

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP1373/2016

CATCHWORDS

DOMESTIC BUILDING; defects in bathroom tiles; s 8 of the *Domestic Building Contracts Act 1995*, assessment of damages for rectification of grout and removal of efflorescence.

APPLICANT: Ms Susan Margaret Barclay

RESPONDENT: Joe Mark Builders Pty Ltd (ACN: 154 625 368)

WHERE HELD: Melbourne

BEFORE: Member C Edquist

HEARING TYPE: Small Claim Hearing

DATE OF HEARING: 17 January 2017

DATE OF ORDER: 17 January 2017

DATE OF REASONS: 28 February 2017

CITATION: Barclay v Joe Mark Builders (Building and Property) [2017] VCAT 307

WRITTEN REASONS PROVIDED AT THE REQUEST OF THE APPLICANT

- 1 On 17 January 2017 I made orders.
- 2 On 30 January 2017 the applicant requested written reasons. I now set out in edited form the reasons given orally at the end of the hearing.

MEMBER C EDQUIST

APPEARANCES:

For Applicant Ms S Barclay in person

For Respondent Mr M Attard, director and Mr J Angelucci, director

REASONS

- 1 The applicant Ms Barclay has come to the Tribunal seeking damages for defects in the bathroom which was constructed for her by Joe Mark Builders Pty Ltd ('the Builder') under a contract signed by the parties on or about 18 October 2012. The contract appears to be in a form which complies with the *Domestic Building Contracts Act* ('the DBC Act'). The Builder concedes that it contains the statutory warranties implied by s 8 of that Act, on which Ms Barclay is entitled to rely.
- 2 The work under the building contract was completed on 30 October 2012. It is clear that after the completion of the tiling, efflorescence occurred. Ms Barclay said that the efflorescence occurred at an early point. The Builder's representatives responded that they were not advised about efflorescence for some time, but they agreed that in July 2014 Mr Attard attended on behalf of the Builder to rectify the efflorescence. Mr Attard attempted to do so by removing the grouting and re-grouting the tiles. He also attended to 'the fillet grout' which is a lengthy, essentially triangular, area underneath the shower screen at the point where the shower screen sits above the shower base.
- 3 The problems with the efflorescence did not disappear. Ms Barclay, amongst other things, took steps to have the matter conciliated by Consumer Affairs Victoria. To this end an inspection took place under the auspices of Consumer Affairs Victoria (a division of the Department of Justice) at Ms Barclay's residence at [number redacted] Harding Street, Ascot Vale on Monday 28 September 2015. The meeting was attended by Ms Barclay, Mr Angelucci and Mr Attard on behalf of the Builder, Mr Len Pawluk a conciliator with Consumer Affairs Victoria, and Mr Nick Kukulka, a building inspector with the Victorian Building Authority.
- 4 At the meeting, the following defects were discussed:
 - (a) the efflorescence along the grout lines;
 - (b) cracking in the grout;
 - (c) lifting of tiles; and
 - (d) the question of insufficient waterproofing.
- 5 It is convenient to deal with the last issue first. The report of Mr Pawluk refers to Ms Barclay claiming that a waterproof membrane was not installed with the cement screed. Ms Barclay is adamant that she did not assert there was no waterproof membrane, but simply asked whether there was a waterproof membrane.
- 6 The inspector, understandably at the time, said he was unable to determine if a waterproof membrane was installed as an intrusive inspection was not undertaken. At the hearing, I was shown photographs by the Builder which

demonstrated that a waterproof membrane was installed. This issue is not relied on by Ms Barclay.

