

**LORVICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1335/2017

CATCHWORDS

Building and Property List – allegations of defective tiles – tiles not defective at time of handover – tiles not defective within the meaning of the contract – defective shower recess – defect admitted – inappropriate to order rectification – damages appropriate

FIRST APPLICANT	Peter Bladeni
SECOND APPLICANT	Ann Bladeni
RESPONDENT	Latitude 37 Projects Pty Ltd (ACN: 118 131 507) t/as Latitude 37
WHERE HELD	Melbourne
BEFORE	Robert Davis, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	4 & 17 April 2018
DATE OF ORDER	27 April 2018
CITATION	Bladeni v Latitude 37 Projects Pty Ltd (Building and Property) [2018] VCAT 604

ORDERS

- 1 The applicants' claim in relation to scratched tiles is dismissed.
- 2 The respondent pay the applicants the sum of \$1208.08 in relation to rectification of the shower niche.
- 3 Costs reserved.

Robert Davis
Senior Member

APPEARANCES:

For Applicants

Mr P. Bladeni, in person

For Respondent

Mr J. Waters of Counsel

REASONS FOR ORDER

Application

- 1 The applicants are the owners of No. 15 Carrigal Street Balwyn in the State of Victoria (the **Property**). The respondent being a builder, was engaged by the applicants to build and did, in fact, construct a house (the **House**) on the property.
- 2 The applicants are seeking that the respondent replace the porcelain floor tiles, which it laid at the property because the applicants alleged that the tiles were scratched by the respondent or/and defective at handover. The respondent denies this allegation.
- 3 The applicants are also seeking that the respondent perform further work on the shower niche in the house to rectify the defects in the same. The respondent accepts that there are defects in the shower niche but alleges in the circumstances damages are the appropriate remedy and there is a dispute as to the quantum of appropriate damages between the applicants and the respondent.

The Contract

- 4 By written contract executed by the parties on 18 March 2016 (the **Contract**), the respondent agreed to build the house on the property for the sum of \$763,119 subject to the terms and conditions of the contract.
- 5 The contract expressly incorporates the *Guide to Standards and Tolerances 2015* (the **Guide**).
- 6 Specifications are defined in Clause 1.0, page 3 of the contract as follows:

Specifications – mean specifications described in Item 6 of the **Appendix** and also includes and incorporates the Standards and Tolerances Guide produced by the Building Control Commission as applicable at the date of the **Contract**.
- 7 Item 6 of Appendix A provides:

The Standards and Tolerances Guide produced by the Building Control Commission is applicable at the date of this **Contract** forms part of the **Specifications**.
- 8 At the date of the contract, the Guide produced by the Victorian Authority 2015 was applicable.
- 9 The test incorporated into the parties' contract to determine whether the tiles are defective is set out in Section F in Clause 11.05 of the Guide:
 - (a) Generally, variations in the surface colour, texture and finish of walls, ceilings, floors and roofs, and variations in glass and similar

transparent materials are to be viewed where possible from a normal viewing position. A normal viewing position is looking at a distance of 1.5 m or greater (600 mm for appliances and fixtures) with the surface or material being illuminated by 'non-critical light'. Non-critical light means the light that strikes the surface is diffused and is not glancing or parallel to that surface.

.....

Slight variations in the colour and finish of materials do not always constitute a defect.

Section F also sets out a footnote of non-critical light, which states:

(b) Non-critical light is defined in appendix. B3 and D7 Australian Standard AS/NZS 2589. Refer also to CSIRO TR 90/1, Report No. L8 – 1992.

(c) The relevant section AS 2589 is as follows:

(i) **1.4.2.6** *Critical lighting*

Natural or artificial light projected across a surface at a low incidence angle.

(ii) **D7.3** **Diffuse and directional light**

...

Highly diffuse lighting, such as from a luminous ceiling, provides even illuminations with little shadow or modelling.

Highly directional lighting, such as from lighting, spotlights or direct sunlight, provides uneven general illumination, sharp deep shadows and harsh modelling.

(d) Clause 11.05 Cracked, pitted, chipped, scratched or loose tiles provides:

Tiles are defective if they are cracked, pitted, chipped, scratched or loose at handover.

After handover, tiles are defective where the builder's workmanship causes the tiles to become cracked, pitted, chipped or loose within 24 months.

Background

- 10 When the house was nearing completion, on 27 March 2017, the respondent conducted a quality control (QC) survey of the house for any defects that might be in existence at that time. The survey was conducted by one of the respondent's employees, which Mr Myers, the General Manager of Construction of the respondent, described as a very pedantic person, and was specially employed because he was pedantic.
- 11 In the QC list of defects there were numerous examples of matters concerning the tiles and cleaning. However, there was no reference whatsoever to scratched tiles.

