

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D429/2008

CATCHWORDS

Failure by developer-builder to rectify defective and incomplete works, liability for patent versus latent defects, cost of rectification

APPLICANT	Lavina Fernandez
FIRST RESPONDENT	E & M Farag Pty Ltd
SECOND RESPONDENT	4 S Constructions Pty Ltd (ACN 083 248 122)
WHERE HELD	24 November 2009 at 55 King Street, Melb and on site 25 November 2009 at 55 King Street, Melb
BEFORE	Member L. Rowland
HEARING TYPE	Hearing
DATE OF HEARING	24 & 25 November 2009
DATE OF ORDER	9 December 2009
CITATION	Fernandez v E & M Farag Pty Ltd & Anor (Domestic Building) [2009] VCAT 2618

ORDERS

1. The respondents pay to the applicant the sum of \$8,976 forthwith.
2. Liberty to the parties to apply for costs. The parties' attention is drawn to s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

MEMBER L. ROWLAND

APPEARANCES:

For the Applicant	Ms H. Fernandez on behalf of Ms L. Fernandez
For the Respondents	Mr E. Farag in person

REASONS

Background

- 1 In 2006, the respondents as owners and developers of a site in Noble Park, built 20 town house units. Unit 16, the subject of this dispute was built by the second respondent and completed in November 2006.
- 2 Immediately after it was built, unit 16 was tenanted for a period of approximately one year.
- 3 The applicant purchased unit 16 from the first respondent in March 2008 for \$280,000. The property was vacant at the time the applicant inspected and purchased the property. The applicant understood that the property had been used by the respondents' employees and this is the reason given to her for the works not being finally completed. The applicant said that she was informed that the incomplete and defective works would be rectified by the respondents before settlement. Mr Farag, on behalf of the respondents, denies this. He said that the purchase price of the unit was discounted on the basis that the applicant purchased the property on an as is basis. The applicant denies that the unit was discounted and says that she could have purchased 2 other units nearing completion for the same price. The contract of sale is not expressed to be conditional upon any works being undertaken by the respondents.
- 4 Following settlement of the unit, the applicant noticed a number of building defects including a roof leak. In April 2008, the applicant obtained a building inspection report from Mr Joseph Borg, building consultant. She also lodged a complaint with the Building Commission. As a result of that complaint some incomplete and defective works have been rectified by the respondents, but the applicant remains unsatisfied with the outstanding list of defective and incomplete works.
- 5 In June 2008 the applicant filed an application with the Victorian Civil and Administrative Tribunal seeking rectification costs in excess of \$50,000 for incomplete and defective works. At the hearing, the applicant was represented by her mother, Hyatt Fernandez and the respondents were represented by Emad Farag. Mr Farag said that he controls both companies.
- 6 In November 2008, the applicant obtained an inspection report from the Building Commission. The respondents retained Mr Graham Neale, from Just Building Surveying Solutions to prepare a report. Apart from a small number of items, Mr Neale agreed with the Building Commission report.

Latent versus patent defects

- 7 The claim against the respondent arises from the purchase of a completed domestic building. This is not a case where the applicant has contracted with the builder to build the unit, but where the applicant has purchased the

unit some time after it was completed. The applicant must establish that she has suffered loss and damage as a result of the respondents' breach of statutory warranties under the Domestic Building Act.

- 8 Generally, the price paid for a property takes into account all the facts and circumstances of the property including the location, size, quality and any patent defects. By patent defects, I mean defects that could have been reasonably observable on inspection of the unit prior to purchase. If a defect is patent, no allowance will be made to the applicant because the defect will be taken to have been reflected in the purchase price whether or not the applicant observed the defect.
- 9 Where the defect is latent, or where it could not have been reasonably observable on inspection prior to purchase, I will allow the reasonable cost of rectification of the defect.

