

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1357/2017

CATCHWORDS

Domestic building work – extensive water damage – lack of waterproofing – expert opinion agreed on cause of damage and method of rectification – expert opinion disagreed on reasonable cost – agreement on the method of calculation of damages to be applied by the Tribunal

APPLICANTS	Gregory Bird, Silvana Bird
RESPONDENT	Expo Constructions Pty Ltd (ACN: 074 932 595)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	7 June 2018
DATE OF ORDER	9 July 2018
CITATION	Bird v Expo Constructions Pty Ltd (Building and Property) [2018] VCAT 1000

ORDERS

1. The respondent must pay to the applicants the sum of \$93,441.98.
2. Costs and reimbursement of fees reserved with liberty to apply.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Ms J. Johnston, solicitor
For the Respondent	Mr B.J. McCullagh of counsel

REASONS

BACKGROUND

1. This claim is for damage to a house in Niddrie, caused by water leaks from the bathrooms, ensuite and toilet. The house was built for the applicant owners by the respondent builder in 2010. They have lived there since that time, regularly using the wet areas. In about 2016 they started to notice signs of water damage, including a door jamb swelling and leaks through a downstairs window frame from water coming from above.
2. Extensive investigations were then undertaken and it became apparent that none of the bathroom and shower downstairs, the ensuite bathroom and shower, the family bathroom and separate toilet upstairs had been adequately waterproofed at the time of construction. As a result, significant water damage is now visible throughout the house, together with signs of mould.
3. The matter came before me for hearing on 7 and 8 June 2018. The owners were represented by Ms Johnston, solicitor. The builder was represented by Mr McCullagh of Counsel. I was greatly assisted by the parties' representatives, who consulted and agreed on a sensible and time efficient manner for conducting the hearing.

THE ISSUES IN DISPUTE

4. Prior to the hearing, the parties had each obtained voluminous reports from a number of experts in relation to the cause and extent of the damage (a list of these is appended to this decision). However, at the commencement of the hearing, Counsel for the builder advised that the question of the builder's liability was no longer in dispute, and as a result, the issues to be determined by the Tribunal related only to the quantum of the owners' claim.
5. He said that while the builder did not positively concede liability, the expert he relied upon, Mr Salvatore Mamone, had changed his opinion about the standard of the work carried out by his client. In his latest report of 8 May 2018, Mr Mamone said that the construction of the ground floor bathroom, first-floor ensuite, first-floor bathroom and first-floor toilet was in breach of the relevant provisions of the Building Code of Australia and the Australian Standard.
6. As a result of this acknowledgement, the parties' legal representatives agreed that the questions for the Tribunal to decide are:
 - a. what works are necessary to fix the damage; and
 - b. what is the reasonable cost of doing so.

7. In answering these questions, they relied on one building consultant each: Mr Antony Croucher (for the applicants) and Mr Mamone (for the respondent), both of whom had prepared scopes of rectification work and costings.
8. The builder also conceded that the amount claimed by the owners for mould remediation, namely \$9251 (including GST), is appropriate. This amount is contained in a quotation by Capital Facility Services (“CFS”)¹.
9. As a result of the builder’s concessions, the other expert reports and the parties’ witness statements were not needed to be considered at the hearing. However, the documents making up the original building contract were tendered by consent for the sake of completeness, as were a number of quotations which the owners had obtained and said should be taken into consideration as evidence supporting Mr Croucher’s opinion.
10. The hearing proceeded with a view of the property (which I attended together with the parties, their legal representatives and the experts) and then with evidence given concurrently at the Tribunal by Mr Croucher and Mr Mamone.
11. The experts were in substantial agreement on the scope of work required to rectify the property, namely to strip out all wet areas, repair any damage found, treat the mould, waterproof, re-tile, reinstall all fittings and appliances and paint. They differed in their costings, with the raw figures for the building works (i.e. excluding margin and GST) for Mr Croucher being \$95,584 and for Mr Mamone \$40,268.