- 12 On 7 April 2017, there was a final inspection where both the site manager of the respondent and the second applicant were present. Again, there were a number of items identified including tiling and cleaning items. However, there was still no reference to scratched tiles.
- 13 On Wednesday, 19 April 2017, just prior to handover, there was a “handover inspection”. At that inspection, Mr Myers was present as was the first applicant. Reference was made, to the list of defects prepared at the final inspection. Again, there was no reference to scratched tiles and the only reference to cleaning in the 19-item defect list was item 5 which required ‘clean void window and entry’.
- 14 The second applicant, who is a professional cleaner, gave evidence that on 20 April 2017 she cleaned the tiles because they were dirty and had wax on them. The first applicant said that he did not make reference to cleaning on the day of the “handover inspection” because his wife was a professional cleaner and she intended to clean the tiles. The second applicant made similar comment in relation to the final inspection.
- 15 Mr Myers gave evidence that there were three industrial cleans prior to the handover of the house. The first was prior to 27 March 2017, the second on 7 April 2017 and the third just prior to handover. He stated that at the time of handover, the whole house including the tiles was completely clean save and except for item 5 in the defects list to which I have referred.
- 16 After handover the second applicant had cleaned the tiles on 20 April 2017, she stated in her evidence that at that time she noticed that many of the tiles had scratches on them. The scratches were throughout the whole tiled area of the house which was approximately 150 square meters.
- 17 Many witnesses called by the applicants attested to the fact that they observed scratches on the tiles at some point after handover.
- 18 On Sunday 23 April 2017, the applicants emailed the respondent complaining of the scratches on the polished porcelain floor tiles. The applicants said that they waited until 23 April 2017 to notify the respondent of the scratches because they wanted to quantify the amount of the scratches on the tiles and it took them that time. Further, the first applicant stated that he was in denial in relation to the scratches and he needed to be convinced by the second applicant.
- 19 Approximately a week later, there was an inspection by a Mr Sutton, one of the respondent’s employees, who was not called to give evidence, where some scratches were noted in approximately 6 tiles. It is unclear whether Mr Sutton observed the scratches or not. Mr Myers stated that he was being “customer-friendly” in this regard in offering to replace 6 tiles.
- 20 After the inspection by Mr Sutton, Mr Myers inspected the tiles and was unable to find any scratches whatsoever. It is noted that Mr Myers has been in the building industry for approximately 30 years and has worked for the respondent for some 3 years.

- 21 In late May of 2017, Domestic Building Disputes Resolution Victoria (DBDRV), were notified that there was a dispute between the applicants and the respondent in relation to the scratched tiles. As a result, DBDRV engaged a building expert, Damien O’Kearney, to perform an inspection and write a report in relation to the allegation of scratched tiles. Mr O’Kearney performed an inspection on 29 July 2017 and published an amended report on 29 August 2017. Mr O’Kearney gave evidence before me and he stated that he stands by the opinions that he expressed in the amended report.
- 22 When Mr O’Kearney examined the tiles, he did so by reference to the contract and the Guide and attempted to establish whether the tiles were scratched within the meaning of the Guide and consequently the contract.
- 23 When Mr O’Kearney initially inspected the tiles, he was unable to see any scratches whatsoever. He then looked at the tiles in different lighting conditions as follows:
- (i) The blinds were closed, downlights were turned on (direct light perpendicular to tiles). These lighting conditions created more ‘critical light’ which is not in conformance with the Guide but which would tend to highlight scratches. In these conditions, from a normal viewing position of 1.5 m with a 45° degree angle, scratches in the tiles were not evident.
 - (ii) The blinds were then closed, downlights turned off and a torch was held above Mr O’Kearney’s head and pointed at the tiles. This created direct light not in conformance with the Guide. It was at this time that Mr O’Kearney was able to observe the scratches.
- 24 Mr O’Kearney admitted, that he could not completely create a situation of non-critical light but formed the view that:

However, it is not established that the light (the light he used above his head) conforms to the standard outlined in the Guide as ‘non-critical’ lighting conditions and it is not the assertion of this report that the examination of the defects by holding a torch above the head of the assessor constitutes an examination from a normal viewing position.

As the scratches and the marks on the tiles cannot be seen under ‘non-critical’ light from my normal viewing position in accordance with the Guide the tiles do not constitute defective building work.