Evaluation of cost estimates

- 10 The applicant obtained the following quotations to repair the works listed in the building commission report:
 - a. Paul Carstensen, builder \$35,132
 - b. Halkan Construction \$29,760
 - c. Willright Nominees Pty Ltd \$26,116
 - d. Fiddly Bits \$23,980
 - e. Walter Grandine \$33,743
- 11 The quotation from Willright Nominees Pty Ltd is a detailed quotation, itemizing each of the items individually and explaining the scope of works. It does not specify the builder's margin, however, the quotation is at the lower end of the 5 quotations obtained and I accept it generally, as a reasonable quotation. I accept the Willright Nominees quotation as the applicant's costs of rectification. The other quotations are lump sum quotations.
- 12 The respondents do not wish to return to site to undertake any further works. The respondents rely upon an estimation of costs prepared by Dewhurst Construction Pty Ltd. It totals \$2,475 plus GST for the works set out in the Building Commission report. Each item is separately priced. I note that Dewhurst Construction Pty Ltd has provided an estimate only and not a quotation.
- 13 On the whole, I find that the Dewhurst Construction Pty Ltd has understated the cost of rectification or not allowed sufficiently for the works to be carried out. For example, where the price allows for sealing of the bathroom junctions at \$50, no allowance has been made for the removal of the existing non compliant grout and it does not allow for the purchase of materials. Mr Farag said that for most of the items an hour was allowed at the rate of \$50 which included a 15% margin. This equates to around \$42

per hour with no allowance for materials. I note that the estimate states that any extra or variations would be charged at the rate of \$75 per hour. For these reasons, I find that the cost estimate provided by Dewhurst Construction Pty Ltd is understated.

- 14 I will deal with each of the items separately as listed in the Building Commission report.

Items 1 & 2

Claims withdrawn.

Item 3

The claim is that the roller door is rubbing against the cornice in the garage. When the Building Commission report was prepared the Building Commission was responding to a complaint that the cornice had been removed. The respondents had recently installed the cornice but it was not then apparent that the cornice was obstructing the operation of the roller door. The cornice as re-fitted by the respondents obstructs the operation of the roller door. Mr Farag observed that this could easily be rectified by cutting back the cornice. No quotation has been provided to rectify the defect. I allow the applicant \$200.

Item 4

The claim is that the garage window sill is out of level by 15mm over 590mm. Both the Building Commission and the respondents' consultant report a defect. Both consultants agree that the sill needs to be demolished and rebuilt. The applicant's rectification cost is \$472. The respondents' cost is \$150.

The respondents contend that the defect was noticeable upon a reasonable inspection of the unit and the applicant ought to have observed the defect. The respondents further contend that they are not liable to remedy the defect because that is how the applicant purchased the unit and it is reflected in the purchase price. The defect is cosmetic. The applicant denies she noticed the defect.

I find that the defect was patent or detectable upon an inspection of the unit and therefore reflected in the purchase price of the unit. The claim is dismissed because the applicant is not able to establish a loss arising from the respondents' breach of warranty.

Item 5

Claim withdrawn.

Floating Timber floor defects

Item 6 & 7

The claim is that the garage step has loose flooring and the riser is loose and not properly secured. Both the Building Commission and the respondents' consultant report a defect. Mr Farag argues that the defect is wear and tear and the applicant should have detected it upon inspection. The applicant denies observing the defect on inspection of the property. The applicant's cost to rectify the step and riser is \$128. The respondents' cost is \$50. I accept the applicant's evidence that the defect was not detectable at the time of inspection. Mr Borg reports that there was an attempt to glue the boards to the slab which was not successful. I find therefore that the defect was latent. The claim is proved.

Item 8

The claim is that the floating floor has many small sections of non matching (colour) sections of timber quad to secure the floor. The Building Commission reports a defect in that the quad is of small size and not colour matched. The respondents' consultant reports that the quad is not properly secured to the floor. The Building Commission report recommends complete replacement. The applicant's rectification cost is \$747. The respondents' cost to secure the quad is \$50.

The quad is not colour matched and is in small sections. This is a patent defect which could have been observed upon an inspection of the unit. I find that the applicant did accept the cosmetic appearance of the quad and therefore the respondents are not liable to remedy the defect. The respondents are liable to rectify the unsecured quad, as this is a latent defect. The claim is otherwise dismissed.

Item 9

The claim is that the timber floating timber floor has separated in the area adjacent to the stairs. The Building Commission reports a defect and recommends that the planks of floating floor be secured. The respondents' consultant reports that the lifting of the floating floor is wear and tear. I do not accept that finding because it is unreasonable to attribute separation of the floating floor from the slab after 2 years as fair wear and tear. The defect arose some time after Mr Borg's report. I therefore find that the defect is latent. The applicant's cost to rectify the floor allows 20 boards to be replaced at a cost of \$1816. The respondent does not price the item.

I find that the floating floor is lifting from the slab and this is a defect the respondents are liable to rectify. The claim is proved.

Item 19

The claim is that there is a 5mm gap between the kitchen tiles and the floating floor. Both the Building Commission and the respondents'

consultant report a defect. The respondents' consultant recommends that the joint be completed in a proper and workmanlike manner. The applicant's cost of rectification is \$84.60. The respondents' cost is \$75. The claim is proved.

