

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D881/2004

CATCHWORDS

Domestic building work – defective work – builder attempting to rectify - method of rectification inadequate – assessment of cost of rectification – claimed difference between expert evidence of cost of rectification and actual cost to rectify – relevance of quotations obtained from other tradesmen

APPLICANTS

Josephine Borg, Kevin Borg

RESPONDENTS

J & L Cassar

WHERE HELD

Melbourne

BEFORE

Senior Member R. Walker

HEARING TYPE

Hearing

DATE OF HEARING

6 December 2005

DATE OF ORDER

13 December 2005

[2005] VCAT 2908

ORDER

1. Order that the Respondents pay to the Applicants the sum of \$31,827.50.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants

Mr E. Reigler of Counsel

For the Respondents

Mr P. Rompotis of Counsel

REASONS FOR DECISION

Background

1. The Applicants (“the Owners”) are the owner of a dwelling house situated at 8 Mitta Place, Taylor’s Hill. The house was constructed for them by the Respondent (“the Builder”) pursuant to a domestic building contract entered into on 9 September 2001.
2. The Owners moved into the house in May 2002. In September of that year they noticed that some of the tiles made a gritty noise when walked upon. At that time there were only about 4 tiles affected but as time went on the problem became worse.
3. Eventually, in June 2003, the Owners contacted the Builder who visited the house together with the tiler who had laid the tiles.

Attempts to rectify

4. Rectification was attempted by drilling holes in the grout line around the offending tiles and injecting them with an adhesive. The tiles were then left for 48 hours. The Builder said that this fixed the problem but the Owners did not agree and engaged an architect from Archicentre to advise them.
5. The Archicentre report is dated 21 July 2003. Its author, Mr Farries, is an architect. In his report he said that the distribution of “drummy” areas throughout the tiled areas of the house indicated a generally unsound method of installation and a probability that the whole of the tiles would separate from the slab within a few years. He said that the method of rectification adopted by the Builder, involving the drilling of the holes and the use of adhesives was not appropriate and the only way to achieve a sound installation was to remove the existing tiling and install new tiles. A copy of this report was provided to the Builder by the Owners.
6. By a letter of 22 July 2003 the Builder wrote to the Owners stating “.... *the tiler and I have agreed to repair these ‘drummy’ tiles*”. He goes on to say that he and

the tiler "... have every intention to rectify the problem and ask that you contact us when you are ready to have the matter attended to ...". It does not seem to me from this letter that it was the intention of the Builder to replace all of the tiles as recommended in the Archicentre report but rather, only to repair those that were "drummy".

The Owners' evidence

7. The Owners did not immediately contact the Builder about rectification because they were expecting a baby. They contacted the Builder again in October 2003 and he came back and glued other areas. According to Mrs Borg the Builder told her that, despite the wording of his earlier letter, he only proposed to fix the number of tiles stated in the Archicentre report. Further, the Owners did not believe the gluing worked. On the second day of this attempt at rectification there was a heated exchange between the Builder and Mrs Borg and the Builder then left the house.

8. Thereafter the Owners contacted the domestic building insurer, Vero and were advised that they should allow the Builder to come back. The Builder did return and at one time removed a section of tiles in the rear hallway and re-laid them. According to Mrs Borg this was successful at rectifying the problem in that area. The Builder was to return but did not and so on 18 November the Owners submitted a claim to Vero. Vero sent an inspector to the house and, on 16 February 2004, made a decision that the Builder was to carry out the following scope of work:

"Make good drummy\hollow floor tiles to interior of home. Provide articulation joints within the field of the existing tiles surface to prevent any reoccurrence".

The Owners were directed to grant the Builder access to carry out this work.

9. On 29 February 2004 the Builder rang the Owners to seek access to the house. At the time, the Owners were in Queensland on holiday and did not return until March. There is a dispute as to what was said in this phone call. The Builder says that Mrs Borg refused him access stating that she wanted to take legal advice and she also insisted on knowing the exact procedure that would be implemented in

order to fix the tiles. Mrs Borg says that she did not deny the Builder access but was simply unable to let him in at the time of the call because she was in Queensland.

10. Thereafter the Builder sent to the Owners two floor plans of the house, each with a different proposal for the location of the articulation joints and requested the Owners to choose one, sign the appropriate plan and return it. They did not so. Mrs Borg says that they knew nothing about articulation joints and so had to seek advice. On 24 May 2004 the Owners wrote to Vero stating that they were not convinced that installing articulation joints would fix or help rectify the problem. They also sought a guarantee that no tiles would be chipped, scratched or broken by the Builder during the process of installing the articulation joints or if they were, that that would be “an expense to him”. In their letter they stated that they had asked the Builder to come back and complete the previous attempts to rectify the problem including re-grouting the drill holes and removing stains from tiles and walls and they wanted this done before any further rectification work is done. They wrote again to Vero on 8 June 2004 asking when rectification work would be recommenced. Thereafter, no further work was done.