AGREED APPROACH

12. During the hearing of the expert evidence, the parties agreed that I should approach the differences between the experts on the following basis:
 - a. the difference between the two is approximately \$55,000;
 - b. the experts nominated the items which make up the majority of \$55,000 difference between them;
 - c. they gave evidence in respect of each of those nominated items in the hearing;
 - d. I am to accept that the base figure of \$40,268 (per Mr Mamone) is the starting point and then assess each of the nominated items in order to:
 - i. make a decision on the validity of the item claimed, and
 - ii. the reasonableness of the cost claimed, if appropriate;

¹ Quotation dated 4 October 2017, exhibit A8

- e. then add to the base figure:
 - i. the accepted items,
 - ii. an amount for margin (which I am to decide as part of the previous task),
 - iii. GST,
 - iv. the agreed amount for mould remediation, and
 - v. an amount for alternative accommodation;

which will result in a total reasonable cost to rectify.

THE NOMINATED ITEMS

13. The main items in dispute are as follows:
- a. Whether or not the whole of the downstairs tiled floor should be replaced (in addition to the downstairs bathroom), which Mr Croucher estimated will cost \$26,430.
 - b. A provisional sum of \$7000 allowed by Mr Croucher in case the timber structure needs replacing – Mr Mamone said this is allowed for in his contingencies.
 - c. Both Mr Croucher and CFS (the mould repairer) include an amount for stripping out the bathrooms so there is some overlap between them. Mr Croucher thought the amount of overlap was \$3600. Mr Mamone thought it was closer to \$9360.
 - d. For the ensuite bathroom, Mr Croucher allowed 10 m² more tiles than Mr Mamone, which is a \$1200 difference.
 - e. Mr Croucher allowed for a building permit (in his margin) and warranty insurance of a further \$800; Mr Mamone did not.
 - f. Mr Croucher priced his labour rates for the trades on a half day or full day basis, on the assumption that each trade would need time to get to site, set up and clean up after each task. Mr Mamone's estimate was based on the exact number of hours he thought would be required, on the assumption that the works would be coordinated by a builder and multiple tasks could be completed at the one time.
 - g. The cost of supplying and laying the tiles.
 - h. Mr Mamone allowed extra for protection works; Mr Croucher did not.

- i. Mr Croucher included an allowance to straighten walls in case they are bowed from water damage; Mr Mamone said there is no evidence of this being necessary.
14. I will address each of the nominated items in turn, then reconcile the figures in accordance with the parties' agreed method.

Downstairs floor tiles replacement

15. The ground floor of the dwelling is mostly open plan, and is tiled in pale coloured porcelain 600 x 600 floor tiles. The floor flows in a continuous line from the front door into an open hallway and music room, then into a large open kitchen, dining and family area. To the left of the hallway is a spare room, with the same floor tiles but shut off with a door. To the right of the hallway is an alcove which contains the staircase and the entries to the laundry and bathroom. These rooms are all tiled with the same porcelain floor tiles.
16. The floor tiles in the downstairs bathroom must be removed in order to rectify the waterproofing problems. Both experts agreed that it may not be possible to match the existing floor tiles. The owners claim that as a result, all floor tiles on the ground level must be removed and replaced so that all tiles will match. The builder said that is not a reasonable expense, as the tiles are in excellent condition and it is possible to carry out the repairs in a visually satisfactory way.
17. Mr Croucher estimated the cost to do this at \$26,430 (plus margin and GST). The owners also relied on a quote from Adesso Tiling for \$30,590 (excluding GST). Mr Mamone had not provided a costing.
18. Mr Mamone's opinion was that the existing floor tiles can be diamond cut at the doorjamb, so that the hall tiles would be left in place while the bathroom tiles could be removed and replaced. A waterstop bead would be used at the join between the old and new tiles in the doorway as a line of demarcation.
19. In circumstances where there is nothing wrong with the existing floor tiling, the question as to whether it ought be replaced comes down to what the law will consider to be reasonable in the circumstances.
20. Senior Member Walker conveniently summarised the relevant authorities on this question in *Clarendon Homes Vic Pty Ltd v Zalega*², at paragraph 165 (excluding references):

