

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1902/2018

### CATCHWORDS

Domestic building work – Claim for order that builder rectify alleged defective or non-compliant work – warranties under *Domestic Building Contracts Act 1995* - claims dismissed.

<b>FIRST APPLICANT</b>	Afolake Akande
<b>SECOND APPLICANT</b>	Olushola Akande
<b>FIRST RESPONDENT</b>	Carlisle Homes Pty Ltd (ACN: 106 263 209)
<b>SECOND RESPONDENT</b>	Peri Construction Pty Ltd (ACN 151 372 191)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	A. Eastman Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	10 September 2019
<b>DATE OF WRITTEN SUBMISSIONS</b>	1 October 2019
<b>DATE OF ORDER</b>	31 October 2019
<b>CITATION</b>	Akande v Carlisle Homes Pty Ltd (Building and Property) [2019] VCAT 1716

### OTHER MATTERS

1. The applicants' claim in the proceeding consisted of three items of alleged defective work, which may be briefly described as:
  - a. Burnt splashback;
  - b. Water tank issue; and
  - c. Cracks in the dwelling.
2. During the hearing on 10 September 2019, the applicants' claim with respect to the item described as 'cracks in the dwelling' was settled by agreement. The Tribunal was therefore required to determine the dispute only with respect to the remaining two items.

## ORDER

1. The applicants' claims with respect to the items described as 'burnt splashback' and 'water tank issue' are dismissed.
2. The applicants' claim with respect to the item described as 'cracks in the dwelling' is struck out with the right to apply for reinstatement.

A. Eastman  
**Member**

### **APPEARANCES:**

For the applicants	In person
For the first respondent	Ms M. Hogg, solicitor
For the second respondent	Mr N. Kumar, director

## REASONS

1. The applicants' home was built by the first respondent, Carlisle Homes Pty Ltd (**builder**), and completed in around June 2015. The second respondent, Peri Construction Pty Ltd (**landscaper**), was engaged by the applicants to carry out landscaping works around the home in around June 2016.
2. Within a month after moving into their home, the applicants noticed burn marks on the glass splashback behind the gas cooktop. In around September 2016, internal cracks in the home were observed. During a directions hearing held in this matter in January of this year, the applicants raised an issue regarding the water tank at the home, namely, that it was not collecting water. Accordingly, when this matter came before the Tribunal for hearing, the applicants' claim in this proceeding was in respect of these three items. In general, it was said that the items were defective, and the remedy sought by the applicants was an order that they be rectified.
3. Before the end of the hearing the parties had, by agreement, resolved the claim relating to the internal cracks in the dwelling. What therefore remained to be determined by the Tribunal was the applicants claim against the builder that:
  - a. the burn marks on the splashback have occurred because the splashback was not installed in accordance with the relevant Australian Standard, and/or, because 'no thermal protection was provided on the glass splashback installed' and/or because 'the material behind the glass splashback was not a non-combustible material' or was a 'poor quality material'; and
  - b. the area of roof draining into the water tank is very small.
4. By reason of provisions in the *Domestic Building Contracts Act 1995* (Vic) (**DBC Act**), there are implied warranties about the work to be carried out under a domestic building contract between a homeowner and a builder.<sup>1</sup> Although the applicants did not directly reference the warranties, their claim is, in effect, that there has been a breach of these warranties by the builder. In order to succeed in their claim, the applicants must prove, on balance of probabilities, that the damage suffered, or complaint made, is because of the builder's failure to comply with a statutory warranty.
5. The builder denies there has been a failure to comply with the statutory warranties in relation to either claim. Specifically, it says the splashback has been installed in accordance with the relevant Australian Standard and the manufacturer's specifications and that compliant materials have been used. The builder says the burn marks on the splashback have been caused by the applicants' misuse of the cooktop. In relation to the water tank, the builder says there are no defects and the tank has been installed in accordance with the contract documentation.

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<sup>1</sup> Section 8 of the DBC Act.

6. For the reasons that follow, based on the evidence, I am not satisfied that the applicants have proved that there has been a breach of the statutory warranties. I therefore dismiss the claims relating to the burn marks on the splashback and the water tank issue.