- 25 In his assessment Mr O’Kearney stated as follows:

However, the tiles are scratched and marked. The cause and timing of the scratches and marks cannot be determined from a visual inspection.

Although the post-handover defect list does not identify damaged tiles it cannot be ruled out that they were present but unable to be observed due to the difficulty presented by the lighting conditions at the time.

It is not clear that this is inconsistent with *the Guide* and in any event, night conditions could not be reproduced at the time of the assessment site visit.

Considering all of these factors the item is undetermined.

Timing and cause of the scratched tiles

- 26 The applicants called a number of lay witnesses who had observed the tiles within a number of days after handover and those witnesses said that the tiles were scratched. They also called the removalist to say that the house was completely ruffled at the time the applicants' furniture was moved into the house and therefore it was unlikely that tile scratching could have happened by the furniture being moved into the house.
- 27 The applicants argued, that the tiles were a Rating 5 tile which was the highest rating of strength for a polished porcelain tile and that they had had previous experience in living in a house with such tiles and knew how to treat them.
- 28 The applicants also produced a photograph taken in January of 2017 which showed that there was builder's mess on the floor and that around that time, tradesmen were entering the house with their boots on. Mr Bladeni hypothesised, that it was the tradesmen and their mess on the floor that caused the scratched tiles.
- 29 Mr Bladeni also referred to the fact, that the respondent's solicitors organised an expert, Mr Laurich, to inspect the tiles but no report was given by Mr Laurich and he was not called to give evidence. Mr Bladeni suggested that as a result I should infer that Mr Laurich found that the tiles were scratched and the report would not have assisted the respondent. The difficulty with the applicant's submission about Mr Laurich is that Mr Waters, Counsel for the respondent, took the objection to that evidence on the basis that legal professional privilege applied because it was a communication for the purpose of litigation, between an expert and the respondent's legal advisor. During the hearing I upheld that objection.
- 30 I must determine on the balance of probabilities, whether the tiles were scratched at the time of handover. I do not need to determine, if the tiles were not scratched at the time of handover, what was the cause of the scratches. Neither do I need to determine what was the cause of the scratches if they were not scratched at the time of handover.
- 31 It seems unlikely to me that the tiles were in the dirty condition that they were described by the two applicants. If the tiles were in such a dirty condition as described by the applicants, one would have expected complaints to be made and asked for them to be cleaned by the respondent. Other items were noted for cleaning.

- 32 It is difficult to accept, because the second applicant was a professional cleaner, that she was happy to do the cleaning herself. Particularly if there were items on the tiles such as wax.
- 33 Therefore, I do not accept that the scratches were camouflaged by the dirt on the tiles or that there was any dirt on the tiles whatsoever apart from perhaps a normal slight amount of everyday dust.
- 34 Having found that the tiles were not in the dirty condition described by the applicants prior to handover, then one has to ask the rhetorical question, why were the scratches not observed at that time?
- 35 The fact that there was dirt on the floor in January 2017 and workmen were walking on these tiles with their boots, does not in itself show that those set of circumstances caused the scratches. The applicants themselves gave evidence that these tiles were very “hardy”.
- 36 I do not accept, that the applicants were concentrating on other matters at the time of the inspection. The applicants gave the impression of being very pedantic people and I doubt whether they would have concentrated on all other items and not concentrated on the floor. This is particularly so as the first applicant gave evidence that the floor was to be a “feature of the house”. In my view it is likely, that the applicants would have paid a considerable amount of attention to the floor at the time of both the final and handover inspections. If they had noticed scratches on the floor at that time, they would have pointed them out to the respondent’s representative. They did not.
- 37 I find it hard to understand that if the applicants observed the scratches around about 20 April, which was a Thursday, that they would not have notified the respondent immediately. I do not accept the applicants’ explanation that they waited until the Sunday because the first applicant needed to be convinced that there were scratches. Thursday and Friday were both working days. It would have been appropriate and “normal” if there were scratches observed on those days, to notify the respondent at that time. It is difficult to understand why the applicants would wait until the Sunday evening, before emailing the respondents if they observed the scratches earlier and they believed that the respondent or its workmen caused the scratches.
- 38 I am unable to determine what was the cause of the scratches. However, on the balance of probabilities, I find that the scratches did not exist in the tiles, at the time of handover. They came later. Whether they were a result of cleaning or some other activity, I do not know. However, I cannot be satisfied, as I must be, for the applicants to succeed, on the balance of probabilities that the scratches existed at the time of handover.
- 39 Bearing in mind, the provision of 11.05 of the Guide, that: “*Tiles are defective if they are cracked, pitted, chipped, scratched or loose at handover*”, the applicants must necessarily fail, in their claim in relation to

the scratched tiles against the respondent as I am not satisfied that the tiles were scratched at the time of handover.