- 7 Turning to the issue of efflorescence, the opinion of the building inspector was that there was greater efflorescence than was normal in the bathroom, but ultimately efflorescence was not a building defect. Ms Barclay confirmed that she was told at the conciliation that she had to accept the efflorescence.
- 8 An agreement, however, was made notwithstanding that determination that the Builder would provide the owner with a product designed to eliminate the efflorescence.
- 9 The next issue was the cracking in the grout. Ms Barclay had stated that further grouting was undertaken by the Builder 4 to 5 months ago. That seemed to be inconsistent with the fact that the Builder had been back in July 2014. Nonetheless, the inspector determined the manner in which the grouting had been installed was a building defect, and agreement was reached at the conciliation for the Builder to “re-grout the shower base to the areas identified by the inspector”.
- 10 The third issue was the lifting of a tile. The inspector concluded that the tile had lifted beyond the maximum allowed by the guide in the Australian Standard, and was a builder’s defect. The agreement reached was that the Builder was to install grouting to the affected tile to reduce its edge.
- 11 As a result of the conciliation, the Builder had, in summary, agreed to provide a product to the owner to clean the efflorescence off the tiles; to re-grout the tiles including the fillet area at the base of the shower screen, and to add new grouting to chamfer the lip edge of the raised tile.
- 12 The timetable for remedial works was not fixed at the conciliation. The report of Mr Pawluk confirmed that Ms Barclay was to inform the Builder of a suitable timeframe when she had checked her diary.
- 13 In the event, Ms Barclay determined she did not want the Builder back on site for a number of reasons, including the manner in which she had been treated, and spoken to, by the Builder. She felt that her complaints had not been dealt with appropriately and respectfully, and she resented being told that she had to be appeased, and that nothing would make her happy.
- 14 Ms Barclay said she had a discussion with Mr Angelucci of the Builder, in or about November 2015. Mr Angelucci agreed. She said that the Builder was not to go back and do the rectification work. At that point, the Builder offered \$400 as a cash settlement to resolve all issues. That offer was not accepted, and because the matter remained unresolved, Ms Barclay instituted these proceedings.
- 15 Prior to the proceeding coming on for hearing Ms Barclay indicated to the Tribunal that she wished to raise the quantum of her claim. She initially sought \$1,500, which was a figure she had been prepared to settle for, but she had since obtained a quotation from Krongold Constructions for

rectification of wall tiling in the bathroom including lifting and replacing the tiling. The Krongold quotation was for \$3,248 exclusive of GST.

- 16 In order to claim that amount, Mr Barclay would have had to pay a higher filing fee. She was reluctant to do that, but she availed herself of the opportunity to increase the claim to \$3,000, which she could do without incurring a higher fee. That sum became the adjusted claimed amount, and she said she notified the Builder that that was her claim. The hearing proceeded on the basis that the claim was for \$3,000, plus reimbursement of the filing fee which she had paid.
- 17 In order to sustain the claim for \$3,000, it would be necessary for Ms Barclay to persuade the Tribunal to accept the opinion expressed by Krongold Constructions that the substantial issues with the tiling required its entire replacement. She sought to rely on a letter from Krongold Constructions dated 13 January 2016.
- 18 The author of the letter, Mr Michael Comben, the Maintenance Projects and OHS Manager at Krongold Constructions, did not attend the Tribunal and give evidence. His letter was not put forward as an expert's report, and it is not a report which is in any way independent. It is a letter written by Krongold Constructions about the state of the bathroom in order to persuade her that the bathroom ought to be replaced at a cost of \$3,248 plus GST.
- 19 Nonetheless, the letter might have had some value as evidence that, at the time the bathroom was inspected by the author, the bathroom had the issues referred to. The inspection by Mr Comben was on 11 January 2016. He observed that the tiling in and around the shower recess was clearly defective, and he said it was due to poor installation methods. He said that the affected area has tiles that are currently lifting and holding water underneath and that the grouting appears to have completely failed. He rejected the suggestion that re-grouting will resolve all the issues.
- 20 The Builder objected to the letter from Krongold Constructions on the basis that the author was not present for cross-examination, and his assumptions could not be tested.
- 21 The letter was admitted into evidence it, but it was not accepted as expert evidence. It must be viewed as a letter written by Krongold with a view to justifying the quotation of \$3,248. That is not a criticism of Krongold. It is not suggested that Mr Comben has written anything which is not accurate. However, he did not write the letter with a view to having his evidence relied on as the evidence of an expert for the purposes of a hearing.
- 22 The Builder has an explanation for the current state of the tiling, including lipping, and that is that the house is not a new house. It is an old house. It is in Ascot Vale, and potentially subject to soil movement and movement of the frame.

