

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D19/2006

CATCHWORDS

Flood damage alleged to be due to defective plumbing fitting for refrigerator – insufficient evidence that the fitting was supplied or installed by the builder’s plumber – no evidence of any defective workmanship – builder not liable for actions of supplier of refrigerator purchased by owner

FIRST APPLICANT	Tawab Afzal
SECOND APPLICANT	Najiba Afzal
BUILDER	John Tomiczek
JOINED PARTY	John Van Bree
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	30 -31 August and 6 - 7 September 2006
DATE OF ORDER	14 September 2006
CITATION	Afzal v Tomiczek (Domestic Building) [2006] VCAT 1916

ORDER

1. Najiba Afzal is joined as an Applicant to this proceeding.
2. The Application is dismissed.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Owners	Mr B. Miller of Counsel
For the Builder	Ms J. Lardner of Counsel

For Joined Party

Mr G. O'Hara of Counsel

REASONS

Background

- 1 The Applicants (“the Owners”) are the Owners of a large multi-level dwelling house at 55 Marykirk Drive, Wheelers Hill. The house was constructed for them by the Respondent (“the Builder”) in accordance with an agreement detailed in a number of documents prepared by the Owners’ solicitor. At the time the arrangement was entered into the Builder was not a registered Builder and the purpose of these documents appears to have been to circumvent that problem.
- 2 The documents describe the Builder as the “assistant” and the Owners as the owner-builders on the project. The arrangement was nonetheless that the Builder would engage sub-contractors in his own name to carry out the work and the whole of the construction cost would be paid to him by the Owners. It is unnecessary to investigate the lawfulness or otherwise of this arrangement.
- 3 The Joined Party (“the Plumber”) is and has been for many years a licensed plumber and was engaged by the Builder to carry out all the plumbing work required for the construction save for a small amount of roof plumbing, which was done by someone else.
- 4 The construction of the house appears to have proceeded without incident and the whole of the cost was paid to the Builder by the Owners who then moved into the house.

The flood

- 5 On 4 March 2005 a flood occurred in the kitchen. A very large amount of water spread over the floor to the back of the kitchen where it wet the bottoms of the curtains. It also ran down the steps towards the front of the kitchen and wet not only the lower dining area and adjoining rooms but also the garage and the kitchenette at the bottom level.
- 6 A specialist contractor was called on the day of the flood to mop up the water and bring in dryers. The carpet, some furniture and curtains were subsequently cleaned and dried and the total cost for the initial clean up was \$3,627.15.

The claim

- 7 In addition to the clean up cost, the Owners claim that damage has been done to the house by the flood waters and that to rectify this will cost \$17,978.39. They say they have spent a further sum of \$1,000.00 on engaging experts’ reports and they seek to recover all of these sums from the Builder. The Builder joined the Plumber to the proceeding asserting that, if he is liable to the Owners, the Plumber is liable to him. Notwithstanding that, the facts asserted by the Owners are largely denied by both the Builder and the Plumber.

The hearing

8 The matter came before me for hearing on 30 August 2006 for two days and was adjourned part heard at the end of the second day to 6 September. The hearing concluded on 6 and 7 September. Mr Miller of Counsel appeared on behalf of the Owners, Miss Lardner of Counsel appeared for the Builder and Mr O'Hara of Counsel appeared on behalf of the Plumber. I heard evidence from each of the Owners, their plumbing expert, Mr Quick, and their building expert Mr Thompson. The Builder gave evidence on his own account. For the Plumber I heard from the Plumber himself, his plumbing expert Mr Rapsey, his building expert Dr Eilenberg and from Mr Conway, the electrician who carried out the electrical work when the house was built ("the Electrician"). The Plumber also produced his diary in which he noted the days he worked at the house.

The water supply for the refrigerator

- 9 The Owners purchased a new refrigerator ("the fridge") for the house which had a water chilling and ice making capability. In order to provide water for the fridge a cold water tap had to be supplied and the fridge connected to it. The tap itself was provided by the Plumber and was located inside the cabinet adjacent to the fridge cavity against the back panel. It was unclear whether access the tap could be obtained merely by opening the drawer in front of it or whether it would be necessary to remove the drawer.
- 10 There was a brass fitting connected to the tap to which a plastic pipe was connected leading to the fridge. There was no evidence about how the other end of this pipe was attached to the fridge. A major issue in the case was who connected the brass fitting and plastic pipe to the tap.
- 11 The Owners allege that the flood occurred as a result of the plastic supply pipe coming out of the brass fitting. They claim that the plastic pipe and fitting had been attached to the fridge and the tap by the Plumber. This is denied by the Builder and the Plumber who say that the fridge was installed by or on behalf of its supplier, Clive Peeters, and the brass fitting and plastic pipe must have been fitted by the installer.
- 12 In the alternative, the Owners say that, when the Plumber fixed a leak in the plastic pipe fitting shortly after the Owners moved in and he either fixed it defectively or alternatively, ought to have advised them that the plastic pipe and fitting were inappropriate and likely to fail. The Plumber admits having fixed the leak but denies there was any apparent fault with the fitting.
- 13 Further, the Owners argue that, under the terms of the contract between the Owners and the Builder, irrespective of who connected the fridge, the Builder was responsible to ensure that it was properly connected. The Builder denies any responsibility for the acts or omissions of the installer.

