE BY WHICH RESPONDENTS HAD TO MAKE APPLICATION TO EXTEND THE TIME FOR FILING OF FINAL SUBMISSIONS	12 February 2016
DATE OF ORDER	15 March 2016
DATE OF REASONS	15 March 2016
CITATION	Strong v Eco Smart Concept Builders Pty Ltd (Building and Property) [2016] VCAT 391

ORDERS

1 The Tribunal finds and declares that the builder who entered into the contract with the Applicants is the Second Respondent Mr Anthony Milanovic.

2 The Applicants’ claim against Eco Smart Concept Builders Pty Ltd (ACN 149 584 770) is dismissed.

3 The counterclaim of Eco Smart Concept Builders Pty Ltd (ACN 149 584 770) against the Applicants is dismissed.

4 The Tribunal finds and declares that the contract made between the Applicants and the Second Respondent was abandoned.

5 **The proceeding is listed for further hearing at 10.00am on 11 April 2016, at 55 King Street, Melbourne, before Member Edquist, with an allowance of two hours, at which time the Tribunal will hear submissions as to damages in the light of the Tribunal's declaration that the contract was abandoned, and consider any other application made by the parties**.

MEMBER C EDQUIST

APPEARANCES:

For the Applicants:	On the first two days of the hearing, Mr Strong. On the third, fourth, fifth and sixth days of the hearing, Mr L M Stanistreet of Counsel
For the Respondents:	On the first, second, third, fifth and sixth days of the hearing, Mr A Milanovic. On the fourth day, no appearance.

REASONS

INTRODUCTION

1 The Applicants Mr Michael Strong and Mrs Michelle Strong are the owners ('owners') of a house in Doncaster East.

2 On 10 August 2013, they entered into a domestic building contract with a builder for the purpose of renovating and extending their home. The identity of the builder is an issue in the proceeding. The First Respondent and the Second Respondent, collectively, are referred to below as the builder as a matter of convenience. Any such reference is not of itself a finding about the identity of the builder.

3 The contract came to an end. The owners say the builder repudiated the contract. The builder says the owners repudiated the contract. How the contract came to an end is the second major issue in the proceeding.

4 The owners seek damages from the builder in the sum of $88,989.40. The builder has counterclaimed for $112,952.76.

HISTORY

5 Initially the project went well, but over time it turned sour. In particular, the owners formed the view that the builder had invoiced them for stages that were not complete, and was asserting that unfinished portions of the works would be finalised at the completion of the project.

6 The project moved towards crisis when the builder forwarded an invoice for the Painting, Tiling and Carpentry stage ('PTC stage invoice') on 5 March 2014, despite this stage being, in the owners' view, nowhere near complete.

7 Following negotiations, the owners still declined to pay the PTC stage invoice, and the builder formally suspended the works, and returned only on or about Friday 11 April 2014.

8 The owners complained about the builder to the Victorian Building Authority and Building Advice Conciliation Victoria, and on 24 April 2014 the owners instituted these proceedings against Eco Smart Concept Builders Pty Ltd ('Eco Smart') seeking an order that the builder comply with the contract. The owners, at this point, were not alleging that Mr Milanovic was the builder.

9 The owners engaged a building consultant, Mr Ian Forrest, to assist them in early May 2014. Following Mr Forrest's advice, the owners agreed to pay the disputed PTC stage invoice on or about 3 June 2014, and later agreed to pay a portion of a disputed invoice for variations.

10 After early June 2014, the builder completed no further work, and the contract came to an end at some point after 2 July 2014.

11 The owners reactivated this proceeding by filing, on 31 October 2014, Points of Claim. Importantly, the owners, in these Points of Claim, named

Anthony Milanovic, trading as Eco Smart Concept Builders Pty Ltd as the builder. This was a surprising pleading, as an individual can trade as a business name, but not as a company.

12 According to the Points of Claim, the owners are claiming damages for:

- incomplete contract works;
- defective contract works;
- consulting fees and other costs; and
- prime cost and provisional sum adjustments.

13 When the contract came to an end, only the final payment of $11,500 remained to be paid. However, the owners assert a large amount of work remained to be completed, and that they had to engage trades to rectify incomplete work which should have been performed by the builder. The owners say the builder is liable to them because the builder repudiated the contract, and they accepted the repudiation. The owners seek damages in respect of the costs incurred in completing the contracted works of $71,961.40, damages in respect of consulting fees and other expenses incurred in pursuing the matter in the sum of $14,028, and damages for the 'malicious actions' of the builder in the sum of $14,500, yielding a total claim, after allowing for the amount due on contract completion of $11,500, of $88,989.40.

14 On 23 January 2015, Eco Smart filed Points of Defence and Counterclaim, which contended:

- there were no incomplete works;
- it had consistently informed the owners that should there be any defects in the works under the contract, such defects would be rectified in accordance with the provisions of the contract allowing for a 'Defects Liability Period';
- The owners were in breach of the contract because they:
  - (a) had not made progress payments as required by the contract;
  - (b) had not paid certain agreed variation invoices;
  - (c) had taken possession of the works prior to payment of the final claim without the written consent of the builder;
  - (d) obstructed, interfered and hindered the carrying out of the works;
  - (e) instructed tradesmen contracted by the builder to perform works, in particular the plumber in June 2014, and the electrician;
  - (f) consistently questioned work which was ongoing, and engaged three inspectors to assess the works including Archicentre, Hansen Design and Ian Forrest;

(g) ignored the builder's advice that any defects would be rectified in accordance with the contract;

(h) threatened, and then initiated, proceedings in this Tribunal;

(i) frequently required Mr Milanovic to respond to them, or their consultant Mr Forrest, by telephone or email, or to be on site when not required; and

(j) indicated they were unwilling to make payments required under the contract.

- it sent notices of its intention to terminate the contract on 26 June 2014 and 30 June 2014; on 2 July 2014, the owners refused to remedy the breaches notified; and accordingly it validly terminated the contract;
- the owners accepted the builder had validly terminated the contract;
- alternatively, the owners repudiated the contract, and the repudiation was accepted by the builder.

15 By way of counterclaim, the builder says that it terminated the contract in accordance with its terms, or the owners repudiated the contract and it accepted the repudiation. In any event, the builder claims to have suffered loss and damage estimated at $37,852.76 comprising:

- the sum of $3,352.76 in respect of:

  (a) unpaid variations, which were invoiced on 8 April 2014 and in respect of which only $770 had been paid, leaving a balance due of $2,910; plus

  (b) interest of $442.76 in respect of late payment of the invoice of 5 March 2014;

- lost opportunity to complete the contract, and entitlement to the final payment of $11,500, subtracting approximately $2,000 in respect of the purchase of kitchen appliances by the owners;
- loss of a new contract with a Mr Chris Whitley;
- interest pursuant to clause 11.10 of the contract at the rate of 20% compounding weekly;
- costs.

16 The owners filed Points of Defence to the builder's counterclaim on 22 January 2015.

17 On 7 April 2015, a director of Eco Smart, Mr Anthony Milanovic, was joined as Second Respondent. The Tribunal noted that a reference to the Respondent in the Points of Claim is to be taken as a reference to the First Respondent and/or the Second Respondent.

18 By email to the owners dated 16 October 2015, copied to the Tribunal, the builder confirmed that the defence in relation to alleged defective or incomplete work is that the owners continually breached the contract and, in effect, repudiated the contract, 'which then inevitably ended in the contract coming to an end'. The builder asserted that the works, when the contract was terminated, were incomplete, but not defective.

19 The builder, in its email of 16 October 2015, then added claims totalling $75,100 to the original counterclaim. The additional claims were for:

- transcripts and associated costs $600;
- legal costs $7,000;
- lost time defending the matter $24,000;
- medical costs $1,500;
- costs associated with loss of work due to medical issues $24,000;
- fraudulent use of Mr Milanovic's building licence to continue adding works onto the licence $17,000; and
- expert reports $1,000.

ISSUES

20 I consider that the issues that I will have to decide include the following:

(a) the identity of the builder, i.e. is it Eco Smart, Mr Milanovic, or both;

(b) whether either party terminated the contract;

(c) whether either party repudiated the contract, and whether any such repudiation was accepted by the innocent party;

(d) whether the contract merely came to an end by mutual abandonment;

(e) if the builder has continuing liability for defects, and if so, the extent of those defects, and the cost of their rectification;

(f) if the builder has continuing liability for incomplete work, and if so, the extent of that incomplete work, and the cost of its completion;

(g) whether the builder's counterclaim is valid in whole or in part, and if so, the extent of the owners' liability to the builder.

THE HEARING

The first two days of the hearing

21 The hearing began on 25 June 2015. Mr Strong appeared on behalf of the owners, and Mr Milanovic appeared on his own behalf, and on behalf of Eco Smart.

22 After introductory statements had been made by both parties, Mr Strong opened the owners' case. He handed up a Tribunal Book. He tendered a

number of documents from it which related to the formation of the contract.[1]

23 Mr Forrest was present, and when it became clear that there was going to be an issue with his evidence, he was put in the witness box to explain his role in the project. He was cross-examined and re-examined. After this, Mr Strong gave evidence about the termination of the contract. He tendered a number of exhibits.[2] He was briefly cross-examined by Mr Milanovic.