### **The hearing**

7. The applicants attended the hearing, and both gave evidence. They were supported and assisted for part of the hearing by a relative, Mr Tammy Ogaji. The applicants had filed, and referred to during the hearing, two expert reports in support of their claims, namely, a report by registered building inspector John Rosa of Independent Building Inspectors dated 3 September 2015 (**Rosa report**); and that of Peter Farries, registered architect, of Houspect dated 17 April 2019 (**Houspect report**).
8. Ms Hogg, in house solicitor, appeared on behalf of the builder. Mr Stephen Milne, the builder's Warranty Manager, also attended and gave evidence.
9. At the end of the hearing the parties were each given leave to file, and to provide each other, with any further material and/or written submissions upon which they wished to rely in respect of the two issues the subject of the hearing. The applicants filed further material on 23 September 2019 and the builder filed further material on 1 October 2019. It is apparent from that material that the builder has submitted evidence in addition to what was given during the hearing. To the extent the documents filed addressed matters which were not addressed during the hearing, I have not had regard to it. I have only had regard to the further material to the extent it merely verifies evidence given during the hearing.

### **Relevant legislation/Australian Standards**

10. The implied statutory warranties prescribed in the DBC Act<sup>2</sup> include the following:
  - (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
  - (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
  - (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;
  - (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract.

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<sup>2</sup> Section 8 of the DBC Act.

11. At the hearing, both parties referred to and relied upon AS/NZA 5601.1-2013 (**Standard**) being the relevant standard governing the requirements for gas installations, in particular, the clearance requirements between an appliance and a surrounding surface. The relevant sections of the Standard referred to are as follows:
12. Clause 6.2.5, ‘Temperature limitation on nearby combustible surface’ which states that:

A gas appliance shall be installed such that the surface temperature of any nearby combustible surface will not exceed 65 degree Celsius above ambient.
13. The clause contains an explanation ‘Notes’. Note 3 states ‘Care should be taken where a *combustible surface* is covered by a *non-combustible material*. For example, covering a *combustible surface* with stainless steel may not prevent heat transfer and in some circumstances a hazardous situation could arise.’
14. Clause 6.10 of the Standard is entitled ‘Additional Requirements for Installation of Specific Gas Appliances’.
15. Clause 6.10.1.1, ‘Clearance around a gas cooking appliance’ provides, amongst other things:

Where *B*, measured from the periphery of the nearest *burner* to any vertical *combustible surface*, is less than 200mm, that surface shall be protected in accordance with Clause 6.10.1.2 to a height (*C*) of not less than 150 mm above the periphery of the nearest *burner* for the full dimension (width or depth) of the cooking surface area..<sup>3</sup>.
16. Clause 6.10.1.2, ‘Protection of a combustible surface near a gas cooking appliance’ states:

In order to meet the requirements of Clause 6.2.5, any *combustible surface* within the clearance zone specified in Clause 6.10.1.1 shall be protected in accordance with Appendix C for the applicable facing and backing materials.
17. Appendix C of the Standard is headed ‘Fire Resistant Material and Acceptable Methods of protection of Combustible Surfaces’. Clause C4, ‘Acceptable Methods of Protection for Domestic Applications’ contains Table C1. Relevantly, the Table stipulates that if toughened safety glass is used as the ‘facing material’, it must have a minimum thickness of 5 mm, and if ‘gypsum-based wall board’ is used as the ‘backing material’, it must have a minimum thickness of 10mm.

## **Issue 1: Burn marks on splashback**

### *Applicants’ evidence*

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<sup>3</sup> Clause 6.10.1.1(b).