Where did the water come from?

13. Mrs Afzal was the only witness called as to the cause of the flood. She said that she had returned to the house that day at about 1 pm to drop off some shopping and noticed nothing amiss. She returned with her children from school at about 4 pm and noticed water in the garage, which is at the lowest point of the house. She went up to the kitchen and found the floor flooded up to the back wall. She said the depth of the water was to the top of her feet. She rang her husband who told her it must be from the fridge and she should turn the water off. In examination in chief she said she removed the drawers and turned off the tap. In cross-examination she said that she pulled the drawer all the way out and put her hand in and turned it off. She said she could see the tap.
14. There was much circumstantial evidence raised by the Builder and the Plumber to cast doubt upon Mrs Afzal's account which I summarise as follows:
 - (a) There was a great deal of water.
 - (b) The area within the cabinet where the water would have come out is very confined.
 - (c) On the rear panel of the cabinet there was a paper label that was not water affected;
 - (d) There was a pencil mark on the floor of the cabinet under the drawer that was not washed away;
 - (e) There was sawdust under where the holes had been drilled by the installer for the plastic pipe to go through. This sawdust ought to have been washed away but it was still below the holes on the floor of the cabinet;
 - (f) The panels of the cabinet and the skirting board in the fridge cavity were made from medium density particle board and there was no water damage to the rear panel, the end panel next to the fridge or the skirting behind the fridge. Yet it was suggested on behalf of the Owners that cabinet work on the island bench further away had been water damaged.
 - (g) The floor slopes very slightly to the front of the house, yet the curtains against the back window were damaged. Mrs Afzal also claimed that the water level was to the top of her feet in this location. Although there is a small lip on the top step it is difficult to see how the water could have built up to that level at the back of the kitchen if the source of the water had been slightly downhill at the front of the kitchen;
 - (h) According to the Plumber during an earlier visit he saw water damage to a splash back above a sink near the rear of the kitchen that had been repaired when he visited the house this year. The Owners denied this. The Plumber speculated that perhaps this sink was the source of the flood;

- (i) According to the Plumber Mrs Afzal changed her account of the incident. He said that on a visit to the house earlier this year she said the flood had occurred in the morning. He claimed that during that visit, after she was unable to remove the drawer to demonstrate how she had turned off the tap, she said her teenage daughter who was present at the time was the one who had turned it off. She denied this in cross-examination and there was no note of what she said in the Plumber's diary.
 - (j) Both the expert witnesses called on behalf of the Plumber expressed doubts that the water could have come from the cabinet.
- 15. On the strength of that evidence Mr O'Hara submitted that I should find that I am not satisfied that the flood came from the cupboard. The evidence is, of course, circumstantial and such evidence can only support an inference. An eye witness account from a witness whose evidence is accepted must carry more weight. In determining whether to accept the evidence of the eye witness the Tribunal will have regard to such things as the credibility of the witness the content of the account given and whether it is consistent with other proven facts.
- 16. The Owners' daughter who, according to Mrs Afzal, was present at the time and might, according to the Plumber, have been the one who turned off the tap, has not been called. Mr O'Hara and Miss Lardner invited me to infer that her evidence would not have assisted the Owners. Mr Miller said that I should not draw any adverse inference because the small amount of the claim did not justify going to the lengths in proving it that one might have been gone to if it had involved more money. The Owners also might have wanted to spare their daughter the burden of giving evidence. What evidence to call is often a difficult decision but here Mrs Afzal's credit was clearly placed in issue and it is surprising the daughter was not called in order to support her mother's credibility. It was not suggested that she was not available to be called.
- 17. There was also no view, which might have assisted me in deciding whether Mrs Afzal could have turned the tap off in the way she described.
- 18. In the end, it is not necessary for me to make a finding where the water came from because, even if the water did come from the hose connection, the case fails for the reasons that follow. For the purpose of those reasons I assume that the water came from the hose connection, but that is not a finding I have made.

Was the provision of the tap part of the Builder's scope of works?