24 The hearing resumed on 26 June 2015. Mr Strong gave further evidence and tendered a number of new documents.[3] Mr Milanovic had no questions for Mr Strong after this evidence.

25 Mr Milanovic then began his own evidence in chief. He tendered two documents.[4] His evidence covered delays on the project, the disputed invoices, his interaction with Mr Forrest, and the termination of the contract. Mr Milanovic was then cross-examined by Mr Strong. Mr Strong then gave further evidence about the termination. At the end of the day, the proceeding was adjourned for further hearing. An order was also made referring the matter to mediation on 24 July 2015. The builder was also directed to send to the Tribunal and to the owners any objections to any expert report of Mr Forrest, and also any submissions as to whether Mr Forrest was an independent expert as required by Practice Note VCATPN2.

Mediation

26 The mediation was duly held on 24 July 2015, but was not successful.

Further orders on 23 September 2015

27 At a directions hearing on 23 September 2015, the Tribunal confirmed the listing of the proceeding for further hearing on 22 October 2015, and made other orders relating to any expert report of Mr Forrest and any submissions as to whether he was an independent expert, and regarding an inspection of the premises by the builder with an expert witness. The Tribunal also ordered:

(a) The owners were to send to the builder the reports they had received from Archicentre and John Hansen.

(b) The owners were to send to the builder a copy of each report of Ian Forrest concerning the works, provided up to 31 August 2015.

(c) The builder was to send to the Tribunal and to the owners Amended Points of Defence and/or Counterclaim setting out any orders sought arising out of the fact that it was alleged the owners had, after the termination of the building contract, continued to construct works at

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1 Exhibits A1-4 inclusive.
2 Exhibits A9-A38 inclusive.
3 Exhibits A39-A45 inclusive.
4 Exhibits R1-R2.

the premises under a building permit which named a respondent as the builder.

The third day of the hearing

28 The proceeding came on for further hearing on 22 October 2015. On this occasion, Mr Stanistreet of Counsel appeared on behalf of the owners in place of Mr Strong. Mr Milanovic again represented himself and Eco Smart.

29 The Tribunal summarised the pleadings, including the builder's amended counterclaim, and what had occurred on the first and second days of the hearing. Mr Strong and Mr Milanovic confirmed their agreement with the Tribunal's summary.

30 Correspondence received from the parties was then reviewed. It was noted that the builder had not filed and served any objections to any expert report of Mr Forrest, nor any submissions as to whether Mr Forrest was an independent expert as required by Practice Note VCATPN2. Mr Milanovic indicated that the Respondents no longer pressed their objection to Mr Forrest giving evidence, but reserved the right to criticise his evidence when it was presented.

31 Mr Forrest was then called by the owners. He gave evidence regarding the defects and incomplete works listed in his updated report dated 28 August 2015. For the convenience of the Tribunal, and with the consent of Mr Milanovic, the Tribunal was handed a version of that report which had been reorganised so that all materials relevant to any particular item were bundled together, rather than being interspersed throughout the pages of the report.

32 The hearing proceeded on the basis that Mr Forrest gave his evidence regarding each item of defective or incomplete work. Mr Strong gave evidence in respect of any item if he wished to do so. Mr Milanovic, at his discretion, asked questions of Mr Forrest and Mr Strong. Mr Milanovic also gave evidence regarding each item, and was subjected to cross-examination by the owners' counsel.

33 By lunchtime on the third day, the evidence in respect of only a limited number of items had been completed, and before the break the parties were invited to discuss how the hearing could be accelerated. In particular, it was suggested that they might review the disputed items and attempt to agree liability and quantum as far as possible, so that evidence would only have to be given in relation to the remaining disputed matters.

34 When the hearing resumed, the parties informed the Tribunal that agreement as to the quantification of a number of items had been agreed. However, liability remained in dispute in respect of all items.

35 The parties then took the Tribunal through the items where quantification had been agreed. This process effectively took the rest of the afternoon.

The fourth day of the hearing

36 At the scheduled commencement time of 10.00am on 23 October 2015, the owners were ready to proceed, represented by Mr Stanistreet. Mr Forrest was also present. However, there was no appearance on behalf of the builder, and the proceeding was stood down.

37 At 11.35am, the hearing was re-opened. There still being no appearance for the builder, the owners made an application for an adjournment. The owners also sought the costs of the adjournment, contending that the Tribunal's discretion to award costs had been enlivened under s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').

38 In the event, the Tribunal adjourned the owners' claim and the builder's counterclaim for further hearing on 6 November 2015 and also listed the proceeding for further hearing on 7 December, and on 21 December 2015 if necessary. Orders were also made, among other orders, for the filing of submissions regarding costs.

The fifth day of the hearing

39 The fifth day of the hearing got underway on 6 November 2015 without incident. The owners were represented by Mr Stanistreet, and Mr Milanovic appeared on behalf of himself and Eco Smart.

40 Mr Forrest was recalled, and gave evidence about acceptable building practices, and also as to the role of a Domestic Builder - Manager and a Domestic Builder - Unlimited. He then gave more evidence about defects and incomplete work.

41 The owners asked for clarification of the items in respect of which Mr Milanovic disputed quantification, and Mr Milanovic gave evidence about a number of these items including the garage doors, invoices from the plumber, Begbie, in respect of the rough-in of the ensuite and the outlet from the shower grate, and the wine rack in the kitchen.

42 Mr Milanovic then gave evidence regarding his counterclaim, insofar as it related to the owners continuing to use his building permit after he was off the site.

43 Mr Forrest was interposed in order to give his expert evidence on this issue, and he was then excused as a witness.

44 After lunch on the fifth day, Mr Strong gave evidence regarding the continued use of the original building permit, and was cross-examined by Mr Milanovic.

45 Mr Milanovic then gave evidence about other aspects of his counterclaim, and tendered a number of exhibits.[5]

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[5] Exhibits R16-R26.

46 At the end of the day, the Tribunal made a determination regarding the owners' application for costs thrown away as a result of the adjournment of the hearing on 23 October 2015. The proceeding, being part heard, was adjourned for further hearing on 7 December 2015.

The sixth day of the hearing

47 The sixth and final day of the hearing took place on 7 December 2015. Mr Stanistreet again appeared on behalf of the owners, and Mr Milanovic appeared on behalf of himself and Eco Smart.

48 Mr Milanovic resumed his evidence about his counterclaim, and tendered further documents.[6] He was then cross-examined.

49 After the conclusion of the evidence, Mr Stanistreet handed up written submissions on behalf of the owners, and spoke to them. The builder was given leave to file closing submissions by 17 December 2015, and the hearing concluded.

50 The builder failed to send closing submissions to the Tribunal by 17 December, and by order in Chambers made on 21 December 2015 the time for the filing of closing submissions by the builder was extended to 8 January 2015.

51 As the builder failed to file closing submissions by 8 January 2015, the Tribunal in Chambers, on 19 January 2016 ordered that, subject to the builder making an application to extend the time to file and serve final submissions by 29 January 2016 together with reasons as to why a further extension should be granted, the Tribunal would proceed to determine the proceeding in the absence of final written submissions from the builder. That time limit was extended, after the Tribunal received correspondence from the builder, to 12 February 2016.

52 The builder ultimately did not make any application for an extension of time in which to file submissions, and the Tribunal makes this decision without the benefit of submissions from the builder.

THE IDENTITY OF THE BUILDER

53 The first matter to be determined is whether the contract made between the owners and the builder was made Mr Milanovic, Eco Smart Concept Builders Pty Ltd, or both.

54 Having heard submissions from the parties and examined the executed contract and associated documents, I find that the contract was made between the owners and Mr Milanovic in his personal capacity. My reasons for this finding are:

(a) The contract on the face page, on the second page, and in the appendix refers to the builder as Anthony Milanovic - Eco Smart Concept Builders.

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6 Exhibits R27-R31.

(b) Nowhere is Eco Smart Concept Builders described as a company and nowhere is an ACN given for it, leaving the inference open that Mr Milanovic, is for the purposes of the contract, trading as Eco Smart Concept Builders.

(c) Mr Milanovic executed the contract under his own hand, and in the execution block the builder is described as 'A. Milanovic'. The execution block does not refer to Eco Smart Concept Builders at all, let alone Eco Smart Concept Builders Pty Ltd.

(d) The insurance arrangements support the proposition that the builder was Mr Milanovic. In particular, the Certificate of Currency (Cover Note Number MEC-AP-007624-0) issued by Mecon Insurance in the name of Eco Smart Concept Builders Pty Ltd, which was part of the contract, was cancelled. It was replaced by a Certificate of Insurance issued by VMIA and QBE, dated 2 September 2013, which named Anthony Milanovic as the builder.[7]

55 Although some support for the contention that the builder was the company is to be found in the fact that the initial tender letter to the owners on 18 March 2013 was issued on the letterhead of Eco Smart Concept Builders Pty Ltd,[8] it is to be noted that this letter was issued approximately five months before the contract was executed. I consider that the fact the letter was issued on the letterhead of the company does not displace the clear description of the builder in the contract as Mr Milanovic - Eco Smart Concept Builders, nor the alteration of the insurance so that it covered Mr Milanovic as builder.

56 Accordingly, I find that the builder under the contract was the Second Respondent, Mr Anthony Milanovic.

DID EITHER PARTY VALIDLY TERMINATE THE CONTRACT?