“I think the following principles concerning the assessment of damages for the breach by a builder of a domestic building contract can be spelled out from the cases referred to:

² [2010] VCAT 1202

Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract (*Bellgrove*);

- a. The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt (*Bellgrove*);
- b. Reasonableness is a question of fact (*Bellgrove*) and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position (*Tabcorp per Rares J.*);
- c. In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole. The decision in *Ruxley* suggests that account can be taken of the following matters at least:
 - i. Whether and to what extent the work, although not in conformity with the contract, is nonetheless serviceable;
 - ii. Whether and to what extent the defect has affected the value of the work or the building as a whole;
 - iii. The cost of rectification, the proportion that the breach bears to the cost of rectification and whether the cost of rectification would be wholly disproportionate to the real damage suffered by reason of it;
 - iv. The likelihood that, if rectification cost is awarded, the sum so ordered will actually be spent on rectification. Obviously, a successful plaintiff can spend his damages as he sees fit but this may be a useful indicator of whether the amount sought is greater than the real loss suffered.

Quite obviously, this list is by no means exhaustive. Other matters might be relevant according to the facts of the particular case. For example, the innocent party might have elected to accept the non-conforming work, whether by taking the benefit of it or otherwise; the owner might have waived the breach or so acted after becoming aware of the breach as to create an estoppel or to make rectification impracticable. There might also be many circumstances in which it could be argued that an award of rectification cost would give the innocent party an uncovenanted profit (*Radford*).”

21. In order to apply these considerations, I have regard to my observations made during my inspection of the property. I observed that the entry to the

bathroom is not directly visible from the front door, the music room, the front part of the hallway, the kitchen, dining or family room. It is tucked in the corner at the bottom of the staircase, with a return wall providing a barrier on one side and the laundry door and staircase providing a barrier on the other, so that it is not visible unless standing in the hallway directly facing the bathroom. Nor is it visible from the staircase. Further, the existing ground floor tiles appear to be in excellent condition, with many years of life left in them.

22. On the basis of those observations, I am satisfied that it would be unreasonable to award the cost of replacement of the existing floor tiles in this case. In my view, the floor is serviceable and the cost of replacement would be wholly disproportionate to the real damage suffered by reason of the lack of waterproofing. Further, I was provided with no evidence to suggest that the use of a different floor tile in the downstairs bathroom, with a demarcation line at the doorway to the hall, would affect the value of the work or the building as a whole, and I find it unlikely that such work would adversely affect the property's value.
23. Accordingly, I do not allow this item.

Provisional sum to repair timber structure

24. Provisional sums totalling \$7000 have been allowed by Mr Croucher in case parts of the timber framework need replacing. He said the extent of any damage will not be known until the bathrooms are pulled out. Mr Mamone said that he doubts there is significant damage to the timber frame, because he has been able to inspect the wall frame in the worst areas of leaks, being the ensuite shower, where destructive testing has already taken place. He said that in any event, he has made an allowance for extra costs in his item called "contingencies".
25. A 'provisional sum' is in many ways just another way of describing a contingency. In a contract, an allowance for unknown work can be made either by reference to the specific item as a provisional sum, or by adding a percentage to the total contract price to cover all potential 'unknowns'. That is the difference in methodology adopted by the experts in this case.
26. Mr Mamone included 10% of the cost of works as contingencies, which on his figures worked out to be \$4530. As stated above, Mr Croucher did not allow a specific item for contingencies, but instead allowed a 'provisional sum' of \$7000 for the timber structure.
27. I pause here to note that while Mr Croucher has described the \$7000 as 'provisional sums', I think that in the present case this is not an accurate description. A provisional sum may be appropriate in a contract, where adjustments to the contract price may be made along the way. Here, this is a claim for damages, and no adjustment to the amount ordered is possible

after the event. Accordingly, I will characterise Mr Croucher's \$7000 as a reasonable estimate where the precise sum cannot be determined, not as a 'provisional sum'.