Summary on floating floor defects

Items 6, 7, 8, 9 and 19 relate to the floating timber floor in the living room. The total claim by the applicant to repair these items is \$2775.60. The respondents' cost to repair these items is \$175. The respondent did not price item 9. The floor area is 25 square metres. Mr Farag said that the cost of the floor was \$15 per square metre plus the cost of laying the floor.

The applicant has proved rectification costs in excess of \$2,000 for the floating timber floor. However, it would be more economical to replace the floor than repair it. Replacing the floor would cure all of the defects complained of by the applicant. Both parties accepted that the cost to the applicant to replace the floor with a similar quality floor would be in the order of \$50 per square metre. I allow the applicant \$1650 to replace the floating timber floor including \$400 for demolition works.

Items 10 and 11

Claim withdrawn.

Item 12

The claim is that an infill panel was not installed to cover the motor section of the range hood. The infill panel is on site but not installed. Both the Building Commission and the respondents' consultant report a defect. The applicant's cost is to install the cover is \$122. The respondent's cost to install the cover is \$75. The absence of the panel is a patent defect and could have been observed upon an inspection of the property. The claim is cosmetic only. Further, the panel can be installed at the same time repairs are undertaken to the item 21 range hood repairs. The claim is dismissed.

Item 13

The claim is that the kitchen kick board is 4mm short, making a gap between the kick board and the side panel. Both the Building Commission and the respondents' consultant report a defect and both recommend providing a new kickboard cut to measure and made good. Mr Farag contends that the gap could be filled. The applicant's cost to replace the kickboard is \$184. The respondent's cost is \$75. The gap is a patent defect and could have been observed upon an inspection of the property. The defect is cosmetic. The claim is dismissed.

Item 14

The claim is that there are visible screw fixings on the outside face of the joinery unit in the kitchen. The Building Commission reports a defect and

recommends that the fixings be covered. The respondents' consultant reports that the missing caps are fair wear and tear. The applicant's quotation requires replacement of the screws because the screws are damaged and caps cannot be fitted to the damaged screw heads. I find that the damaged screw heads are a latent defect which could not be detected by a lay person upon inspection of the unit. Further, the applicant gave evidence that the respondents agreed to rectify the defect. I accept that evidence. The applicant's cost of rectification is \$66. The respondent has not priced the works. The claim is proved. I allow \$66.

Item 15

The claim is that the bench top, walls and vertical joinery are not sealed and not scribed to adjoining surfaces. Both the Building Commission and the respondents' consultant report a defect in that no sealant has been used. Instead grout has been used. This defect could not be reasonably observed by the applicant, a lay person, prior to purchase. The Building Commission recommends that the installation process be carried out in accordance with the recommendations of the Building Commission Standards. The respondents' consultant recommends that the junctions be sealed with a flexible sealant. The applicant's cost to remove the grout and seal with flexible sealant is \$245. The respondents' cost is \$50. The respondents have not allowed for the removal of grout. The claim is proved. I allow the applicant \$245.

Item 16

Claim withdrawn.

Item 17

Claim withdrawn.

Item 18

The claim is that the head infill of the sliding door has not been scribed to fit and has a gap of 4mm wide to the right hand side of the door. Both the Building Commission and the respondents' consultant report a defect. The respondents' consultant agrees that the head infill to the top of the opening be fitted and made good. The applicant's cost of rectification is \$137. The respondents' cost of rectification is \$100. I find this is a latent defect. I allow \$137.

Item 20

The claim is that the power point in the main bedroom is not properly secured. Both the Building Commission and the respondents' consultant report a defect and recommend that the power point be securely fixed. The applicant has now removed the cover plate and tightened the screws herself. The power point is now secure. The claim is dismissed.

Item 21

The claim is that the range hood is not flued to the outside air as per manufacturer's instructions. Both the Building Commission and the respondents' consultant report a defect and recommend that the range hood be flued to the outside. This is a latent defect. The applicant's cost is \$2,842. The applicant's method of rectification allows the flue to be installed through the ceiling space which will require considerable plastering and painting works. The respondents' cost is \$280. The respondents' method of rectification is to install the flue on top of the kitchen cupboards and then install a fascia to cover the flue. Another alternative is to replace the range hood with a re-circulating range hood, but this alternative has not been fully investigated or costed. I find that the applicant's method of rectification is unnecessary and unreasonable. I allow the applicant \$1,500 to enable the applicant to either replace the range hood with a recirculating model or to flue the range hood as per the respondents' method of rectification.