57 The parties agree that, after 2 July 2014, the contract came to an end. It is a live issue as to whether it was terminated by the owners or the builder, or whether one or other of the parties repudiated the contract, or whether the parties mutually abandoned the contract.

Discussion regarding termination using the contractual mechanism

58 On the third day of the hearing, counsel for the owners submitted that it was the owners' case that neither party had effectively terminated the contract using the mechanism outlined in the contract. He said further that the owners contended that it was the builder who had repudiated the contract and that the owners had accepted that repudiation.

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7 Exhibit A3.
8 Exhibit A1.

Did the builder terminate the contract?

59 With respect to the possibility that the builder successfully terminated the contract using the mechanism contained in the contract's general conditions, I observe the following:

(a) The builder issued a notice of suspension of the works pursuant to clause 16 of the general conditions on 14 March 2014.

(b) However, the builder went back to work on or about Friday 11 April 2014, as appears from Mr Milanovic's email dated 9 April 2014.

(c) On 26 June 2014, Mr Milanovic advised Mr Strong that it was his intention to issue a notice under clause 22.1 of the contract unless all outstanding invoices were paid in full.[9]

(d) On 30 June 2014, a formal notice of intention to terminate the contract was issued pursuant to clause 22.1 of the contract.[10]

(e) The last communication from the builder on the topic of termination was the builder's email of 2 July 2014 which was issued in response to the owners' notice of intention to determine the contract. This email referred back to the communications of Thursday 26 June and Monday 30 June 2014.

60 Mr Milanovic conceded that he did not issue the further notice required under clause 22.2 of the contract to actually terminate the contract. This was a critical concession because strict compliance with the procedure set out in a building contract is required in order to effect termination using the show cause mechanism. The rationale for this rule is explained by the authors of Dorter and Sharkey's *Building and Construction Contracts in Australia*, Second Edition, at [12.12] as follows:

> Provisions for termination need to be viewed rather differently to most other provisions of building contracts. The consequences of a successful resort to a termination provision are grave, particularly where the conduct complained of cannot be said to be repudiatory, and the courts therefore strictly construe such provisions.

61 Because the builder did not take one of the key steps set out in the termination procedure appearing in the contract, namely, issuing the actual notice of termination, I find that the builder did not effectively terminate the contract pursuant to clause 22.

Did the owners terminate the contract?

62 Turning to the owners, I note that Mr Strong conceded that the owners had not issued the further notice required under clause 20.2 in order for the owners to actually terminate the contract, following their notification, on 2 July 2014, of their intention to do so.

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9 Exhibit A35.
10 Exhibit A37.

63 Furthermore, in their written submissions dated 7 December 2015, the owners referred to *Stojanovski v Australian Dream Homes* in which Dixon J said:

> The contractual purpose of the default notice is to inform the builder that something is amiss with the works that requires its immediate attention.[11]

64 The owners also referred to an earlier decision of this Tribunal, *Fasham Johnson Pty Ltd v Ware & Saunders*, in which Deputy President Cremean observed:

> A notice under cl. 20.1 should be such as to prompt the builder into action to remedy breaches. That is why it calls upon the builder to remedy. But the builder must be able to know, by a Notice, what the other party wants remedied.[12]

65 The owners went on to concede:

> Having regard to these principles, of the several purported notices of intention to terminate, only the Owners First Notice of Intention to Terminate dated 25 March 2014 could be considered valid notice under the contract. But the Owners did not then serve a termination notice under clause 20.2.[13]

66 Accordingly, the owners effectively concede that their notice of 2 July 2014 was not sufficiently detailed to have founded a valid termination, even if a proper notice of termination had been given under clause 20.2.

67 For these reasons, I find that the owners did not effect a valid termination using the contractual mechanism set out in clause 20.

CONCLUSION REGARDING TERMINATION UNDER THE CONTRACT

66 I accordingly agree with the proposition put forward on behalf of the owners to the effect that neither party effectively terminated the contract using the show cause notice procedure set out in the contract. This conclusion leaves open the possibilities that the contract was repudiated by one party or the other, or was abandoned.

67 I now turn to the issues of whether the contract was repudiated by the owners or by the builder.

REPUDIATION - RELEVANT LEGAL PRINCIPLES

68 The owners, in their submissions, refer to the test laid down by the High Court in *Koompahtoo v Sandpine*.[14] The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.

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11 [2015] VSC 404, [58].
12 [2003] VCAT 885, [24].
13 Owners' written submissions, paragraph 70.
14 *Koompahtoo Local Aboriginal Land Council v Sandpine Pty Ltd* (2007) 233 CLR 115, [44].

69 In *Kane Constructions Pty Ltd v Sopov*,[15] Chief Justice Warren [at 795] quoted Chief Justice Gibbs in the High Court in *Sheville & Anor v The Builders Licensing Board*,[16] where he observed:

> 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" ...

70 In *Fasham Johnson Pty Ltd v Ware & Saunders* [2003] VCAT 885 (25 July 2003), a domestic building contract case in which the central issue was which party had acted lawfully to terminate the contract, Deputy President Cremean said at [33]:

> Repudiation occurs where a defaulting party "evinces an intention no longer to be bound by the contract... or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way": *Shevill v Builders Licensing Board* at 625-6. Or it may arise if the party indicates an intention to perform under the contract only when it suits the party: see *Carr v JA Berriman Pty Ltd*[17] at 349. In whichever way it is alleged to have arisen, repudiation "is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default" which conveys the relevant meaning: *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*[18] at 647. In that case Deane and Dawson JJ said that, for the doctrine of repudiation to operate, it suffices "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": at p 658.

REPUDIATION BY THE OWNERS

Breaches relied on by the builder

71 In its counterclaim, the builder claims damages arising out of the owners' breaches of contract which led to its termination in accordance with its terms, or in the alternative, the owners' repudiation of the contract.

72 The basis upon which it is said that the owners breached the contract are set out in paragraph 19A of the builder's Points of Defence. Reference to clause 19A makes it clear that the builder is relying on the following alleged breaches by the owners:

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15 [2005] VSC 237.

16 [1982] HCA 47; (1982) 149 CLR 620.

17 [1953] HCA 31; (1953) 89 CLR 327.

18 [1989] HCA 23; (1989) 166 CLR 623.

(a) Not making certain payments to the builder as required by the contract.

(b) Taking possession of the works without the written consent of the builder.

(c) Obstructing, interfering and hindering the carrying out of works, in particular by:

  (i) instructing tradesmen contacted by the builder to perform work under the contract, and

  (ii) consistently questioning work as it was ongoing including by engaging three inspectors to assess the works, namely Archicentre, Hansen Design and Ian Forrest.

(d) Indicating that they are unwilling to make payments required under the contract.

No acceptance of owners' repudiation by builder – the law

73 I consider that the builder's case about repudiation has a fatal flaw, which is that the owners' repudiation was not accepted by the builder. The builder cannot point to any acceptance of the owners' repudiation of the contract. This is a necessary step in order for the contract to be brought to an end.

74 The point is acknowledged by the owners in their written submissions, where, under the heading 'Legal principles – termination is necessary for damages for anticipatory breach', they said:

> As the learned author of *Carter on Contract* states, by reference to the authorities:[19]
>
> > Except in one situation, a plaintiff need not prove the exercise of a right to terminate the performance of a contract (for breach or repudiation) in order to claim damages for breach.
> >
> > The one exception is in cases of anticipatory breach, where termination is necessary to complete the plaintiff's cause of action, so that no right to damages accrues unless and until termination occurs. Thus, if prior to the time for performance a promisor repudiates the obligation to perform the contract, no breach occurs unless and until the promisee 'accepts' the repudiation as an anticipatory breach. For example, if prior to the time for delivery of goods, a seller repudiates the obligation to deliver, no breach occurs unless and until the buyer accepts the repudiation as an anticipatory breach. If termination does not occur, or the contract is frustrated, no claim can be made. The promisee may wait until the time appointed for performance, to see whether performance takes place, in which case no right to damages accrues unless the promisor fails to perform at the appointed time.

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[19] J W Carter, *Carter on Contract*, Online edition, LexisNexis, [40-010].

75 Another statement of this principle is to be found in Lord Wright's judgment in *Heyman v Darwin's Ltd*,[20] where he said:

> But perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation.

No acceptance of owners' repudiation by builder – the facts

76 In paragraph 52 of the counterclaim, the builder says that it accepted the repudiation when it sent the notices of intention to terminate the contract on 26 June 2014 and 30 June 2014.

77 Reference to the builder's notice of 26 June 2014 confirms that it is expressed as a notice of intention to terminate the contract under 'section' 22.1. Accordingly, it does not operate as a notice of termination following repudiation at common law, for two reasons. First, it is a declaration of intention only. Second, it is a notice issued under the contractual mechanism for termination.

78 Reference to the builder's letter to the owners dated 30 June 2014, indicates that it constitutes an actual notice issued pursuant to clause 22.1 of the contract. As such, it reiterates the builder's intention to terminate the contract unless the owners remedy the stated breaches of contract within 14 days. As a declaration of intention issued under the contract, it also does not constitute a notice of acceptance of the owners' repudiation at common law.