28. In this case, I prefer the approach of Mr Croucher, to allow a specific amount referable to the framework of each bathroom, rather than to allow a general contingency amount. This is a case where numerous experts have carried out extensive inspections to ascertain the damage and the scope of works required to rectify. The only 'unknowns' are whether there is damage to the timber framework behind the walls. In those circumstances, I think that the contingency figures should be allowed for in regard to specific items rather than the job as a whole.
29. As to whether Mr Croucher's estimates (totalling \$7000) are reasonable, I accept that it is more likely than not that there will be damage to the timber structure. I note that Mr Mamone was able to see a small area of the frame in the ensuite shower and above the kitchen ceiling and did not observe any significant damage. However I accept Mr Croucher's view that work to the timber structure is likely to be required, based on the extensive damage now visible, that the first signs of damage became apparent in the downstairs window frame, the complete lack of waterproofing and the fact that water has been penetrating to the framework since 2010 (when the house was completed).
30. Accordingly, I will allow \$7000 for the 'provisional sums' in Mr Croucher's report. I note that by allowing the \$7000 and not removing Mr Mamone's 10% contingency there is a chance that this results in a duplication or overlap of the amounts allowed. However, I was not asked to replace any of the \$40,238 base cost. Moreover, I am reluctant to make any adjustments in circumstances where I have not heard from Mr Mamone as to whether his 10% contingency includes allowances for items other than the framework.

Duplication of mould costs

31. Both Mr Croucher and CFS (the mould repairer) include an amount for stripping out the bathrooms and Mr Croucher acknowledged that his items relating to the strip out should be removed from his scope of works if CFS is to carry out that work. Mr Croucher thought the amount by which his costing should be reduced was \$3600, while Mr Mamone thought the amount of the overlap was approximately \$9360. The difference between the two experts is a differing interpretation of the CFS scope of works. Mr Croucher assumed that CFS did not allow to remove the tiles, whereas Mr Mamone thought it did.
32. During the hearing, the parties suggested that I should deal with this discrepancy by assessing the amount which I find to be duplicated between the Croucher and CFS scopes of work and then reducing Mr Croucher's

costings by that amount. However, now that I have considered this suggestion more carefully, I have decided that the parties' suggested approach is not appropriate. It is inconsistent with my task of deciding what should be added to Mr Mamone's base figure of \$40,238. Mr Mamone has included amounts for stripping out the bathrooms in his costings³. In circumstances where I am not asked to add anything to Mr Mamone's base figure, I find that I do not need to turn my mind to the extent of the overlap between Mr Croucher and CFS.

33. Further, I am aware that there may be some duplication or overlap between Mr Mamone's figures and CFS, but I was not asked to look at that issue. Accordingly, I do not make any adjustment to the strip out costings included in the base figure.

Number of tiles required

34. In the ensuite bathroom, Mr Croucher allowed 10 m² more tiles than Mr Mamone, being a difference of \$1200. No evidence was provided to me of each of the experts' methods of calculating the area of tiling. I have examined the tendered architectural plans, but can discern no accurate measurement of the tiling. The quote by Raniti CBMS Pty Ltd⁴ (provided by the owners) did not include any measurements either. In those circumstances, I am unable to determine what is the actual area of tiling in the ensuite. Nevertheless, I must decide on the amount of tiling required. In circumstances where the owners bear the onus of proving their claim, but have failed to do so, I do not allow anything more than Mr Mamone's estimate for the number of tiles required.

Building Permit and Insurance

35. Mr Croucher allowed for the cost of a building permit as part of his margin of 35%. He also allowed \$800 warranty insurance. Mr Mamone had made no allowance for either of these items, but during his evidence he conceded they would be required.
36. I accept that the works to repair the home will require a building permit and warranty insurance. I will allow the \$800 estimated by Mr Croucher for insurance, and I will accept that by allowing a margin of 35% (rather than the 30% suggested by Mr Mamone), the building permit cost will be provided for.