The Builder’s evidence

11. The Builder said in evidence that, when first contacted by the Owners he made it clear to them that it was not a big problem. Such a belief would be consistent with the way he subsequently approached the rectification work. He said that after the initial process of injecting tiles they all agreed that it worked. This statement is denied by the Owners and is not consistent with the other evidence and, in particular, the expert evidence but it does seem consistent with the fact that it was the only method of rectification sought to be adopted by the Builder until such time as he physically replaced a section of tiling which appears to have been successful. He said that when he got the Archicentre report he was working in accordance with it, injecting the tiles. I do not see how the Builder could have been implementing the report as he suggests when the process of injecting the tiles was said in that report to be inappropriate.

The method of rectification

12. The Builder said a number of times while giving his evidence that he is and always has been ready to fix the tiles but that Mrs Borg did not like what he did. I do not think this is established on the evidence. I accept that the Owners were content with the rectification of the small area where the Builder lifted and replaced the tiles and it was only the unsuccessful drilling technique that they objected to. The Builder said that when he replaced this area a tile was broken and he had difficulty obtaining one of the spare tiles from the Owners. It seems to me inevitable that, if the tiles are to be removed and replaced, a substantial number will be broken or damaged and require replacement and it is unlikely that there would be sufficient spare tiles to cope with this problem. If this is the reason for not continuing to rectify the floor by relaying the tiles it indicates to my mind that the Builder was not prepared to rectify the problem in the manner suggested.

13. It was appropriate for the Builder to seek agreement with the Owners on the location of the articulation joints but it seems to me that the objection of the Owners was not to the articulation joints themselves but, rather to the rectification method proposed by the Builder. The expert evidence establishes quite clearly that it is necessary to relay the whole of the floor. Despite the Builder's protests I am not satisfied that he ever intended to do so. He has had an opportunity to rectify the problem and has failed to do so. As a result, the Owners are left with the expense and loss involved in rectifying the problem themselves. The task I now have is to assess that loss.

Cost of rectification

The scope of works

14. I heard expert evidence from Mr Rob Lees, a building consultant called by the Owners and from Mr McManus, an architect called on behalf of the Builder. The scope of the works costed by these two experts is different. Mr Lees makes allowances for a plumber to remove and replace a slow combustion heater, for the removal and replacement of skirtings, dust protection to unaffected areas, refixing of skirtings with an allowance for partial replacement of any damaged skirtings and painting of any affected areas. None of these items appears to have been

allowed for in Mr McManus's costing. Mr McManus has allowed for removing the existing floor tiles and the hire of a skip to take them away, and \$85.50 per square metre to supply and lay 120 square metres of comparable ceramic tiles. There is no allowance for a site clean and, because he has only costed one trade, he has made no allowance for Builder's supervision and profit. He says the replacement of the skirting should not be necessary because the existing tiles and screed ought to be able to be removed from under the skirting without damaging them and the presence of the skirting would afford a useful guideline for the tiler to work to when laying the new tiles. Mr Lees said that it would be very difficult to extract the tiles and screed from under the skirting without damaging the skirting. He said it would be more economical simply to remove the skirting. I prefer Mr Lees' view and note that in most of the quotations tendered by the parties, there is an allowance for the removal and replacement of the skirtings.

15. Overall, I think that Mr Lees' scope of works is more realistic and, in view of the overall cost and since more than one trade is involved it will be a major contract for the carrying out of domestic building work and it will be necessary for a Builder to be engaged to do the whole scope of work required rather than just a tiler to do the tiling.

The cost of the work

16. As to the cost, Mr Lees assesses that at \$25,670.00, including removal and replacement of furniture and storage of the furniture during the period of four weeks. Most of the quotes and Mr Lee's assessment included a figure for removal and storage of furniture. I accept that, given the nature and scope of the work it will be necessary to remove the furniture and store it until the work is completed.
17. The storage figure is dependent upon the length of time the work will take. Mr McManus has suggested that it should take 10-14 working days. Mr Lees said that an allowance for 3-4 weeks should be made. In view of the extent of work that I find necessary I prefer Mr Lees' estimate and will therefore base any allowance on a period of 3.5 weeks. The allowance in Mr Lees' figure for 4 weeks storage is \$740.00, being \$185.00 per week. A quotation obtained by the Builder from a removal company in East Keilor has been tendered for \$13.50 per