79 Mr Milanovic conceded that he did not, after 2 July 2014, inform the owners that he considered they had repudiated the contract at common law. His contention, however, is that the owners were on notice that, after the expiration of the builder's 14 day notice issued on 30 June 2014, the contract would be at an end. In this connection it is to be noted that after the owners issued their own notice of intention to terminate the contract on 2 July 2014, the builder responded:

> Michael
>
> I've already advised u on email last Thursday and in writing on 30 June by mail.[21]

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[20] [1942] AC 356 at 379; [1942] 1 All ER 337 at 350, quoted in Dorter & Sharkey, *Building and Construction Contracts in Australia*, Second Edition, at [1.740].

[21] Exhibit A36.

80 Mr Milanovic said that this email was an indication that his position had been made clear in his email of 26 June 2014, and in the actual issuing of a notice of intention to terminate by letter on 30 June 2014, and that he was awaiting the passing of the 14 day period before he terminated the contract.

81 Be that as it may, Mr Milanovic did not communicate that the owners' common-law repudiation of the contract was being relied on in place of the contractual show cause mechanism. His evidence was clear. He was relying on the show cause mechanism in the contract as the vehicle for termination.

82 In these circumstances, I find that the builder did not accept any repudiation of the contract on the part of the owners, and thereby bring the contract to an end.

REPUDIATION MAY NOT HAVE BEEN MADE OUT BY BUILDER ANYWAY

83 In case there is doubt that I have correctly characterised the notices of 26 June 2014 and 30 June 2014 respectively as not constituting notices of repudiation at common law, it is appropriate that I assess the builder's claim that the owners repudiated the contract.

Variations

84 The first basis on which the builder alleged the owners had repudiated the contract was that the owners were unwilling to make payments to the builder for outstanding variations. The dispute about variations comes down to this. The builder issued an account for $3,680 in relation to variations on 8 April 2014. Mr Strong's evidence is that he did not ignore the account. On the contrary, he acknowledged it in an email and said he would get back to Mr Milanovic about it shortly. He then responded in detail on 27 April 2014 in an email which included this passage:

> Our attitude to variations etc is this - we have a contract we both agreed to & signed. This clearly details the work to be completed and the specifications and finishes etc that we expect and you agreed to. Importantly, these are the very same specs and design that we put out to tender-any other builder that had been awarded the contract would be expected to do the same work to the same standard. You quoted on the kitchen as designed-which clearly includes a glass splashback.
>
> Any changes to the contract need to be agreed to in writing prior to being made, and the appropriate cost difference allowed for. An example is the kitchen-we made changes to the dimensions of the cabinetry prior to it being constructed so it would fit the space-this causes you no cost. You did however invoice us for the two extra cupboards next to the oven as that is extra work.
>
> Many of the variations that you are now invoicing us for we discussed during the build without any discussion nor agreement on cost, and our expectation was that they would not impact the cost of the build - in a similar fashion to the items that you have not had to complete,

> such as-demolish the mezzanines in the garage; carefully remove & store the spa; raising the height of the garage door, changing the window in the spare room from double hung to awning (at your convenience without prior approval)- have not been deducted from your invoices…
>
> As I have said previously, we are not opposed to paying for variations, however we do object to paying an exorbitant price.[22]

85 Mr Strong then went on to expressly challenge the price sought by the builder for five variations, namely, an extra down-light in the kitchen, a TV point and a garage power point, two extra down-lights in the bedroom, an extra external light and a two-way light in the kitchen.

86 There is a serious question as to the builder's entitlement to seek variations in circumstances where the builder has not followed the procedure set out in the general conditions of contract regarding the claiming of variations. In particular, the builder had not obtained the approval in writing of the owners to the proposed variations and their cost. Reference in this regard may be made to clause 12 of the general conditions of contract, which deals with variations by the owner, and clause 13, which deals with variations by the builder. It is to be noted that these clauses substantially replicate the requirements of ss 38 and 37 respectively of the *Domestic Building Contracts Act 1995*.

87 Notwithstanding this doubt over the owners' obligation to make payment for the variations, the owners ultimately paid $770 in respect of the five variations which had been challenged by Mr Strong in his email of 27 April 2014.

88 The upshot is that once the $770 had been paid, the builder is left with a claim for variations of $3,680-$770= $2,910. This remains as part of the builder's counterclaim.

89 In circumstances where the owners' liability to pay a further sum of $2,910 to the builder for variations was disputed in a well-articulated letter setting out what appears to be an arguable basis for rejection of the variations, I consider that it was manifestly unreasonable for the builder to take the view that the continued refusal of the owner to pay the disputed $2,910 constituted a breach of the contract. The outstanding variations were in dispute, and the dispute resolution process in the contract should have been followed by the builder. I accordingly find that the builder could not rely on the allegedly outstanding variations as a basis for asserting that the owners had repudiated the contract.

Taking possession

90 The second basis upon which the builder relied was 'taking possession of the works without the written consent of the builder'.

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22 Exhibit A16.

91 In paragraph 19A of the builder's Points of Defence, the builder makes it clear that the breach referred to is the insistence of the owners that they start using the extension whilst the works were ongoing, and taking occupancy at about the end of February even though no occupancy permit had been issued. From this point, the builder was allegedly forced to work around the owners, their family and their belongings.

92 The fact that the owners continued to live in the house when it was being renovated came up in evidence. Mr Strong contended that Mr Milanovic agreed that the family remain in residence in that part of the house that was not being renovated.

93 The allegation relied on by the builder as a breach of contract is not that the owners continued to remain in the part of the house that was not being renovated, but that they took possession of the renovated wing when the works were continuing. Although this distinction is made clear in the pleading, it was not brought out during the hearing, and the proposition contended for by the builder was not, in my view, sustained by the evidence presented. I find against the builder on this point.

Obstructing, interfering and hindering the carrying out of the works

94 The next basis upon which the builder relied in giving notice of intention to terminate the contract was:

> Obstructing, interfering and hindering the carrying out of Works, in particular by:
>
> (i) instructing tradesmen contacted by the builder to perform work under the contract, and
>
> (ii) consistently questioning work as it was ongoing including by engaging three inspectors to assess the works, namely Archicentre, Hansen Design and Ian Forrest.

95 The allegation of breach of contract arising out of communications with the trades was not particularised, except by references to communications with the plumber and the electrician. The builder alleges, in paragraph 19A of the Points of Defence, that the plumber was instructed directly by the owners in 'about June 2014' to replace the existing hot water system, and the plumber was given an instruction that his costs should be subtracted from the contracted price for the work. In my view, the reference to taking the plumber's costs off the builder's contracted price makes it clear that the communication referred to is the owners' email to the builder dated 17 June 2014, which contained the following passage:

> Hi Anthony, it's now over two weeks since we made our last payment and you emailed that the job will be finished in about three weeks, and there has been no progress at all. You have stated that you would send through a programme to complete and you have not even done that. Please advise within seven days:
>
> 1 When you intend to recommence work;

2 A detailed plan to complete the work;

3 In particular, replacing the hot water service is now urgent. It is now well into winter and as we discussed on Thursday 15 May, and as per my email of Sunday 18 May, the current hot water system is barely functioning - we need to boil the kettle to wash dishes and the shower is no longer hot. I have a wife and 2 children living here and that situation is not acceptable. If the new hot water service is not installed by this Friday we will install it and take the payment off your final invoice;[23] …

96 In the absence of any provision in the contract which allowed the owners in certain circumstances to take works out of the hands of the builder while the contract was still on foot - and the owners did not refer to any such provision - any direct communication with the plumber directing him regarding the performance of any contract works would not have been an appropriate communication. Indeed, it might have amounted to repudiatory conduct.

97 However, instead of taking the bold step of declaring that the owners had repudiated the contract at common law and rescinding the contract, thereby risking a protracted legal battle with an uncertain outcome regarding the legality of the termination, the builder took the prudent step of relying on the termination procedure set out in clause 22 of the contract. The builder issued what I consider to be a *declaration* of intention to terminate the contract on 26 June 2014 and issued an *actual* notice of intention to terminate the contract on 30 June 2014.

98 If the builder was intending to rely on alleged direct communications with subcontractors, other than the plumber, as a basis for asserting repudiation, the communications relied on are not identifiable as the builder did not give particulars. This is important, as Mr Strong, in his evidence, said that there were occasions when he did talk to the trades directly because they wished to talk to him. For instance, he said that he was asked by the plumber who connected water to the house to pay him directly. Another example was the earthworks contractor, who came to the owners' house at night. The electrician said he had not been paid, and a painter also said he had not been paid. Accordingly, had the instances of direct communication with the trades been particularised, the owners might have been in a position to justify them. In the absence of particularisation of this third basis of alleged repudiation, other than the communication with the plumber - which is immaterial because the builder did not rely on it to assert repudiation, but merely to issue a section 22 notice - I consider that communications with the trades, other than the plumber, could not have been relied on by the builder as a basis for repudiation.

99 The second reason for alleging repudiation under the heading of obstruction, interference and hindrance in carrying out the work, was that

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[23] Exhibit A33.

the owners had consistently questioned the work as it was ongoing, including by engaging three inspectors to assess the work, namely, Archicentre, Hansen Design and Ian Forrest.