18. The applicants said that approximately three weeks after moving into their home they noticed burnt areas on the splashback behind the cooktop. They said they notified the builder about the burn marks and provided photographs they had taken of it to the builder. These photographs were tendered during the hearing. The applicants said a building supervisor had attended their home, acknowledged there was a problem and told them it would be rectified. When that did not occur and dissatisfied with the perceived lack of response from the builder, the applicants engaged a private building inspector, John Rosa.
19. Item 4 of the Rosa report dealt with the burn marks on the splashback. It stated that the cooktop distance was non-compliant to AS 5601 – 2004, noting that it prescribed a minimum clearance of 200 mm measured from the outer edge of the nearest burner to the vertical combustible surface covered with toughened glass. The Rosa report concluded that, given the distance of the outer edge of the nearest burner to the splashback was only 110 mm, the distance was non-compliant, and the glass splashback ought to be replaced. A copy of the Rosa report was provided to the builder.
20. Eventually, the applicants said that, at their insistence, Mr Shaun Milne, the builder's Warranty Manager, attended their home in early 2016. Ms Akande was present for the inspection. What was said during that inspection is a matter of much dispute between the parties. Ms Akande said that Mr Milne had asked her to get out her biggest pot and place it on the stove. She said, having done that, without her permission, he took a photograph of the large pot on the stove. A copy of the photograph taken by Mr Milne during the inspection was also tendered during the hearing.
21. After the inspection Mr Milne sent an email dated 13 April 2016 to the applicants concerning the burn marks that had appeared on the splashback. In that email Mr Milne said that the author of the Rosa report had misapplied the Standard or had applied the wrong section of the Standard to the outer edge. The email also noted the standard from which the author had quoted had been updated and it went on to state that the placement of the cooktop was compliant with the Standard. The email stated that it was evident from the inspection on site that large pots had been used on the cooktop and had been sitting against the splashback for a considerable amount of time. Mr Milne said that the photos that had previously been sent by the applicants showed the centre wok burner trivet had been moved to the rear burner and that 'the only reason for doing this would be to accommodate a large pot, similar to the one placed on the cooktop when I visited the home'. He concluded by saying that the builder had complied with the relevant building codes and standards and that the glass had withstood the direct heat that had been applied to it 'with only the paint discolouring at the rear of the glass'. Mr Milne said if the temperature had exceeded the glass tolerances, the glass would have shattered. Mr Milne concluded by saying the marks on the glass splashback has been caused through misuse of the cooktop by the applicants.

22. After receiving this email, the applicants sought further advice from Mr Rosa. With his assistance, they prepared a further email to the builder which asked the builder to provide them with additional information, in particular, documentation from the glass manufacturer or supplier verifying its suitability and confirmation from the builder that the substrate used was a non-combustible material in accordance with the Standard's requirements.
23. By email dated 19 July 2016, the builder confirmed that it had complied with all the relevant standards and installation requirements.
24. In preparation for the hearing, the applicants obtained the Houspect report. In that report the author notes 'two rear burners only 110 mm from the glass splashback which has resulted in a large burn mark and a smaller burn mark to splashback'. In summary, it says:
  - a. It is presumed that the splashback has been fixed to standard plasterboard lining, as used throughout the house, as this is the normal installation;
  - b. In relation to the two burn marks, it is 'presumed that it is a paint coating applied to the back of the glass that has been burnt';
  - c. As a guide, a combustible surface should be a minimum 200 millimetres clear of the nearest burner. However, the glass panel fixed to the plasterboard lining would seem to be non-combustible. 'The cook top metal housing is about 50 millimetres from the splashback and this is about normal for cook tops manufactured for installation into domestic kitchen cabinets'; and
  - d. It appears that [the splashback] may be compliant, however, it also appears that it is inadequate.
25. The Houspect report suggested the manufacturer of the glass be contacted to check the damage and potentially replace it if the materials are faulty. The author said the glass manufacturer should verify the product meets the requirements of combustibility test for materials in AS 1530.1 'Methods for fire tests on building materials, components and structures' and also the requirements of Appendix C of the Standard.
26. During the hearing the applicants produced an extract dated 5 October 2016 from VBA website entitled 'Does your glass splashback comply? That extract stated:

AS/NZS 5601.1:2013 Gas Installations Part 1: General Installations specifies that the required clearance distance between the periphery of the burner and a vertical combustible surface should be at least 200mm...Where the distance is less than the specified clearance then protection of the combustible surface is required as per AS/NZS 5601.1:2013 Clause 6.10.1.2 and Appendix C.
27. It went on to state that:

One method of protecting a combustible surface is to use toughened safety glass with a suitable backing material ... The toughened safety glass would either need to be marked as complying with AS/NZS 2208 or documentation from the manufacturer will need to be provided to demonstrate compliance with AS/NZS 2208.