Labour Rates

37. I note at this point that both Mr Croucher and Mr Mamone based their estimates on similar hourly rates for the trades. Labourers are both \$50/hour and general trades \$60/hour. Painters and plasterers are \$60/hour

³ ground floor bathroom \$797.50, ensuite \$890, first-floor bathroom \$665, toilet \$150

⁴ Quote dated 23 November 2017, exhibit A8

plus materials (Mamone) or \$75/hour including materials (Croucher). Licensed trades are either \$80 or \$85 per hour.

38. The real difference between the two was in their calculation of the number of hours required. Mr Croucher priced his labour rates on either a half day or full day basis, and said that to get a tradesperson to come to site and perform work would require at least half a day per item. Mr Mamone estimated the number of hours required per room. He said his method is more appropriate because in actually carrying out the work, a painter or plasterer will be carrying out multiple areas at once.
39. The scope of the rectification works required is significant. It is likely that a builder will be engaged to carry out the whole scope, which will involve arranging, managing and coordinating all the tradespeople required. On that basis, I prefer the method of costing used by Mr Mamone, since he has assumed that the works will be coordinated. Mr Croucher's costing assumes that the trades would come to the property to work on one item at a time. Accordingly, I do not allow any extra amounts for the labour rates.

Cost of the tiles

40. Mr Mamone has allowed for the supply and laying of replacement tiles at \$90/m², which is made up of \$45/m² for the supply and \$45/m² for the labour. Mr Croucher has allowed \$120/m², which is made up of \$75/m² for the supply of the tiles, \$5/m² for sundries and \$40/m² for laying.
41. Based on those figures, it appears that the difference between the experts is whether the reasonable cost to supply the tiles is \$45/m² or 75/m². I have added up the tiling items in each of the experts' reports. Mr Croucher's figures total \$9198 while Mr Mamone's total \$8316.
42. I have obtained no assistance from the quotes provided by the owners. Adesso Tiling⁵ uses a rate of \$50/m² to supply the porcelain floor tiles, but does not include wall tiles. Further, it quotes a much higher installation rate than the experts (\$75/m²) and so presumably has loaded its costings in that direction. Raniti does not provide any breakdown of its tiling costs; however, if I add all the tiling items together (before adding margin and GST), the amount quoted is \$34,950, including water proofing. This amount is significantly higher than either of the experts (even allowing for waterproofing).
43. In the absence of any definitive evidence as to the cost of the supply of the tiles, I am not prepared to add any extra amount to the estimate provided by Mr Mamone. I am reinforced in this decision by noting that when I add up each experts' amounts for tiling including waterproofing, the difference between them is minimal. Mr Croucher estimated \$11,718 while Mr

⁵ exhibit A

Mamone estimated \$10,781. I take this to mean that Mr Mamone has loaded his costings towards the waterproofing, whereas Mr Croucher has loaded his towards the tiling. As a result, when the retiling and waterproofing are considered as a whole, I accept that the overall amounts allowed in the base figure is reasonable, and so no adjustment is necessary.

Protection works

44. I was advised that Mr Mamone has allowed an extra amount for protection works, whereas Mr Croucher has not. This item forms part of Mr Mamone's base figure of \$40,268, and as I was not asked to review items within the parties' starting point, I have not considered this item any further.

Bowing of walls

45. Mr Croucher allowed an amount of \$840 to straighten walls in case they are bowed from water damage; Mr Mamone said there is no evidence of this being necessary. Mr Croucher gave evidence that this item is an allowance in case the timber framework needs to be planed level prior to plasterboard being attached. He is unable to say whether this work would be required until after the plasterboard bathrooms are stripped. The cause of the timber bowing would be swelling caused by water moisture.
46. I do not allow this amount, on the basis that I have already allowed Mr Croucher's estimate of \$7000 to address potential problems with the timber framework. If works are required to the timber framework as part of that estimate, then planing or levelling of the timber structure would be addressed as part of those works. On the other hand, if works are not required to the timber framework as part of the previous item, then the owners will have sufficient monies in hand to allow for any planing or levelling that may be required.