100 This argument can be swiftly disposed of. The contract executed by the owners and the builder was a Master Builders Association standard form contract known as HIC-5 (Edition 1-2007). The contract made no provision for independent review or certification of the works by an architect or superintendent or any other form of administrator. The owners were entitled to seek assistance from individuals with expertise in domestic building in order to help them understand whether the builder was performing the contract satisfactorily. It would, of course, have been inappropriate for the owners to have asked anyone from Archicentre, or John Hansen or Ian Forrest, to have given directions to the builder. But the builder is not asserting that this occurred. The mere obtaining of independent advice by the owners - even from three separate sources - cannot justify, in my view, an allegation of repudiation of contract.

Refusal to make payments

101 The final basis on which the builder alleged repudiation was that the owners indicated that they were unwilling to make payments required under the contract. By way of particulars, the builder said in paragraph 19A of the defence:

> The applicant repeatedly made statements that they would not pay sums that had been invoiced.
>
> The applicant had threatened and then initiated VCAT proceedings in respect of the works.
>
> The respondent repeats and refers to paragraph 11.

102 It is to be noted that no particulars are given of when the owners 'repeatedly made statements that they would not pay sums that had been invoiced'. However, the reference to paragraph 11 of the defence is instructive, because in that paragraph the owners had raised concerns about work that they believed was incomplete and made a request that such work be finalised to the specifications before any further invoices were forwarded to them.

103 These details suggest that the builder is referring to the owners' failure to pay the PTC stage invoice promptly after it was issued on 5 March 2014. The owners' reasons for refusing to pay this invoice were set out by Mr Strong in an email sent on 14 March 2014 at 11.48am in which he set out a non-exhaustive list of items of painting, tiling and carpentry that were not complete. On 17 March 2014 at 4.52pm, Mr Strong emailed the builder confirming his position that there was a good deal of painting, tiling, and carpentry work that was still incomplete and seeking a meeting with the builder to discuss a resolution and completion of the build. By letter dated

19 March 2014, Mr Strong wrote to the builder in similar terms to the 17 March 2014 email.

104 The owners' position regarding payment of the PTC stage invoice is consistent with the scheme of the contract which is that the contract price is to be paid in progress payments.[24] One of the builder's obligations was to give written progress payment claims to the owner at the completion of each stage.[25]

105 The builder's contention that the owners repudiated the contract because they repeatedly stated they would not pay sums that had been invoiced, is misconceived. The owners' obligation was to make payment in accordance with the terms of contract, not necessarily to pay upon the builder rendering an invoice.

106 In insisting that the PTC stage invoice be completed before payment for it was made by them, the owners were not repudiating the contract, but were insisting on its performance.

107 It remains to deal with the proposition that the owners repudiated the contract because they threatened to initiate and then did initiate VCAT proceedings in respect of the works. This proposition can be dealt with quickly. When the owners initiated this proceeding, the relief they sought was an order that the builder comply with the contract. This was behaviour which reinforced the sanctity of the contract, rather than disavowed it. It was the opposite of repudiatory conduct.

THE OWNERS' CLAIM THAT THE BUILDER REPUDIATED THE CONTRACT

108 The owners contend, according to their written submissions, that the builder repudiated the contract. Specifically, it is asserted:

> In addition to breaching the warranties in s 8 of the DBC Act [previously defined as the *Domestic Building Contract Act 1995*], the owners submit that the Builder repudiated the Contract by his conduct in relation to the "Painting tiling carpentry stage" invoice.[26]

109 After canvassing what they say is the relevant evidence, the owners referred to *Papadopoulos v Hands Free Painting Pty Ltd*[27] and *Alpha Developers and Promoters Pty Ltd v Advanced Building & Engineering Pty Ltd*.[28]

110 In *Papadopoulos v Hands Free Painting Pty Ltd*,[29] Senior Member Farrelly said that the respondent builder, in making wrongful demand for full payment of the contract price, repudiated the contract.

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24 Contract clause 11.8.
25 Contract clause 10.3.
26 Owners' written submissions, paragraph 18.
27 [2015] VCAT 1366.
28 [2015] VCAT 317.
29 [2015] VCAT 1366.

111 In *Alpha Developers and Promoters Pty Ltd v Advance Building & Engineering Pty Ltd*,[30] Senior Member Farrelly, being satisfied on the evidence that the builder had not completed work for which it had demanded payment from the owner, said:

> I find that the builder was not entitled to suspend or terminate the contract by reason of Alpha [the owner]'s refusal to make payment of the fixing stage invoice and the variations invoices. By purporting to do so, the builder substantially breached the contract and, in my view, repudiated the contract. Alpha was entitled to "accept" the builder's repudiation and bring the contract to an end, as it did on 17 June 2013, and sue for damages.[31]

112 In their submissions the owners say:

> The present case is squarely on point with both these decisions. Here, the builder demanded payment for the PTC Stage Invoice when, on any view of the evidence, the works relating to that stage were far from complete.
>
> Accordingly, the builder's:
>
> (a) suspension of works on 14 March 2014 based on the Owners' failure to pay the PTC Stage Invoice;
>
> (b) purported notices of termination of 26 and 30 June 2014; and
>
> (c) refusal to return to the site until (and even after the PTC stage invoice was paid),
>
> amount to a clear repudiation of the Contract.[32]

The evidence relied on by the owners

113 The evidence relied on by the owners to establish repudiation, as set out in their written submissions, is as follows:[33]

> On 5 March 2014, the Builder issued the PTC Stage Invoice in the amount of $14,500.00.
>
> On 11 March 2014 at 10.18pm, the (sic) Mr Strong emailed the Builder stating that as the build was nearing completion the bank sought a progress inspection before releasing any more funding and that would hopefully occur in the next few days.
>
> On 12 March 2014 at 8.23am, the Builder replied by email saying "*Ill await confirmation from yr bank when payment made thanks*".
>
> On 14 March 2014, at 11.48am, Mr Strong emailed the Builder seeking a meeting to discuss how the build could be finished quickly and without dispute. Mr Strong set out a non-exhaustive list of items of painting, tiling and carpentry that were incomplete, as well as expressing concern about the amount of work still to be completed

[30] [2015] VCAT 317.
[31] Owners' submissions, paragraph 48.
[32] Owners' submissions, paragraphs 49 and 50.
[33] Owners' submissions, paragraphs 19-29.

that would be left to be covered by the final payment ($11,500.00) under the Contract.

By letter dated 14 March 2014, emailed to the Owners at 12.22pm that day, the Builder suspended the works, puportedly (sic) pursuant to clause 16.1 of the Contract.

Later on 14 March 2014 at 1.34pm, the Builder responded the (sic) Mr Strong's earlier email stating, inter alia, "*We won't be returning until invoice paid in full. I've issued you with a notice today addressing that issue*."

On 17 March 2014 at 4.52pm, Mr Strong emailed the Builder confirming his position that there was a good deal of painting, tiling, and carpentry work that was still incomplete and seeking a meeting with the Builder to discuss a resolution and completion of the build.

By letter dated 19 March 2014, Mr Strong wrote to the Builder in similar terms to the 17 March 2014 email.

On 24 March 2014, the Builder replied by email at 1.41am stating, *inter alia*, the works had been suspended "*because you ignored my invoice with no explanation*", but proposing to complete some items of work.

By letter dated 25 March 2014, the Owners gave the Builder notice of their intention to terminate the contract. The letter repeated the matters raised in Mr Strong's previous emails, and stated the Owners' intention to terminate the contract if the Builder's breaches (as set out in the letter) were not remedied within 14 days.

Two days later, on 27 March 2014 at 10.30pm, the Builder replied by email. [The submissions quoted the email in full. It set out a timeline for the remaining works.]

The Owners did not give any notice of termination in accordance with clause 20.2 of the contract.

On 21 April 2014, the Owners issued this proceeding themselves, seeking an "order to comply with a contact (e.g. rectification or completion of building work".

Between April and late June 2014:

(a) the parties then exchanged a deal of email correspondence;

(b) the builder returned to site and completed some work; and

(c) the Owners made some payments to the Builder, including the PTC Stage Invoice, albeit under protest.

By letter dated 8 May 2014 to Mr Strong, the Tribunal acknowledged the Owners' application and gave notice that the matter had been listed for mediation on 10 June 2014.

On 3 June 2015 (sic) the Owners sought an adjournment of the mediation and on 5 June 2015 (sic), Deputy President Aird ordered that the mediation be vacated and referred to an administrative mention on 11 August 2014. Those orders note that the Owners'

adjournment application advised that "the builder is continuing with the works".

On 26 June 2014 at 8.52pm, the Builder emailed the Owners, purportedly giving notice of intention to terminate. [The submissions quoted the notice in full.]

This purported notice of intention to terminate gave the Owners less than 24 hours to respond, not the 14 days required by clause 22.1 of the contract.

By letter dated 30 June 2014, the Builder wrote to the Owners. The letter was headed "Notice of intention to terminate contract". [The submissions set out the notice in full.]

By letter dated 2 July 2014 (and also by email dated 2 July 2014 at 12.14pm in identical terms), the Owners wrote to the Builder giving notice of intention to terminate the contract under clause 20. [The submissions set out the notice in full.]

The Builder replied by email on 2 July 2014 at 6.19pm, as follows:

Michael

I've already advised u on email last Thursday and in writing on the 30 June via mail.