week storage. This seems an extraordinarily low figure and since the author of the quotation, a Mr Doolan, was not available to give evidence as to what it meant or to be cross examined about it I am uncertain what it is for. The figure looks to be far too small to be for a whole house load of furniture. It is more likely to relate to a particular volume of furniture, such as a cubic metre, but just what it means is not known. Mr Doolan's quote for collecting and returning the furniture is \$480.00, but again, there is no evidence as to how much furniture he has allowed for in this figure. It does not appear that Mr Doolan has visited the house to see the Owners' furniture and assess how much has to be moved. Mr Lees on the other hand has visited the house. I therefore prefer Mr Lees' figure for storage, removal and replacement but shall reduce it to three and a half weeks. Since his allowance of \$1,760.00 is included in the figure of \$25,670.00 previously referred to I shall reduce that figure by half a week's storage, which is \$92.50.

Accommodation

18. A number of quotations have been proffered by the parties for accommodation of the Owners and their two very young children while the work is carried out. I am satisfied from the extent of the tiling to be done, the nature of the work and the age of the children, that it will be quite impossible for the Owners to occupy the house until the work is finished. They will therefore incur an accommodation cost of 3.5 weeks. According to Mrs Borg's evidence she has obtained quotations from a number of motels in the area but these did not have cooking facilities. It also appears that these figures are for a single room and the Owners' children are very young. They also obtained a quotation for a serviced apartment in Flemington of \$250.00 per night. This is for two bedrooms with a kitchen. Quotations obtained by the Builder range from \$80.00 to \$105.00 per night, but again these were for motels with only tea and coffee making facilities. I think it is reasonable to allow the cost of the serviced apartment. For 25 nights at \$250.00 per night that would amount to \$6,250.00.

The rectification work

19. In addition to the expert assessments, the parties have sought quotations for the replacement of the tiles. The Owners' quotations were \$32,450.00, \$36,360.50 and \$62,915.00. In order to obtain these quotations Mrs Borg contacted five

builders but only three of them would quote. Each one of them visited the house and inspected what had to be done before giving the quotation. The Builder obtained quotations from five different tradesmen at prices ranging from \$9,319.75 to \$9,957.75. Some of these tradesmen were either friends of or known to the Builder although one of them was, he says, quite independent. Comparing the two, it appears that substantial allowances included in the quotations relied upon by the Applicants are missing or substantially less in the quotations obtained by the Builder. In particular, there is no allowance for a Builder's margin and either no allowance or a very small allowance for protection and removal of furniture. More importantly however none of these tradesmen have actually visited the house but rather, have costed from a floor plan provided to them by the Builder.

20. For these reasons I think the quotations obtained on behalf of the Owners are probably more realistic and reliable than those provided by the Builder. However I have sworn evidence from Mr Lees that a fair and reasonable cost of carrying out the work, with an allowance of 25% of the Builder's margin, and removal and storage of furniture for 4 weeks is \$25,670.00. He did say in evidence that the two lowest quotations obtained by the Owners were "within the ball park", in that rectifying Builders generally want a high margin to take on work of this nature. He said that they were not "bound by the rules of the court room" but of course I am.
21. On the one hand, I am not concerned with what a rectifying builder would want to charge. As Mr Lees said in evidence, such a builder might want to quote a high figure to protect himself against anything going wrong or, he might not really want the job and but will take it if the profit is high enough. On the other hand the enquiry is not strictly what it would be fair and reasonable for such a builder to charge. There might be no builder to do it for a fair and reasonable price. This is not a claim by a builder against an owner for payment of a fair and reasonable price of work done. The question is, what should it reasonably cost the Owners to have the necessary work done? In this regard, Mr Lees said that these quotations were "within the ball park". Nevertheless, the other quotations obtained by the Builder, even allowing for the much lesser scope of works, shows the danger of

relying upon quotations to answer this question. Evidence in the form of a quotation is no more than evidence as to what a particular tradesman will charge. In some cases it might be possible in the circumstances to infer from such evidence what it would reasonably cost in the marketplace to have the work done but I think on the evidence in this case, all I can allow is what is proven on the evidence to be a fair and reasonable price for carrying out the work.

Conclusion

22. There will be an order that the Builder pay to the Owners the sum of \$31,827.50, calculated as follows:

(a) Cost of rectification, including removal and storage of furniture as assessed by Mr Lees, after deduction of half a week's storage:	\$25,577.50
(b) Alternate accommodation for 25 nights	<u>\$ 6,250.00</u>
Total	<u>\$31,827.50</u>

23. Costs will be reserved for further submission.

Rohan Walker
Senior Member