Item 22

The claim is that the striker plate and door lock are misaligned by 5mm so that the door does not close properly. Both the Building Commission and the respondents' consultant report a defect and recommended that the striker plate and the door lock be aligned and make good the door jamb. The applicant's cost of rectification is \$763.60. The method of rectification includes removing the door jamb and all architraves. The respondent's cost of rectification is \$50. I find that the defect is a patent defect. The claim is dismissed.

Item 23

The claim is that the sheet flooring in the cupboard in the main bedroom has been cut short so that there is a 60mm gap. The gap is covered by carpet and could not have been discovered upon a reasonable inspection of the unit. Both the Building Commission and the respondents' consultant report a defect and recommend the floor be repaired and made good. The applicant's cost of rectification is \$105. The respondents' cost is \$50. I allow \$105.

Item 24

The claim is that the bedroom 2 door scrapes on the carpet. Both the Building Commission and the respondents' consultant report a defect. The applicant has not separately priced this defect. The respondents' cost is \$50. The defect is a patent defect. The claim is dismissed.

Item 25

The claim is that architrave to bedroom 2 door has 1.5mm wide cracking along the mitre joint and wall junction. The Building Commission would

report this is as a defect if noted in the first 12 months. The house was completed in November 2006. The cracks were not complained of until April 2008 and therefore outside the first 12 months. The defect is also a patent defect. The claim is dismissed.

Item 26

The claim is that the shelving to bedroom robe 2 is secured with visible fixings to the front of the shelving. Both the Building Commission and the respondents' consultant report a defect. The applicant said in evidence that she was not particularly troubled by the visible fixings. She said that the building consultants identified the defect but it was not a matter that was of concern to her. The defect is a patent defect and I find that the applicant accepted the defect. The claim is dismissed.

Item 27

The claim is that the door jamb has been overcut for the striker plate which had been positioned more than once. Filler has been applied but not sanded or painted. Both the Building Commission and the respondents' consultant report a defect. They recommend that the repairs be completed and made good. The defect is a patent defect. The claim is dismissed.

Item 28

The claim is that the tile trim to the bathroom is not secured to the floor and has come away. Both the Building Commission and the respondents' consultant report a defect. The respondent contends that the applicant has damaged the trim by dragging furniture over the trim. That contention is speculation for which the respondent presented no direct evidence. The cause of the defect is identified by both the Building Commission and the respondents' consultant as the failure to secure the trim to the floor. The defect is a latent defect. The defect is proved. The applicant's cost of rectification is \$72. The builder's cost is \$50. I allow the applicant \$72.

Item 29

The claim is that the door jamb is not square and measured 10mm out of square. The door has been cut accordingly. Both the Building Commission and the respondents' consultant report that the door frame is not square and the top of the door has been damaged. They both recommend that the door frame be repaired and the door made good. The applicant's cost to remove and repair the frame and replace the door is \$1227. The builder's cost is \$75. The defect is a patent defect. The claim is dismissed.

Item 30

The claim is that the bathroom floor and wall junctions have been grouted and not filled with a flexible waterproof sealant. Both the Building Commission and the respondents' consultant report a defect in that the junctions have not been waterproofed in accordance with the Building Code

of Australia (“BCA”). The defect is one which would not be readily observable to the applicant, a lay person, and is therefore a latent defect. The applicant’s cost of rectification is \$454 and includes an allowance for the removal of grout by a special grout removing machine. The respondents’ cost is \$50. No allowance has been made for the removal of the existing grout. I allow the applicant \$454.

Item 31

Claim withdrawn.

Item 32

The claim is that the upstairs plaster ceiling around the air grill has been patched but not painted to match the rest of the ceiling. The works to the plaster ceiling were as a consequence of water damage following a roof leak. The respondents undertook repairs to the roof and ceiling after the applicant purchased the property. The Building Commission and the respondents’ consultant report a defect and recommend that the ceiling be repainted to match. The applicant’s cost of rectification is \$869. The respondents’ cost is \$75. I allow \$869.

Item 33 & 34

The claim is that the linen cupboard has a damaged shelf and the shelves are fitted with visible fixings. Both the Building Commission and the respondents’ consultant report a defect. Mr Farag contends that the defects were visible upon inspection of the property and are merely cosmetic. The claim is a patent defect. The claim is dismissed.

Item 35

The claim is that the upstairs east wall has a bow measurement of 10mm over 2.4mm. The Building Commission report that this is outside tolerance. The respondents’ consultant agreed and both recommend that the wall be straightened and made good. The applicant’s rectification costs including Item 36 are \$869. The respondents’ costs including item 36 are \$300. The defect is patent. The claim is dismissed.