- 40 It is noted, that the second paragraph of 11.05 of the Guide deals with a time after handover of defective workmanship in relation to tiles, but nothing is mentioned in that paragraph about scratches. Therefore, the contract clearly intends that the scratches must be on the tiles at the time of handover and not something that subsequently happened.
- 41 The applicants submitted, that I should treat the Guide as “guides” and not as provisions of the contract. I do not agree with this submission, as the contract itself makes it clear that the Guide are to be incorporated into the contract. As Mr Waters stated, the parties were free to have any contractual terms they so desired and if the applicants did not desire to have the Guide incorporated into the contract they should have sought some other contract.

Relationship of Section F of the Guide to the scratches

- 42 Having made the finding that I have above that the scratches to the tiles did not exist at the time of handover, I do not need to make findings in relation to whether the scratches come within section F of the Guide. However, for completeness and in case I am wrong in relation to my above finding, it is desirable that I discuss the relationship between section F of the Guide and the scratches to the tiles.
- 43 The applicants engaged a Peter Limburg to inspect and report on the scratched tiles.
- 44 The respondent engaged Mr O’Donoghue as a building expert, to comment on where the scratches fell within the contractual provisions between the parties. Mr O’Donoghue did not inspect the house or the tiles. At the commencement of the hearing the first applicant, stated that he did not intend to call Mr Limburg, because he was informed by the Member who conducted the Directions Hearing on 12 December 2017 that he would not be required to do so. I expressed some doubt in relation to this information.
- 45 Mr Waters, said that he was prepared to call Mr O’Donoghue to give evidence by telephone as Mr O’Donoghue was Interstate at that time.
- 46 As a compromise, the parties agreed that the applicants would not call Mr Limberg and the respondent would not call Mr O’Donoghue and that their reports would be tendered and viewed with as much weight as was appropriate bearing in mind that neither were cross-examined and that neither party accepted the evidence of the other’s expert.
- 47 Mr Limberg, in his report, stated:

ASSESSMENT

The floor tiles at the above property were closely inspected under various lighting conditions including natural daylight, internal (above-

head) lighting and flood lighting (i.e. floodlights on a stand that are typically used by painting professionals).....

The floor tiles in all the above areas were scratched.

- 48 The difficulty with Mr Limberg’s report is that he has not discussed in detail the provisions of section F of the Guide and its relationship to the lighting under which he inspected the tiles. Put another way, I am unable to determine whether he inspected the tiles in accordance with section F or otherwise.
- 49 Bearing in mind that Mr Limberg was not cross-examined, and the comments I have made above, I do not believe, that his report assists me in determining whether the scratches on the tiles are observable in the conditions described in section F of the Guide. Therefore, I will put Mr Limburg’s report to one side.
- 50 Mr O’Donoghue, the expert for the respondent, did not examine the tiles. However, what he did in his report was to examine “non-critical” and “critical” lighting. He stated at 10.2:
- 10.2 Generally speaking, how should an inspection of floor tiles be undertaken, consistent with requirements of the Guide, having regard to such factors as:
- 10.2 (a) natural daylight; the inspection should be carried out in cloudy conditions or translucent window shades drawn in full sunlight;
- 10.2 (b) the presence of curtains and blinds to windows; refer 10.2 (a);
- 10.2 (c) internal (above-head) lighting; the inspection can be carried out with internal lights operating as long as the lights are fitted with diffusers. This would not include halogen-type lights or unshaded bulbs;
- 10.2 (d) flood lighting; flood lighting is considered critical lighting and should not be used for the inspection.
- 51 I do not believe, that Mr O’Donoghue’s report takes the situation any further than what is stated in Mr O’Kearney’s report.
- 52 A number of witnesses who had been called by the applicants, had suggested they saw the scratches on the tiles, but no evidence was adduced from them as to the actual lighting conditions at the time. That is, whether the lighting was “critical” or “non-critical” as required by the contract. Therefore I do not believe that these witnesses take the matter any further.
- 53 Mr O’Kearney, is completely independent. He was employed by the DBDRV, and I had the benefit of hearing his evidence-in-chief and seeing him cross-examined. I accept Mr O’Kearney as a reliable witness, who did his very best, at the time of his inspection, to determine whether the scratches on the tiles came within section F of the Guide or otherwise. He was a witness who was willing to make concessions where necessary. His

evidence is the best evidence that was produced to me. I therefore accept, his conclusion that:

As, the scratches and marks to the tiles cannot be seen under “non-critical” light from a normal viewing position in accordance with *the Guide* the tiles do not constitute defective building work.