28. In summary, the applicants contend that the cooktop and splashback have not been installed in accordance with the Standard.
29. Mr Akande is a mechanical engineer. He said he had carefully reviewed the Standard. He submitted the installation of the cooktop did not meet the requirements of the Standard in two respects:
  - a. Firstly, Mr Akande said the Standard required that no particle surface should be less than 150 mm from the nearest burner. He said the splashback was only 110mm from the nearest burner.
  - b. Secondly, when the distance between the burner and the particle surface is less than 200 mm, he said thermo protection is required, that is, the splashback surface must be compliant. He said the splashback was not compliant as evidenced by the discolouration across the splash back which he described as not only occurring directly behind the rear burners but spreading across the splashback. In this regard, part of the further material provided by the applicants after the hearing was a photograph of the splashback taken on 12 September 2019. Mr Akande said the marks on the splashback are evidence the material behind the glass splashback was burning. In reference to Table C in the Standard and the relevant thicknesses required for the facing material and the backing material, Mr Akande said he had measured the thickness of the glass and plasterboard combined and it was 'only 8 mm', not the minimum 15 mm required.

*Builder's evidence*

30. In summary, the builder says the installed cooktop complies with the relevant Australian Standard AS 5601-2013. It says the Standard does not specify a minimum distance between the nearest burner and the splashback as contended by the applicants. The builder says the Standard provides that if the distance between the nearest burner and the vertical combustible surface is less than 200mm, than protection of the combustible surface is required in accordance with Clause 6.10.1.2 and Appendix C, Table C1. The builder says it installed 6 mm toughened safety glass atop 10mm gypsum-based wall board and that therefore complies with the Standard.
31. The builder says the burn marks have been caused due to the applicants' misuse of the cooktop. Firstly, the builder says the applicants moved the centre wok burner trivet to the rear burner and used it when in this position, which was contrary to how the cooktop should be used. The builder says the wok trivet was intended for the centre burner only. The builder says this misuse is evident from the applicants' photograph provided to it on 17



December 2015. When Ms Akande was asked during the hearing why the wok burner trivet was shown on the rear burner, she said it was easily moved and she had put it there whilst cleaning.

32. Secondly, the builder says the applicants' pots have been touching the splashback when in use, which is not how the splashback is intended to be used. Mr Milne said when he attended the home on 30 March 2016, his aim was to understand how the burn marks occurred and to find out why the wok trivet was in the back left-hand burner. He said he asked Ms Akande to show him how she had been using the cooktop and what pots she had been using. He said she placed the large pot on the rear burner. He said Ms Akande told him that she had been cooking at the back and had got the pot to demonstrate what she had done. He agreed he then took the photograph which showed the large pot, which he said Ms Akande had placed on the stove, touching the splashback. Mr Milne said using pots which were too large, and which touched the splashback was a misuse of the cooktop and splashback.
33. Mr Milne said, in his opinion, the heat of the flame was hitting the splashback causing discolouration. He said the glass had withstood the direct heat and that 'only the paint is discolouring at the rear of the glass'. He said the builder had installed 1007 Technika cooktops in homes it has built between October 2014 and September 2019 with the same cooktop as that installed in the applicants' home. He said the majority of the cooktops had glass splashbacks and this is the first time the issue has been observed.
34. In further support of its contention concerning the misuse of the splashback, the builder produced:
  - a. written confirmation dated 4 February 2019 from Terry Williamson, Operation Manager of Crystal Home Pty Ltd, the supplier of the splashback, to the effect that the glass splashback conforms to the relevant safety standards for glazing, that is, 'AS/ NZ2208 – 1996 safety glazing materials in buildings' and 'AS1288-2006, glass in buildings'; and
  - b. the cooktop user manual produced by the manufacturer of the cooktop, Technika. Mr Milne said the cooktop had been installed in accordance with Technika's instructions. My attention was drawn to the section detailing the minimum and maximum diameter of pots for burners. The max diameter for the large burner was 220mm. The manual noted that the use of pans in excess of the maximum diameter recommended in the table 'can result in overheating and discoloration of hob surface'. I note the manual also states in terms of 'Installation' that 'any adjoining wall surface situated within 200mm from the edge of any hob burner must be a suitable non-combustible material for a