Kind regards

Anthony Milanovic

Builder's suspension of work, and subsequent return to site

114 The evidence establishes the following:

(a) The builder, on 5 March 2014, issued the painting, tiling and carpentry ('PTC') stage invoice, in the sum of $14,500.

(b) The builder issued a notice of suspension of the works under clause 16.1 of the contract dated 14 March 2014.[34]

(c) The owners wrote to the builder on 17 March 2014 acknowledging the notice, but quoted in response clause 11.8 of the contract, which provided that:

> The owner will make progress payments to the builder in accordance with the agreed and completed Progress Payments
>
> Table as set out in Item 23 of the Appendix.[35]

(d) The owners followed this email up with a lengthy letter of 19 March 2014.[36]

[34] Exhibit A8.
[35] Exhibit A67.
[36] Exhibit A68.

(e) The owners then issued, on 25 March 2014, their own notice of intention to terminate the contract under clause 20 if the builder did not remedy two stated defaults.[37]

115 If the owners had followed up their notice of intention to terminate the contract with an actual notice of termination issued under clause 20.2, the contract would have been brought to an end. Although the owners no doubt consider they would have won any ensuing fight regarding the legality of such a termination, it is clear from the text of their letter that they wished to avoid such a dispute. Specifically, they stated:

> As per the detail of this letter I hereby inform you that we consider you to have unreasonably suspended the carrying out of the works, in breach of the terms of the contract.
>
> It is our sincere hope that we will be able to resolve this dispute, however I hereby state our intention to terminate the contract unless you remedy this breach within a period of fourteen (14) days of your receipt of this letter.

116 Critically, the builder's response was to return to site almost immediately. Mr Strong, in his evidence, said that the builder returned on 27 March 2014. He added that the tiler attended on 31 March 2014, but Mr Milanovic was not present. However, he said, Mr Milanovic did attend on 1 April 2014.

117 Mr Milanovic agreed that he returned, without being specific about the date, and attended to sanding the kitchen floor.

118 Despite the builder's resumption of work, the tension between the owners and the builder evidently remained high. On 7 April 2014 at 8.37pm, Mr Strong sent an email to Mr Milanovic referring back to the 14 day notice of intention to determine the contract sent in March, and confirmed that that had been sent 12 days ago.

119 On the evening of 7 April 2014 at 9.36 pm Mr Milanovic emailed:[38]

> I accept yr termination Michael.

120 Mr Milanovic confirmed that he accepted the termination in an email sent the following day at 7.50am.[39]

121 This prompted a conciliatory response from the owners, as Mr Strong at 10.25am on 8 April 2014 emailed Mr Milanovic in these terms:

> Just to clarify-we want you to finish the job. Terminating our agreement is our least preferred option and will cause pain to both of us, but we can't continue as we have with only small amounts of work being done & no idea when we will be finished.
>
> Please call me when you get to the job today. I will be very pleased to discuss a program to finish the job.[40]

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[37] Exhibit A70.
[38] Exhibit A10.
[39] Attached to Exhibit A10.

122 Mr Milanovic, in effect, confirmed he was resuming the project when he emailed Mr Strong on 9 April 2014 to advise that the painter would be at the job on Friday [11 April 2014].[41]

123 The importance of the return to work by the builder on 27 March 2014 and the further return on Friday 11 April 2014 must be emphasised, because the owners had indicated on 25 March 2014 an intention to terminate the contract because the builder had 'unreasonably suspended the carrying out of the works…'.

The engagement of Mr Forrest and payment of the PTC stage invoice

124 After the builder returned to the site, the PTC stage invoice still remained in dispute. Mr Milanovic continued to press for its payment. For instance, by email sent on or about 28 April 2014, Mr Milanovic asked Mr Strong to confirm when he would be paying the outstanding invoice.[42]

125 Mr Strong, late on 28 April 2014, responded:[43]

> We're still waiting on the other work previously paid for to be completed-plse refer to my earlier emails over the past two months for detail.

126 At about this time, the owners engaged Mr Forrest. Mr Forrest's evidence was that he became involved in early May.

127 On 13 May 2014, the Mr Milanovic identified the items he thought required completing.[44] Mr Strong issued an email on 18 May 2014 attaching his own list of outstanding items required for completion.[45]

128 Mr Strong's evidence was that he had prepared a list of items for completion dated 31 March 2014 based on the report prepared for him by an architect and builder named John Hansen, who was a friend.[46] This list was updated on 2 April 2014,[47] 16 April 2014,[48] 19 May 2014[49] and finally 25 May, 2014.[50]

129 On 22 May 2014, Mr Milanovic asked Mr Strong to provide the defects report he held. Mr Milanovic also outlined his plans for the following week indicating that it was intended to install 'splits', finish the bathroom, clear up the backyard and finalise the matter, but also stating that the invoice needed to be paid 'ASAP to move forward'.[51]

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40 Exhibit A11.
41 Exhibit A12.
42 At bottom of email trail in Exhibit A16.
43 Part of email trail in Exhibit A16.
44 Exhibit A17.
45 Exhibit A18.
46 Exhibit A39.
47 Exhibit A40.
48 Exhibit A41.
49 Exhibit A42.
50 Exhibit A43.
51 Exhibit A44.

130 On 26 May 2014, Mr Milanovic emailed Mr Strong reviewing some recent works, indicated future works, and again asked for payment of the PTC stage invoice.[52]

131 On 28 May 2014, a site inspection was undertaken by a person unknown to Mr Milanovic. Mr Milanovic emailed Mr Strong on the evening of that day asking for the contact details, name, and company of the person who attended the site. On the following morning, Mr Strong advised that the person was Ian Forrest. Mr Milanovic had evidently contacted Mr Forrest because, on 30 May 2014, he emailed Mr Strong advising that he had spoken to 'Ian' and been advised that he would be sending his report to Mr Strong on the following day. Mr Milanovic asked Mr Strong for a copy of that report when it had been emailed to him.[53]

132 On 1 June 2014, Mr Strong sent this response:

> Hi Anthony,
>
> I have forwarded Ian's report to you, as attached.
>
> Going forward:
>
> 1. I will approve payment of your Painting/tiling/cabinetry invoice tomorrow;
> 2. Please send me a program to complete works, with a proposed completion date;
> 3. I will postpone the VCAT hearing, and copy you on that correspondence;
> 4. Please confirm & arrange installation of the HWS asap-the current system provides very little hot water.[54]

133 It is clear that Mr Forrest was influential in getting the PTC stage invoice paid. Mr Strong tendered his report of 31 May 2014.[55] Although Mr Forrest noted that some works had not been completed [as listed in section 2], he did opine, that:

> The works as inspected do meet reasonable workmanship standard however the works have not been completed entirely as per the stage payments.[56]

134 Notwithstanding, Mr Forrest added:

> The building has reached the Stage 10 payment with the above defects and complete works. At this stage the Builder is entitled to the full contract payment.[57]

135 Mr Milanovic and Mr Forrest had a conversation on or about 1 June 2014 in which Mr Forrest told Mr Milanovic that he was going to be paid. There is

[52] Exhibit A23
[53] Exhibit A24.
[54] Part of Exhibit A25 and Exhibit A45.
[55] Exhibit A6.
[56] Exhibit A6, section 3.
[57] Exhibit A6, section 6.

a dispute between the two of them as to who called whom. I do not consider I need to resolve that issue, as I consider it immaterial.

136 On 2 June 2014, in response to an enquiry from Mr Strong regarding the proposed completion date, Mr Milanovic wrote to Mr Strong in these terms:

> A tentative timeframe for works I would allow 3 weeks to allow for payment of previous invoice to be paid, works to be completed inspections certificates occupancy and to satisfy any concerns you may have. I would like to meet with you this week perhaps to go through any additional concerns you have to address those and move towards completion as quickly as possible for all concerned.
>
> I await yr reply.[58]

137 The PTC stage invoice was paid by the owners on 3 June 2014, according to an email to Mr Strong from his bank manager, Nathan Hill, dated 19 June 2015.[59]

138 A mediation had been scheduled at VCAT for early June. Mr Milanovic says that he wanted to attend, but the mediation was adjourned without his consent.

139 Mr Milanovic came back to site on Monday 9 June 2014 at 9.30am to meet with the owners in order to discuss the future program.[60]

The invoice for variations

140 The builder had issued an invoice on 8 April 2014 for $3,680 including GST in respect of a number of variations.[61]

141 On 13 April 2014, Mr Strong emailed Mr Milanovic seeking an update about a range of matters, but also indicating that he was about to go through the variation's invoice.[62] He later emailed Mr Milanovic challenging the owners' liability to pay the five items in that invoice, and asserting that another five items involved charges which were not reasonable.[63] Mr Milanovic provided reasons why he thought some of the disputed variations ought to be paid, by email dated 27 April 2015.[64] Mr Strong provided a detailed defence of his refusal to pay the variation's invoice on that evening.[65]

142 The builder asked again for payment of the variation's invoice on 11 June 2015.[66]

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[58] Exhibit A27.
[59] Exhibit A26.
[60] See Exhibit A29 which set out the arrangements.
[61] Exhibit A15.
[62] Exhibit A13.
[63] Exhibit A14.
[64] Part of email trail in Exhibit A16.
[65] Part of email trail in Exhibit A16.
[66] Exhibit A30.