Alternative Accommodation

47. The parties agreed that the owners would have to vacate their home for a period of 30 nights while the rectification works were being carried out.
48. The owners obtained a quote from Quest Apartment Hotels⁶ for a three-bedroom apartment at Quest Moonee Valley, in the sum of \$427 per night, making a total of \$12,810. Mr Bird gave evidence that the Quest was in a location near his daughter's school and son's work, was close to family and was a similar standard of accommodation to their home.
49. The builder provided a quote obtained from an online booking site for the Mooney Valley Views Apartments⁷. The price for a three-bedroom apartment for 30 nights is \$6600 with a "low rate (non-refundable)"

⁶ Quote dated 16 April 2018, exhibit A8

⁷ Printout dated 8 June 2018, exhibit R1

discount. Without this discount, the price is \$7137. The builder's counsel submitted that this accommodation was in a similar location to the Quest and is of a similar quality.

50. The owners are entitled to a level of accommodation commensurate with their existing home. They will be put to a great deal of inconvenience to move out of their home for one month and to continue their lives from an apartment. Mr Bird has made enquiries and is satisfied that the Quest will allow them to do this. Based on a one page print out, from an online booking site, with no detail or images of the room to be rented, I am not willing to accept that the MVV Apartments are of an equivalent standard. I note that the one page print out contains a review which states "Fantastic value, great location and great staff, would recommend upgrading some of the furniture (couch, bed)". I also note that the price quoted is a discount price, is non-refundable, and may not be available at the time the owners require the accommodation.
51. For those reasons, I will allow the amount of \$12,810.

RECONCILIATION OF CLAIMS

52. In accordance with the agreed methodology stated above, I now set out my reconciliation of the claims:

Starting amount	\$40,238.00
Downstairs floor tiles replacement	No adjustment
Provisional sum to repair timber structure	\$7000.00
Duplication of mould costs	No adjustment
Number of tiles required	No adjustment
Building Permit and Insurance	\$800.00
Labour Rates	No adjustment
Cost of the tiles	No adjustment
Protection works	No adjustment
Bowing of walls	No adjustment
Subtotal	\$48,068.00
Margin @ 35%	\$16,823.80
Subtotal	\$64,891.80
GST @ 10%	\$6489.18

Subtotal	\$71,380.98
Plus the agreed amount for mould remediation	\$9251.00
Plus alternative accommodation	\$12,810.00
Total	\$93,441.98

53. As a result of the above, I will make the following orders:

ORDERS

1. The respondent must pay to the applicants the sum of \$93,441.98.
2. Costs and reimbursement of fees reserved with liberty to apply.

SENIOR MEMBER S. KIRTON

APPENDIX

List of expert reports in the proceeding

<i>For the Applicants</i>	Mark Newell, Independent Plumbing Inspections, 18.7.17
	Antony Croucher, Tony Croucher & Assoc, 10.10.17
	Antony Croucher 25.1.18
	Antony Croucher 8.5.18
	Karl Wootton, Australian Waterproofing Consultants 3.5.18
	Karl Wootton 15.5.18
	Capital Facility Services (CFS) 7.8.17
	Cameron Jones, Biological Health Services, 17.4.18
	Cameron Jones 29.5.18
	Quote - Raniti \$145,229
	Quote - Capital Facility Services \$9251
	Quote - Adesso \$33,649
<i>For the Respondent</i>	Salvatore Mamone, Mamone Architects, 24.2.18
	Salvatore Mamone 8.5.18
	Wesley Black, Biotopia, 25.4.18
	Wesley Black 1.6.18