height of 150mm from the entire length of the hob.<sup>4</sup> Mr Milne said the pots used by the applicants were 400mm in diameter.

35. Included in the further material filed by the builder since the hearing were copies of the purchase orders relating to the splashback and plasterboard material. The purchase orders noted the splashback ordered and installed was 6 mm metallic on clear glass and that the plasterboard ordered and installed was 10mm.

### Conclusion

*Has the glass splashback been installed in accordance with the Standard?*

36. Clause 6.10.1.1 of the Standard states that it is permissible for the distance between a vertical combustible surface and the nearest burner to be less than 200mm, as long as the combustible surface is protected in accordance with Clause 6.10.1.2. That clause, in turn, provides the non-combustible surface must be protected in accordance with Appendix C for the applicable facing and backing materials. Both the VBA note tendered by the applicants and the expert report relied upon by the applicants, namely, the Houspect report,<sup>5</sup> confirm this is what the Standard specifies.
37. I therefore do not agree with Mr Akande's submission that the distance between the nearest back burner and the vertical combustible surface had to be a minimum of 150 mm. The reference to 150mm in Clause 6.10.1.1 was in relation to the height of the splashback, not the distance of the splashback from the burner.
38. Further, I am satisfied, based on the evidence, that the requirements for the applicable facing and backing materials set out in Table C of Appendix C have been met. Whilst Mr Akande told me he had measured the glass and backing material used and that together they totalled only 8mm, he is not an expert, nor can he be regarded as an independent witness. I am satisfied based on the evidence of Mr Milne, which was corroborated by the purchase orders for both the glass splashback and the gyprock backing material provided by the suppliers, that the installed glass splashback was 6 mm thick and the gyprock backing material used was 10mm thick. In reaching this view I have also had regard to the letter from the glass supplier which confirmed the glass met the relevant standards and to the Houspect report submitted by the applicants that did not raise any concerns or questions regarding the thickness of the facing or backing materials used.
39. For these reasons I find that the splashback has been installed in accordance with the Standard. I am not therefore satisfied that there has been a breach of the warranty under section 8(c) of the DBC Act.

*Is the 'splashback' a 'suitable material'?*

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<sup>4</sup> Page 11, Technika specification.

<sup>5</sup> The Rosa report referenced an incorrect standard and I have therefore not had regard to it.

40. The Houspect report said that whilst the splashback 'may be compliant', it also said that 'it appears that the glass may not be entirely suitable as a splashback behind gas cooktops'. To put this another way, the burn marks on the splashback raise the question whether the glass splashback complies with the warranty under section 8(b) of the DBC Act, namely, that all materials used are 'suitable' for the purpose for which they are used.
41. The Houspect report recommended the splashback manufacturer be contacted to verify the product is non-combustible and to confirm that it met the relevant glass safety standards. This was done by the builder who produced documentation from the supplier of the splashback. Whilst it might be said that the supplier is not truly independent, in that they have been asked to verify their own product, in the absence of any contrary evidence, and in the absence of any evidence of testing performed to the actual splashback in question, I accept their evidence.
42. For the following reasons, having regard to all of the evidence, I am not satisfied that the burn marks in the splashback have arisen due to a breach of the warranty under s 8(b) of the DBC Act, namely, the splashback not being a suitable material. Rather, I am of the view it is more likely than not the splashback has failed due to the applicant's misuse of the cooktop, namely, the placement of pots on the cooktop in such a way that the pots touched or rested upon the splashback during cooking and using the wok trivet on the rear burner, when it was intended only to be used in the centre of the stove.
43. In this regard I have examined the photographs tendered during the hearing. I accept the first photograph taken by the applicants and sent to the builder on 17 December 2015 shows that the centre wok trivet has been placed on the rear burner. The manufacturer's installation manual confirms there is a specific place for the wok trivet, and that is on the centre burner. Further, it is evident from the photo that the wok trivet is not intended to be used on the rear burner as the trivet extends beyond the cooktop. I regard Ms Akande's explanation as to why the wok trivet was on the back burner at the time she took the photo to be disingenuous. I therefore find using the wok trivet on the rear burner is not using the wok trivet as it was intended to be used.
44. I prefer Mr Milne's evidence as to what was said at the site inspection. I accept his aim in attending was to see firsthand the way the cooktop had been used and his evidence that he asked Ms Akande to show him what she had been doing at the time the burn marks appeared is consistent with that purpose. I can see from the photograph taken on the day of the inspection by Mr Milne that the large pot placed on the rear burner is touching the splashback. I find using the cooktop in a way that a pot touches the splashback is not using the cooktop as intended.
45. I note also that the author of the Houspect report was not shown the photographs which had been tendered during the hearing, nor was he asked