143 On 12 June 2014, the builder issued an invoice to the owners in respect of interest on outstanding invoices from 11 April 2014 to 5 June 2014, in the sum of $442.76.[67]

144 The owners' response was to issue an email dated 17 June 2014, complaining about the lack of progress since the last payment, and asking when the builder intended to recommence work.

145 Mr Milanovic said that he spoke to Mr Forrest about the outstanding invoice for variations and that Mr Forrest procured a payment of $770 against the invoice. An email from Mr Strong confirmed the payment was made on 21 June 2014.[68] It is to be noted that this payment equated with the total value of the five variations which Mr Strong, in his email of 13 April 2014, had said were unreasonable.

The required installation of the hot water service

146 As noted above, Mr Strong, on 1 June 2014, sought confirmation when the hot water service was going to be installed.

147 This apparently drew no response, and on 17 June 2014 the builder was put on notice that the hot water service was now urgent, and that if it was not installed by that Friday (4 days away) the owners would install it themselves and take the payment off the builder's final invoice. The letter concluded:

> Taking into consideration the contract clause 16.4 for the builders re-commencement period of (14) days following rectification by the owner, it is most concerning that you the builder may be in breach of the contract if works to not resume within seven days.[69]

Discussion

148 In circumstances where the owners were faced with what they considered to be breaches on behalf of the builder, namely, issuing the PTC stage invoice at a time when the work covered by the invoice had not been completed, and then issuing a notice of suspension in respect of that invoice, the owners had choices to make. They could:

(a) go on and terminate the contract at the expiration of the 14 day notice period created by their letter of 25 March 2014; or

(b) take the bolder step of asserting the contract had been repudiated and accepting the repudiation and rescinding (or terminating) the contract; or

(c) affirm the contract.

149 The evidence is clear that the owners affirmed the contract. They elected to go on with it. They successfully encouraged the builder to lift the

[67] Exhibit A32.
[68] Exhibit A34.
[69] Exhibit A33.

suspension of the work and come back to the site. In particular, they allowed the builder back on the site on 27 March 2014, and in the following days. They did not take up a further opportunity to exclude the builder from the site, even though the builder, on 7 April 2014, had said that he accepted their termination. Instead, they persuaded the builder to return to the site again.

150 The owners, in their written submissions, acknowledged that although they issued their own notice of intention to terminate the contract on 25 March 2014, they did not give notice of termination in accordance with clause 20.2 of the contract.[70] The upshot is that the owners passed on an opportunity to terminate the contract using the clause 20 mechanism. At this point, did not even assert repudiation, let alone purport to rescind the contract.

151 The owners further evidenced their intention to forgive the builder the alleged breach in issuing the PTC stage invoice prematurely when, in early June 2014, they paid the invoice.

Findings on the owners' contentions regarding repudiation

152 I accordingly find against the owners in connection with their contention that they terminated the contract because the builder repudiated it by rendering the PTC stage invoice when the works relating to that stage had not been completed.

153 As the owners affirmed the contract well after the issuing of the builder's suspension notice, I also find against the owners in connection with their contention that they terminated the contract because the builder repudiated it by issuing a suspension notice based on non-payment of the PTC stage invoice.

Allegation of repudiation based on the builder's notice of termination dated 26 June 2014 and 30 June 2014

154 In their written submissions, the owners contend that the builders 'notices of termination' dated 26 June and 30 June 2014 were repudiatory.[71]

155 On 26 June 2014, the builder, by email, gave notice of intention to terminate the contract under clause 22.1 on four grounds, namely, the owners:

(a) being unwilling to make payments to the builder;

(b) making late payments to the builder;

(c) taking possession of the property; and

(d) obstructing, interfering with and contacting and instructing trades directly without the builder's consent.

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[70] Owners' submissions, paragraph 30.
[71] Owners' submissions, paragraph 50.

156 I consider that this email is not to be construed as a formal notice given under clause 22.1 of the contract. I say this for these reasons:

(a) It is not expressed to be a notice given under clause 22.1; and

(b) It can be read as a notice of intention to issue a notice under clause 22.1 the contract;

(c) This reading is consistent with the fact that a mere four days later a document unambiguously stated to be a notice of intention to terminate the contract was issued; and

(d) The email invited a reply by 5.00pm on the following day, which is of course inconsistent with a notice given under clause 22.1, which must give the owners 14 days to remedy the stated breaches of the contract.

157 As I consider that the email for 26 June 2014 is not to be construed as a notice given under clause 22.1 of the contract, I find that it cannot be the basis of any claim by the owners that its issue constituted a repudiation of the contract.

The notice of intention to determine the contract dated 30 June 2014

158 The notice of intention to determine the contract issued on 30 June 2014 was headed 'Notice of Intention to terminate contract' and relevantly read:

> As per my email dated 26 june 2014 I wish to provide notice 22.1 of the building contract for the following reasons:
>
> 1. Unwilling to make payments to builder for outstanding variations.
> 2. Making payments late to builder on numerous occasions.
> 3. Taking possession of the property under construction without consent by builder.
> 4. Obstructing, interfering with contracted trades and instructing trades to undertake works without builders consent or knowledge. Of course this has been raised again due to the fact that all matters should be addressed via the builder with the most recent contact with the plumber directly instructing him for works and you will take it off the builders contracted price.
> 5. Making statements to the effect the moneys will be withheld and attempting to vary the contract without builder's permission.

Finding regarding the builder's notice of 30 June 2014

159 The owners provide no justification as to why the notice of 30 June 2014 should be regarded as repudiatory, and it is not obvious from the face of the notice why it might be said to be repudiatory. The notice does not appear in any way to be a declaration that the builder is not prepared to be bound by the terms the contract. On the contrary, the notice contains a list of complaints which the builder makes about the owners' performance of the contract. It may be that the owners strongly disagree with the substance of

the complaints made against them. However, in my view, the existence of such a disagreement between the parties does not mean that the issuing of the notice was repudiatory of the contract. I formally find against the owners on this issue.

No acceptance by the owners of repudiation of the contract

160 In any event, the owners' claim that the builder repudiated the contract must fail, in my view, because the owners did not accept the builder's repudiation.

The owners' contentions regarding their acceptance of the builder's repudiation

161 The owners, in their written submissions, state that it is an essential part of their case that they establish that they had accepted the builder's repudiation of the contract at common law, as they seek to claim damages in respect of the builder's refusal to return to the site and complete the work, as well as damages for defective work.[72]

162 The owners' response to the builder's email of 26 June 2014 was to issue their own notice of intention to terminate the contract dated 2 July 2014.[73] The bases upon which the notice was issued are, in my view, important. These bases were alleged technical breaches of the building contract on behalf the builder, namely, that the builder:

- refuses to comply with the contract, including failing to provide to the owner any information under Clause 9.2 relating to Prime Cost Items or
- fails to remedy any breach specified in a suspension notice served on the builder under clause 16.2 or
- fails to produce to the owner written notice of the Completion Date under Clause 8.2.

163 In other words, the owners at the time did **not** assert that the builder had repudiated the contract at common law by issuing its email of 26 June 2014. Nor did they make such an assertion in respect of the notice issued on 30 June 2014.

164 In their written submissions, the owners contend:

> Acceptance of a repudiation need not be expressed as such. Any words or conduct are sufficient if they 'make the election manifest to the relevant party'.[74]

165 Furthermore, the owners contend:

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[72] Owners' submissions, paragraph 41.

[73] Exhibit A38.

[74] Owners' written submissions, paragraph 54, citing N Seddon, R Bigwood & M Ellinghaus, *Cheshire & Fifoot Law of Contract* (10th ed, 2012) at [21.23] and the cases there cited.

> the institution of proceedings have been held to be clear notice of an election to terminate, and the relief sought has been held to be relevant.[75]

166 These are, no doubt, sound contentions. However, they overlook the fact that when, on 16 April 2014, the owners instituted this proceeding, the relief sought was an order that the builder comply with the building contract.

167 It was only when the owners filed their Points of Claim on 31 October 2014 that they sought damages from the builder arising from incomplete and defective works.

168 The owners contend that their Points of Claim dated 31 October 2014 put their position beyond doubt. In their written submissions, the owners point out that at paragraph 20 of their Points of Claim, they had made reference to the builder having 'cancelled' the contract by the virtue of the 26 June 2014 email and the 30 June 2014 letter. They then submit:

> that while a legal practitioner might well have used the word "repudiated", here, the Owners' use of the words "cancelled" had that intended meaning.
>
> This view is bolstered by paragraph 23 of the points of claim, which makes it clear that the Owners had, since the Builder's repudiation, engaged alternative trades to complete the works.
>
> The Owners sought to articulate their claim against the Builder as best they could. As the Tribunal is not a court of pleadings,[76] the appropriate allowances ought be made for any deficiencies. A proper examination of the factual matrix clearly demonstrates that the Owners, by their conduct in:
>
> (a) engaging other trades to complete the incomplete works; and
>
> (b) filing of their points of claim seeking damages for incomplete and defective works,
>
> accepted the Builder's repudiation and brought the contract to an end at common law.[77]

Observations regarding the owners' contention that they accepted the builder's repudiation

169 I consider that the owners face a number of hurdles in making out their contention that they accepted the builder's repudiation at some point after 30 June 2014.