- 19. It is common ground that, after selecting the fridge, Mr Afzal told the Builder that it would require a water connection and the Builder agreed to provide one. What was provided was a cold water tap in the rear of the

cabinet adjacent to the refrigerator space to which the fridge might be connected. Since the Plumber charged the Builder for the hours he worked and the value of materials supplied I am satisfied that the cost of providing this tap was charged to the Builder by the Plumber and paid by him. There is no evidence that any charge was made by the Builder to the Owners. The Builder said that he had some padding in the price that he had quoted and might not have considered it worthwhile to charge a variation for what he said was a small length of copper pipe and a tap. It was agreed that there had been a sum paid to the Builder by the Owners for some variations but there was no evidence as to what they were. I am satisfied that it was agreed that the Builder would provide the tap as a connection point for the fridge. It was not suggested that there was anything wrong with the tap. The fault alleged was with the plastic pipe and its connection to the tap.

Who connected the fridge to the tap?

20. The evidence relied upon by the Owners to establish that it was the Plumber who connected the fridge to the tap was as follows:
 - (a) Mr Afzal said he did not request Clive Peeters to install the fridge;
 - (b) Mr Afzal said that on the day the fridge arrived namely, 25 August 2004, he visited the house for 15 or 20 minutes. He saw the fridge sitting on the kitchen floor on the top of the steps wrapped in plastic and was told by the Plumber, the Electrician and the painter that they had helped the delivery man lift it up to the house. He partially unwrapped the fridge from the plastic to retrieve the delivery docket and went back to work. He said the Builder was there with the Electrician, but did not remember speaking to him about the fridge although he understood that the Builder knew that it was coming;
 - (c) Mr Afzal said that he came back two days later and found the fridge in position. He said that the Plumber was there that day “connecting everything”, the day being, presumably, 27 August. However he acknowledged that he did not actually see the fridge connected.
 - (d) Evidence was given by Mr Quick that to connect the fridge to the tap one would need to be a licensed plumber. This seems an extraordinary situation but, as Mr Miller pointed out, that is the state of the evidence and I must accept it. Mr Miller suggested that it was unlikely that Clive Peeters would provide a licensed plumber to deliver a refrigerator.
 - (e) A copy invoice was tendered which was sent by fax to the Tribunal at the instigation of the Owners. Near the bottom left hand corner of this document it indicates the delivery was scheduled for 25 August which accords with the other evidence about the date of delivery. Handwritten next to the printed words “Delivery Charge” are the words “NOT INSTALLED BY CLIVE PEETERS”. The circumstances in which those words were added to the document are not explained. The author of those words has not been identified.

The basis for the view expressed by those words is not revealed. Even if I were to accept them as indicating that the person who wrote them believed that the installation had not been done by Clive Peeters it does not assist me without evidence as to the basis of that belief;

- (f) It was suggested that an entry in the Plumber's diary after the flood to the effect that he did not remember having connected the fridge indicated that he had no recollection of whether he had connected it or not. I think the entry is equivocal. In any event, after the Plumber fixed the leak he told the Builder that he had not connected the fridge.
21. The Builder's evidence is that he was not at the house when the fridge was delivered and this is supported by the evidence of both the Plumber and the Electrician. Both the Plumber and the Electrician say that when the fridge arrived they were sitting on the front steps of the house having either morning coffee or their lunch when the delivery man arrived and, after declining their offer of assistance, brought the fridge up the front steps and into the kitchen on his own, using an electrically operated trolley.
22. The Plumber said that although he had provided a water tap for the fridge at the Builder's request, he had not been asked to do anything else. He said that after the delivery man went inside with the fridge he and the electrician continued their morning tea or lunch and then went inside to find the delivery man still working in the area around the fridge with a small toolbox. The fridge was in the kitchen in front of the recess where it had to go. He said the delivery man was in the house for half an hour to three quarters of an hour. He could not remember whether he was working in the kitchen on that day but he was in there at some time. When he left on that day at 5pm the fridge was in the recess. He denied that he connected it to the tap. He did not recall having seen Mr Afzal.
23. He produced his diary to show that he was on site on that day until 5.00 p.m. but then did not return until 31 August when he worked from 7.30 a.m. to 5.00 p.m. He was not there 2 days after the date of delivery when, according to Mr Afzal's evidence, the fridge was seen to be in position.
24. The Electrician confirmed the plumber's evidence as to them having tea or lunch on the steps when the delivery man arrived with the fridge and brought it up on an electric powered trolley after declining their offer of assistance. The Electrician said that after the delivery man brought it up he (the Electrician) was in the kitchen attending to light fittings. He said that although he was not paying much attention to what the delivery man was doing, he saw him working in the area of the fridge space and he could have been there for an hour or so. When the delivery man left the

fridge was in the fridge space. Like the Plumber, he did not recall a visit by Mr Afzal on the day the fridge was delivered, nor did he recall the Builder or the painter being there. The lights in the kitchen that he was working on were directly opposite the fridge space.