to provide an opinion as to whether the burn marks on the glass splashback could have been caused by a pot touching the splashback during cooking.

46. Accordingly, having regard to the evidence which verified the glass splashback conformed to the required standards and that the cooktop was installed in accordance with the Standard, together with my findings concerning the placement of pots on the cooktop in such a way that they touched the splashback during cooking, and the incorrect use of the wok burner trivet on the rear burner, I am not satisfied that there has been a breach of the section 8 (b) warranty. I therefore dismiss the applicants' claim with respect to the burn marks on the splashback.

## **Issue 2: Water tank issue**

### *Applicants' evidence*

47. The applicants said that the area of roof draining into the water tank is very small due to the rainwater collector installed by the builder extending over a very small area, whereas a greater proportion of the roof area is directed to the storm water drain.
48. The applicants say they are not getting value for money. They selected the larger of two tanks on offer, but the water level is never more than 20% full at any given time.
49. In summary, the Houspect report stated:
- a. the installation of the water tank appears to be in accordance with the usual installation of these tanks and 'it appears the regulation may not specify what proportion of the roof water should be directed to the tank';
  - b. only one downpipe discharges to the water tank;
  - c. the area of roof draining to the tank is a small proportion of the total roof area, 'certainly less than 25%'; and
  - d. the roof catchment area may not be sufficient to ensure all year supply of water to internal appliances at laundry and toilets.
50. The author recommended:
- a. the tank is not used for garden watering; and
  - b. a licensed plumber advises on the required roof capacity that should be sourced to ensure all year supply of water for internal use of toilet and laundry.

### *Builder's evidence*

51. Mr Milne said upon becoming aware of the complaint regarding the water tank at the directions hearing held in this proceeding in January this year, the builder arranged for Stoddard Building, the subcontractor who installed the fascias and gutters, to inspect the fall on the gutters above the tank and/or to install a 'water saver' to allow the tank to catch more water. This

occurred and the subcontractor confirmed that the gutters fall correctly and that a water saver had been installed.

52. Mr Milne said a water tank would not be expected to fill as it was being drawn on a daily basis to feed the toilets inside.
53. Mr Milne said the water tank had been installed in accordance with the plans and contract documents. He said he was not aware of any regulation governing the amount of water to be directed into the tank. He said the tank has two openings to accommodate two lines but noted the contract documents provided for only 1 opening to be connected. He said the downpipe was connected in accordance with the contract plans.

*Conclusion*

54. There is no evidence before me which demonstrates the builder has done anything other than what it was contracted to do, that is, the tanks have been installed in accordance with the contract plans and as agreed. Nor is there any evidence that the tanks have been installed in breach of any regulation or standard. I am therefore not satisfied that there has been a breach of the warranty by the builder. I accept the applicants are disappointed the water tank is not being used to its full capacity. However, this does not amount to a breach of the statutory warranty by the builder. I therefore dismiss the applicants' claim with respect to the water tank.

A. Eastman  
**Member**