170 In early July 2014, the owners were not relying on common law repudiation in order to terminate the contract. Instead, they were seeking to use the

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[75] Owners' written submissions, paragraph 55, citing *Perri v Coolangatta* (1982) 149 CLR 573, 570; *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, 460.

[76] *Dalton v Silberberg* [2007] VCAT 1069 (citing *Barbon and Another v West Homes Australia Pty Ltd* [2001] VSC 405 (Ashley J)).

[77] Owners' written submissions paragraphs 57-59.

show cause notice mechanism set out in the contract to bring the contract to an end. This is apparent from their notice of intention to terminate the contract issued on 2 July 2014. That 14 day notice, in the ordinary course of events, would have matured on 16 July 2014. It had the dual effect of affirming the existence of the contract on 2 July 2014, and affirming that it would remain in place for a further 14 days in order to give the builder an opportunity to remedy the alleged breach of contract.

171 Had the owners, before 16 July 2014, given a notice of common law repudiation based on the facts as they existed on 2 July 2014, that notice would, I suspect, have been inconsistent with their notice to show cause. Perhaps, if the builder had committed a fresh repudiatory act after 2 July 2014, the owners might have relied on the proviso in clause 20.2 of the contract that the issuing of a notice under that clause is without prejudice to any other rights or remedies of the owners, and at that point asserted common law repudiation. However, no common law notice of repudiation was issued between 2 July and 16 July 2016, and so these considerations are hypothetical.

172 A further obstacle facing the owners in respect of their contention that it was the builder who repudiated the contract at common law is that, well before the expiry of the 14 day period in which the builder was entitled to remedy the alleged breaches of contract relied on by the owners, the owners took matters into their own hands by instructing the plumber to install the hot water service. Mr Strong gave evidence that he arranged the purchase of a hot water service on 5 July 2014. This is evidenced by an invoice.[78] The plumber then fitted the hot water service on 9 July 2014, and rendered an invoice for this.[79]

173 The action of the owners in directly instructing the plumber to install the hot water system is understandable in the sense that the conditions under which the owners were then living must have been difficult. However, this action might have constituted a breach of the contract. The owners might reasonably have been expected to understand this, as the owners' actions in 'obstructing, interfering with, contacting and instructing trades directly without the builder's knowledge or consent' had been one of the bases on which the builder had issued a notice of intention to terminate on 30 June 2014.

174 Mr Strong said that he instructed the plumber directly after Mr Milanovic had said he was terminating. It would appear that Mr Strong accepted the effectiveness of the builder's termination even though the 14 day notice period in the builder's notice had not run its course. This is inconsistent, in my view, with the owners asserting that they accepted the builder's repudiation of the contract.

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[78] Invoice from [name obscured] dated 5 July 2014 No. 052581 for $810.90, contained in Mr Forrest's report as document #18.

[79] Begbie invoice dated 9 July 2014 No. 1321 for $1,265, contained in Mr Forrest's report as document #19.

Events subsequent to July 2014

175 A further evidentiary problem for the owners regarding their contention that they accepted the builder's repudiation of the contract is that there are subsequent indications that the owners accepted that it was the builder who had terminated the contract. For instance:

(a) when the matter was mentioned before Deputy President Aird in the Tribunal on 18 September 2014, Mr Strong told the Deputy President that Mr Milanovic had terminated the contract. This statement was queried by Deputy President Aird, and it was repeated.[80]

(b) The owners in their Points of Claim, filed on 20 October 2014, say at paragraph 20 that the builder cancelled the contract by email on 26 July 2014 (sic) and that this was confirmed by letter dated 30 June 2014. It is to be noted that this contention is consistent with the evidence given by Mr Strong at the hearing.

(c) At a directions hearing before Senior Member Farrelly on 7 April 2015, Mr Milanovic told the Senior Member that he terminated the contract, and Mr Strong did not contradict that statement.[81]

176 The evidence is consistent. It is to the effect that the owners, in July 2014, accepted that the builder had effectively terminated the contract. They did not at the time, nor in the following months, expressly assert repudiation by the builder and rescind the contract. The express assertion that the builder repudiated the contract, and that the owners rescinded it, was made quite recently.

177 For all these reasons, I find against the owners in respect to their contention that it was the builder who repudiated the contract, and that the owners accepted the repudiation.

Was the contract abandoned?

178 In *CGM Investments Pty Ltd & Ors v Chelliah & Ors*,[82] Finkelstein J, in the Federal Court, reviewed a number of authorities concerning mutual abandonment of contract and expressed the relevant principles as follows:

> Whenever parties make a contract it is possible that they have conducted themselves in such a way that it can be said by implication that they have agreed to rescind their bargain: *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* ;[83] *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* .[84] This was dealt with by Isaacs J in *Summers v Commonwealth*.[85] In that case the parties had entered into a contract for the supply of a specified number of blocks of marble each

80 VCAT transcript, 18 September 2014, pages 2 and 3.
81 VCAT transcript, 7 April 2015, page 13.
82 [2003] FCA 79; 196 ALR 548 at [17-18].
83 [1957] HCA 10; (1957) 98 CLR 93, 14.
84 [2000] HCA 35; (2000) 201 CLR 520, 534.
85 [1918] HCA 33; (1918) 25 CLR 144.

> of a certain dimension. For some time neither party took any step to perform the contract. It was held that the parties had abandoned or abrogated the contract. Isaacs J said (at 151-152):
>
> > "Whatever the terms of contract may be, it is possible for the parties so to conduct themselves as mutually to abandon or abrogate it. A position not too altogether dissimilar arose in the case of *De Soysa v De Pless Pol*.[86] There, neither party had repudiated or refused to perform the contract, nothing in the nature of rescission had occurred, but, said Lord Atkinson for the Privy Council: - 'One party to a contract is not bound to give the other unlimited time after a day named to do that which the other has contracted to do. There must be some point of time at which delay or neglect amounts to refusal ... In truth, the projects seems to have been, to a great extent, if not altogether, abandoned by all the parties concerned.' In my opinion, that is the legal position here. Informally, but effectively, the parties have so acted in relation to each other as to abandon or abrogate the contract."

179 Finkelstein J's decision of *CGM Investments Pty Ltd* was referred to by the owners in their written submissions.

180 Applying the test set out in *CGM Investments Pty Ltd*, what does the conduct of the parties, objectively viewed, tell us about their intention about the continuance of the contract.

181 A starting point is that, on 2 July 2014, the owners saw fit to issue a notice of intention to terminate the contract pursuant to clause 20.[87] Clearly, then, they saw the contract as being on foot on that date. However, by perhaps 5 July 2014, when the owners purchased a new water service, and certainly by 9 July 2014, when they instructed the plumber to install the new service, they regarded the contract as being at the end.

182 It was Mr Milanovic's intention not to return to the site after the 14 days limited by his show cause notice had expired. In evidence, he stated:

> I made a decision to not go back to the site. Where is it going to end?

183 This evidence is consistent with Mr Milanovic's response to the owners show cause notice dated 2 July 2014, which was in these terms:[88]

> Michael, I've already advised u on email last Thursday and in writing on the 30 June by email.

184 When questioned about how he viewed the situation in early July, Mr Strong confirmed that he had formed the view that the builder was not coming back. The basis of this was that the builder had done nothing since 2 June, other than come to the site on 8 June 2014, and since that date the builder had not returned.

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86 [1912] AC 194.

87 Exhibit A38.

88 Exhibit A36.

185 The situation therefore was that neither party had effectively terminated the contract under the show cause procedure available to them in the contract. Furthermore, neither party had rescinded the contract on the basis of the other's repudiation. In these circumstances, the owners took a step which arguably was inconsistent with the continuation of the contract, at the latest on 9 July 2014. The builder, on the other hand, proceeded on the basis that at the expiration of 14 days from 30 June 2014 the contract was at an end, and did not return to site.

186 I consider that the conduct of the parties, when objectively viewed, manifests an intention to abandon the contract, and I accordingly find that the contract was abandoned.

187 The situation, accordingly, was not unlike that in the High Court decision in *DTR Nominees v Mona Homes Pty Ltd*[89] which was referred to by Finkelstein J in *CGM Investments Pty* Ltd. There, the majority (comprising Stephen, Mason and Jacobs JJ), having begun their judgment with the observation this was a case in which the parties to a contract, having placed conflicting interpretations upon it, have claimed to rescind it on the ground that the other party has repudiated and renounced it, went on to say:

> Thus the contract in the present case was still on foot on and after 25th July 1974. Neither party had effectively rescinded. But there can be no doubt that by 5th December 1974, when these proceedings were commenced, neither party, whatever may have been their reasons, regarded the contract as being still on foot. Neither party intended that the contract should be further performed. In these circumstances the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract.[90]

Assessment of damages in the light of the abandonment of contract

188 The Tribunal has made a finding as to the manner in which the contract came to an end which was not anticipated by either party. Neither party suggested during the hearing that the contract had been abandoned, and neither party addressed the issue of how damages were to be assessed in these circumstances. As a result, the Tribunal considers that the parties should be given an opportunity to address the issue of assessment of damages in respect of both the claim and the counterclaim, upon abandonment of the contract. Accordingly, the proceeding will be listed for a hearing at which submissions on this topic can be received.

MEMBER C EDQUIST

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89 (1978) 138 CLR 423.

90 (1978) 138 CLR 423, at 434.