Item 36

The claim is that the ceiling and cornice to the stairwell have been patched and then painted in a different colour to the surrounding surfaces. The patching and painting are a consequence of the roof leak mentioned in Item 32. The Building Commission and the respondents’ consultant report a defect and recommend that the ceiling and cornice be repainted to match. This item was priced as part of Item 35. I allow the applicant \$300 for the painting.

Item 37 & 38

Claims withdrawn.

Item 39

The claim is that there is incomplete plaster work to the ceiling underneath the stairs which forms a cupboard. The Building Commission report a defect on the basis that the work is incomplete. Mr Farag contends that the area under a stair is not normally plastered and therefore the respondents should not be liable to complete any work. The applicant has now repaired the holes. The applicant's cost of rectification is \$264 and includes repainting the entire under stair cupboard. The defect is a patent defect. The claim is disallowed.

Item 40

Claim withdrawn.

Item 41

The claim is that a section of floor tile is missing in the downstairs WC. Both the Building Commission and the respondent's consultant report a defect and recommend that the tiling be completed and made good. This defect arose after the respondents undertook work to the skirting in the WC. The applicant's rectification cost is \$65. The respondents' cost is \$50. The defect is proved. I allow the applicant \$65.

Item 42

The claim is that the external timber infills above the windows and doors require sealing and painting. Both the Building Commission and the respondents' consultant report a defect and recommend that the infills be sealed and painted. The applicant's cost is \$332. The respondents' cost is \$150. The defect is patent. The claim is dismissed.

Item 43

The claim is that the brick control joints are not sealed with a flexible mastic sealant as required by the provisions of the BCA. The Building Commission and the respondents' consultant report a defect and recommend that the joints be sealed. The respondents agreed that the joint has not been sealed. The defect is not reasonably observable by the applicant, a lay person, and is therefore a latent defect. The applicant's rectification cost is \$397. The respondents' cost is \$250. I allow \$397.

Item 44

The claim is twofold. Firstly, that the damp proof course does not extend the full width of the brickwork and therefore is not an effective damp course. The Building Commission reports a defect. The respondents' consultant reports that the concrete slab acts as damp proof course and

therefore there is no requirement for a damp course to extend through the brickwork. There is insufficient evidence to establish a defect at this time. There is presently no evidence of damage. The first part of the claim is not proved. The second part of the claim is that the weep holes are blocked and need to be cleaned out. Both the Building Commission and the respondents' consultant report the defect. The applicant did not separately price the cost of rectification of the weepholes. The respondents' cost is \$100. I allow \$100.

Item 45

The claims are that there is no balustrade around the retaining wall, the paving is incomplete and a privacy screen has not been installed.

A privacy screen has now been installed, although both the applicant and the respondents deny installing the screen. The evidence is that the neighbour was also insisting on a privacy screen. As the privacy screen has now been installed and the neighbour is not requiring the applicant to install a privacy screen, the claim for a privacy screen is dismissed.

The treated pine retaining wall at the rear of the unit was showing movement. Following the applicant's complaint to the Building Commission, the respondents repaired the retaining wall by building a second retaining wall, 300mm from the existing retaining wall. In doing so, the respondents did not install a handrail or complete the paving to the edge of the new retaining wall. The Building Commission and the respondents' consultant report a defect and recommend that a balustrade complying with the BCA and the Building regulations be installed. The Building Commission report further recommended that the paving be made good. The respondents' consultant did not address the paving.

The claim for the balustrade and extending the paving to the edge of the balustrade is proved.

The applicant's rectification costs of \$5,885 include the privacy screen and removing and re-laying all existing pavers. The scope of the rectification works proposed by the applicant is excessive. The respondents' rectification costs of \$150 only allow a balustrade to be installed over the retaining wall exceeding 1 metre. Taking both the applicant's and respondents' evidence as to costs and the Building Commission's recommended scope of works, I allow the applicant \$2,000.

Item 46

Claim withdrawn.

Summary of sums allowed to applicant

Item 3	\$200
Items 6, 7, 9 & 19	\$1,650

Item 14	\$66
Item 15	\$245
Item 18	\$137
Item 21	\$1,500
Item 23	\$105
Item 28	\$72
Item 30	\$454
Item 32	\$869
Item 36	\$300
Item 41	\$65
Item 43	\$397
Item 44	\$100
Item 45	\$2,000
Total	\$8,160
Add GST	\$816
Total allowed including GST	\$8,976

MEMBER L. ROWLAND