

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D890/2006

CATCHWORDS

Defective building work – evidence of cause - no grounds for rejecting sworn evidence- consequential damage – liability for – measure of damages in contract

APPLICANT	Karen Marie Lines
FIRST RESPONDENT	Burbank Australia Pty Ltd (ACN 007 099 872)
SECOND RESPONDENT	Allianz Australia Insurance Limited (ACN 000 122 850)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	20 April 2007
DATE OF ORDER	10 May 2007
CITATION	Lines v Burbank Australia (Domestic Building) [2007] VCAT 757

ORDER

- 1 Order that the First respondent replace the metal sheet comprising the door part of the roller door on the subject premises with a new sheet to match as closely as possible the original colour of the existing sheet, such work to be carried out in a proper and workmanlike manner and within a reasonable time.
- 2 The appeal against the Second Respondent's decision to reject the Applicant's claim is upheld and it is directed to accept the claim.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the First Respondent	Mr Andrews, Building Manager
For the Second Respondent	No appearance

REASONS

Background

1. The Applicant (“the Owner”) is the owner of a dwelling house at 32 Daly Close Sunbury which was constructed by the First Respondent (“the Builder”). The Second Respondent (“the Insurer”) provided the usual warranty insurance.
2. According to the Owner’s evidence, on 16 July 2006 she became aware that the ceiling in her garage had dropped onto the top of the roller door. She says she immediately ceased using the garage to prevent any further damage and on the following day, a Monday, she contacted a roofing contractor to inspect the roof to ascertain whether there was any leak that had caused the damage to the garage ceiling. The roofing contractor inspected the garage roof the following day and informed the Owner that the plaster sheeting had separated from the ceiling joists in the garage and suggested that the damage should be repaired under the domestic building insurance.
3. On the following day, 19 July, the Owner contacted the Builder to report the damage.
4. On 24 July a representative of the Builder inspected the damage and acknowledged responsibility for the plaster ceiling having come away from the joists but refused to accept responsibility for the consequential damage to the garage roller door. The Owner made a claim on the domestic building insurance and the Insurer denied liability. This proceeding was then brought.

The hearing

5. The matter came before me for directions on 8 March 2007 when the Insurer’s solicitor acknowledged that it would be bound by the outcome of the case and indicated that it did not wish to take any further part in the proceeding. I then adjourned the matter to be conducted on site as a small claim hearing on 20 April 2007.
6. At the hearing on site the Owner appeared on her own behalf and the Builder was represented by its Building Manager, Mr Andrews.
7. I inspected the garage door which showed that the Colourbond coating had been effectively abraded off the door over a substantial area, apparently by the fallen plaster. It was in the position where the plaster fell and no other cause has been suggested.
8. Mr Andrews argued that the extent of the damage was such that the plaster must have been rubbing against the fallen plaster for some considerable time. He argued that the Builder should not be responsible for damage caused by the Owner continuing to use the garage door when she knew or ought to have known that the plaster ceiling was rubbing on it and causing

damage to it. The Owner insisted that she had not used the garage door and that she had reported the matter in a timely way as indicated above.

What caused the damage to the door?

- 9 No expert evidence has been led from an engineer or someone knowledgeable about the propensity of this sort of surface to be abraded by contact with a fallen plaster sheet. Accordingly, since I am not an expert on these matters myself, I am quite unable to conclude simply by looking at the damage, whether it was caused by the plaster rubbing the door on one or two occasions, as the Owner's evidence would suggest, or over an extended period, as the Builder suggests.
- 10 It seems to me that if the plaster ceiling had fallen on the door some damage would have been caused to the door by rubbing against it and this may well have been exacerbated by the weight of the plaster. Whether the extent of the damage I observed could have resulted from one or two operations of the door in this condition or whether it would have taken an extended period as suggested by Mr Andrews I am quite unable to say.
- 11 However it seems unlikely that a householder, knowing that the plaster ceiling of her garage had collapsed onto the door would go on using it in these circumstances. I therefore think that the Owner's sworn evidence that she did not is credible. To reject her sworn evidence I would need to find that it was improbable or that there was other contrary sworn evidence that was more persuasive. I cannot reject it simply because the other party thinks that the damage is inconsistent with the damage caused to the door. To establish such an inconsistency I would have to have sworn evidence from a suitably qualified person that the damage could not have been caused in the manner described by the Owner and there is no such evidence.

Liability for consequential damage

- 12 In the alternative, Mr Andrews argued that the damage to the door was consequential damage and not as a direct result of defective workmanship. He said that the Builder was not liable for consequential damage but only the cost of remedying any defective workmanship.
- 13 This is wrong as a matter of law. The Builder's obligation to carry out the work in a proper and workmanlike manner using good and sufficient materials is to be found in most building contracts or, in any case, is implied by s.8 of the *Domestic Building Contracts Act 1995*. It is a contractual obligation and the measure of any damage arising from a breach of such an obligation is the contractual measure.
- 14 A party breaking a contract "...is responsible only for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely, or liable to result from his breach, or of which there was a serious possibility or a real danger." *Halsbury* 4th Edition vol.12 para 1174.
- 15 In the present case the plaster was fixed to the underside of the ceiling joists immediately above the roller door. It must have been reasonably within the

contemplation of the parties that, if it was not properly affixed it might fall down upon the door and that the Owner might operate the door without realising what had occurred. On the evidence, this is what happened. I am therefore satisfied that the damage sought is recoverable.

Quantum of damages

- 16 The Builder has offered to have the garage door recoated. The Owner had discussions with the Builder in this regard but ultimately, the Builder was unwilling to provide details as to how this would be done, other than by saying that it proposed to recoat the garage door “with a suitable external paint” and that the method of recoating would be “via a paint spraying machine”.
- 17 Technical information concerning the door was tendered by the Owner and not disputed by the Builder. In Technical Bulletin TB2 dated November 2003, Bluescope Steel, the manufacturer of the steel, states as follows:

“Although Bluescope Steel does not recommend the use of touch up paint; it is acknowledged that some people believe they have no option but to apply small amounts of paint to cover scratches. A recommendation not to touch up, is based on the fact that minor scratches (less than 2mm in width and unnoticeable from the street) should be left alone. The available metallic coating will protect the roofing sheet. If scratches are more noticeable, it is the recommendation of Bluescope Steel to replace the affected sheet
- 18 The manufacturer goes on to set out a method of repainting old damaged areas in some detail and describes the materials to be used. I was unable on site to obtain from Mr Andrews any details of how the Builder proposes to repaint the door. There is no evidence before me that it would be done in accordance with the technical bulletin that is in evidence. Not only do I have no specific evidence as to the proposed method of repainting, I have no evidence from any qualified person that that will be a satisfactory method of rectifying the damage. Accordingly, I am not satisfied on the balance of probabilities that the damage can be satisfactorily repaired by repainting according to the very general description given by the Builder. I am therefore left with the only other option which is replacing the metal sheet of the door.

Conclusion

- 19 I think the Builder should be given the opportunity to rectify the damage. The order will therefore be that the Builder replace the metal sheet comprising the door part of the roller door with a sheet to match as closely as possible the colour of the existing sheet, the work to be done in a proper and workmanlike manner and within a reasonable time. The appeal against the Insurer’s decision to reject the claim is upheld and the Insurer is directed to accept the Owner’s claim.

SENIOR MEMBER R. WALKER