- 54 Therefore I find, that the polished porcelain floor tiles in the house were not defective work in accordance with the contract.
- 55 The applicants submitted, that I should not treat the Guides as part of the contract but treat them as simply “guides”. Mr Bladeni emphasised the work “generally” at the commencement of section F of the Guide. He said that meant that the Guide should be interpreted very liberally and just used as a guide nothing more.
- 56 I do not accept Mr Bladeni’s submission in this regard, because the words of the contract make it very clear, as I have previously stated, that the Guide is in fact part of the contract and that is what the parties agreed to. Therefore, in order to determine whether there is defective work or not I must determine that in accordance with the contract. In this particular instance, I find that the scratches on the tiles were not defective work in accordance with the contract. Therefore, the applicants must fail on this ground in relation to the scratches of the tiles.
- 57 The applicants’ referred to the warranty provisions in s.8 of the *Domestic Building Contracts Act 1995*. However in light of the above findings s.8 does not take this matter any further.

Shower Niche

- 58 As I previously stated, the respondent admits, that the shower niche was defective. It is common ground, that the respondent has attempted on three occasions to fix the shower niche and has failed to do so.
- 59 The applicants’ primary position is, that it is appropriate for the respondent to fix the shower niche because it has the facilities of a builder available and all the tradesmen who can fix the niche. That is, the applicants submitted that their preference is for a repair of the niche rather than damages.
- 60 It is clear on the evidence before me that there is a strained relationship between the applicants and the management of the respondent. Mr Bladeni admitted as much in his oral evidence.
- 61 Further, there have been three attempts made by the respondent to fix the shower niche which have not been successful.
- 62 During the hearing, I informed Mr Bladeni that experience had shown me in the Tribunal over a number of years, that where there was a tense relationship between the parties and the parties had come to the Tribunal to

resolve their differences, that ordering one party to do further work on a domestic building where it was occupied by one of the other parties, usually ended in disaster. I still take this view.

- 63 Given these circumstances, it is inappropriate to order that the respondent rectify the shower niche.
- 64 It is thus appropriate, that I should award damages rather than rectification.
- 65 Initially, the applicants produced no evidence whatsoever as to the cost of rectification of the problems with the shower niche. On the first day of hearing, the applicant called Mr Ceconato, who is a tiler, and he gave evidence, that he did not wish to tile wet areas and therefore the quote he had given at that time did not include the wet areas. He was cross-examined on that basis. On the second day of hearing, which was approximately 2 weeks later, the applicants produced a quotation from Mr Ceconato in relation to the rectification of the shower niche of \$2200 inclusive of GST. Mr Ceconato did not attend for cross-examination on the second day.
- 66 The first applicant said in evidence, that the quotation did not necessarily mean that Mr Ceconato wanted to do the work or would do the work.
- 67 Mr O'Donoghue in his report tendered on behalf of the respondent, estimated that the cost of repair to the shower niche was \$955 plus GST. I have previously referred to the way Mr O'Donoghue's evidence was tendered. Further, it is also noted that Mr O'Donoghue had not inspected the premises.
- 68 However, I noticed, that comparing Mr Ceconato's quotation and the estimate given by Mr O'Donoghue, Mr O'Donoghue has specifically referred to time and rates in order to come to his estimate. On the other hand, Mr Ceconato has not referred to time and rates whatsoever. He has just given a bald figure after stating the work that was required to be performed. Bearing this in mind, I prefer the estimate of Mr O'Donoghue to that of Mr Ceconato.
- 69 However, I do notice that Mr O'Donoghue has failed to include a builder's margin in his estimate. Doing the best I can in relation to a builder's margin, I have formed the view that a 15% allowance should be made to the quotation which he has given for a builder's margin which is \$143.25. Thus, the figure that adding the builder's margin to Mr O'Donoghue's estimate, comes to \$1098.25 plus GST. The GST rounded off on \$1098 is \$109.83 bringing the total to \$1208.08. Thus I will order, that the respondent pay the applicant the sum of \$1208.08 for rectification of the shower niche.

Conclusion

70 In relation to the allegation of scratched tiles, as I have found above, the tiles were not scratched at the time of handover and in any event, the scratches did not come within the meaning of defects in the contract between the parties. In relation to the shower niche, I have found that it is inappropriate to order that the respondent rectify the defect but instead I will order that the respondent pay the applicant the sum of \$1208.08 so that the applicant can have the shower niche rectified.

Robert Davis
Senior Member