25. The Painter acknowledged that he had known the Plumber for many years as a result of working on the same building sites from time to time but despite that, there is no reason to disbelieve his evidence. No witness was called from Clive Peeters to establish the circumstances of delivery or whether their delivery man had installed the fridge.
26. An additional piece of evidence is provided by the shape of the brass olive that formed part of the brass fitting. The wholesaler that supplied the fridge on behalf of Clive Peeters was Sampford and Staff Pty Ltd. A facsimile was sent by that company to a loss adjuster who passed it on to Mr Rapsey. The faxed page bears the facsimile machine imprint of Sampford and Staff Pty Ltd and depicts the brass olive which is, according to the evidence of Mr Rapsey, fitted to the hose fitting, suggesting that, if the plumber had fitted the fridge, he must have had the necessary plastic pipe and the correct fitting with him on the day or alternatively, the pipe and fitting had come with the fridge.
13. Whatever the contractual obligation of the Builder might have been, I am not satisfied on the balance of probabilities that the fridge was connected to the tap by the Plumber. I find instead that it was connected by the man who delivered it. The evidence relied upon by the Owners can only support an inference which cannot stand against the direct sworn evidence of both the Plumber and the Electrician.

Was the Plumber negligent in regard to the repair?

14. The alternate claim is that, when the Plumber fixed the leak in the brass fitting to the plastic tube, he ought to have identified that the fitting and the tube were inadequate and advised the Owners accordingly. By not doing so he was negligent and, since he attended the house at the request of the Builder, the Builder is liable for the Plumber's negligence in this regard.
15. The evidence as to the suitability of plastic pipe for this sort of connection is conflicting. It is common ground that the fitting works by threading the pipe through the centre of a compression nut and a tapered brass olive and screwing the nut into the main body of the fitting. As pressure is applied to the nut the olive is compressed over the tube, grasping it in position. Mr Quick said that this sort of connection is only suitable if the interior pipe is copper. He said that the polythene pipe has a high rate of expansion and contraction and would eventually pull clear.

16. After making enquiries, particularly with the wholesaler, Sampford and Staff Pty Ltd, Mr Rapsey concluded that the connection appeared to be the fitting supplied with the fridge as recommended by that company. He said that brass fittings of this type were previously used with copper pipe but are now commonly used with plastic pipe. He said that as far as he could ascertain the fitting used was satisfactory although he had seen a number of these types of fittings blow out in the past.
17. I find on the balance of probabilities that the materials used to connect the fridge to the tap came with the fridge at the time of its delivery. There is no evidence to show that they came from anywhere else. No evidence has been called by the Owners from Clive Peeters or Sampford and Staff Pty Ltd to the effect that these were not the fittings supplied, although such evidence ought to have been readily available. I am not satisfied that there was anything about the fitting that should have alerted the Plumber that it was the wrong fitting or that he ought to have advised the Owners that it was unsatisfactory.
18. An alternate scenario put by the Owners is that the integrity of the fitting was affected by the Plumber when he repaired the leak. There is no evidence of anyone having interfered with the fitting after he carried out that repair but there is also no evidence that the repair was defective. If the pipe did blow out of the fitting this is something, according to Mr Rapsey, that can occur when plastic pipe is used. Because of this evidence and the evidence of Mr Quick to a similar effect, I cannot infer that, simply because Mr Rapsey removed the olive, wrapped some Teflon tape around it and replaced it, what he did on that occasion made it more likely for the connection to fail. There is no evidence that there was anything wrong with the connection from the date of the repair until the day of the flood.

Regardless of who connected it, was the Builder required to ensure that the fridge was properly connected?

19. Mr Miller referred me to clause E in the contract document which states:
“In relation to the final payment, the assistant will ensure that all visible defects are attended to and rectified and further, that all appliances are properly installed and functional.”
20. Mr Miller argued that this clause imposed an obligation on the Builder to ensure that the fridge was properly connected, even if it had been connected by the Owners’ own supplier. I do not accept this submission. I think the clause was only intended to apply to appliances the Builder was contractually obliged to install. It cannot have been within the contemplation of the parties that the Owners could go out and purchase appliances outside the scope of the contract and require the Builder to

ensure that those appliances were “properly installed and functional”. He was not contractually obliged to connect the fridge to the tap.

Conclusion

21. For all of these reasons the application fails. Costs will be reserved.

Mr R. Walker
Senior Member