- 23 Another cause of movement was also identified by Mr Angelucci. He suggested that the movement on the inside of the external wall of the house was accounted for by movement of the external wall of the house.
- 24 In all of the circumstances, I am not satisfied that complete replacement of the tiles in the bathroom is justified as suggested by Krongold Constructions, and I am not prepared to make an assessment of damages on the basis that a complete re-tiling of the shower area is justified.
- 25 The next question to be considered is: what is the responsibility of the Builder for the efflorescence. The efflorescence, according to the evidence, is the effect of water combining with the grout, i.e. the cement and sand, so that salt percolates to the surface of the tiles leaving white chalk-like marks on the surface of the tiles. This is a naturally occurring process. The inspector's view was that, whilst the efflorescence was unusual, it was not a builder's defect.
- 26 A feature of this case was that although the Builder undertook the construction of the bathroom, the Builder did not actually supply the grout in question. That was supplied under an unusual arrangement whereby the owner engaged a project manager. It was through the project manager, as I understand it, that the grout was supplied. In any event, the actual grout applied during the construction process was provided by or on behalf of the owner, not by the Builder. Insofar as the efflorescence arose from the initial selection of the grout, it would not have been the responsibility of the Builder.
- 27 However, the Builder made an election in July 2014 to attend to rectification of the efflorescence, and in that way became involved. The Builder had not previously been contractually responsible, but the attempt to rectify the grouting has not been successful. This is a situation where I am satisfied, having looked at photographs, that there are cracks in the grouting. The rectification of the fillet also appears to be unsatisfactory, insofar as the fillet appears to be marked, unsightly, and possibly mouldy, and needs further work. So I find that the Builder has some responsibility for the current state of the tiles. But the question then is: what is the basis for assessment of damages?
- 28 For the reasons I have expressed, I am not prepared to assess damages on the basis that the tiles need to be re-done. The question then is, what is the cost of removing the efflorescence from the tiles, and re-grouting the tiles?
- 29 The Builder contends that the re-grouting can be done in half a day. The justification for this figure was examined in some detail. Mr Angelucci explained that four lines of grout plus cross-lines would have to be removed. That would involve marking a line in the grout, and then applying a small angle-grinder very carefully and slowly to remove the grout. I am satisfied that even proceeding with that process slowly, the work in grinding out the grout, rectifying the fillet, re-applying grout, and

wiping the shower out might be completed in half a day. However, there is the issue of cleaning off the efflorescence.

- 30 I think it is unrealistic to think that the efflorescence can be removed, and the floor re-grouted, in half a day. I think that more than half a day is required, which effectively means all day. I consider the value of the work to be \$800.
- 31 I am mindful that an agreement was made for the Builder to come back and do the work. Following the conciliation, Ms Barclay resiled from the agreement she had made to allow the Builder to come back. She rejected the proposition that she breached the agreement; she said she entered negotiations with the Builder on the basis that she would have someone else do the work, and the directors knew that was the situation.
- 32 Accordingly, I make an order that the Builder is to pay damages to Ms Barclay of \$800.
- 33 Turning to the question of whether the Tribunal should order reimbursement of the filing fee under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*, I note where a party has been successful, they are entitled to reimbursement of the filing fee. This was \$61.50, in this case. If Ms Barclay had recovered only \$400 there would not have been any basis for her to come to the Tribunal, and any claim she made for reimbursement of the fee would fail. But she has recovered \$800.00. I will allow reimbursement of her filing fee of \$61.50.

MEMBER C EDQUIST