

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D159/2008

CATCHWORDS

Domestic Building, alleged defects in plumbing leading to alleged defects in a floor surface installed by a separate contractor, causation, proof, res ipsa loquitur, extent of removal of surface – open plan home.

FIRST APPLICANT	Jason Borg
SECOND APPLICANT	Grace Borg
RESPONDENT	Metricon Homes Pty Ltd (ACN 005 108 752)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	5, 6 and 10 November 2008
DATE OF ORDER	10 December 2008
CITATION	Borg v Metricon Homes Pty Ltd (Domestic Building) [2008] VCAT 2586

ORDER

- 1 The application is dismissed.
- 2 Costs are reserved and there is liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants: Mr I. McEachern of Counsel

For Respondent: Mr B. Carr of Counsel

REASONS

- 1 Mr and Mrs Borg, the Applicants, had their house (“the home”) built by Metricon, the Respondent. Work finished in June or July 2006. About five months later they entered a contract with Unique Concrete Designs (“Unique”) and a polished surface (“the surface”) was applied to concrete floors on the ground floor of their home. The work was done by or under the direction of Mr Grech, the principal of Unique. Neither Unique nor Mr Grech are parties to this proceeding.
- 2 Mr and Mrs Borg say that two white patches appeared in the second-last layer of the surface, which was an epoxy, and that they were caused by dampness in the concrete which in turn was caused by faulty plumbing work by Metricon.
- 3 The question for me to determine is whether there was a defect in the plumbing or floor of the home that justified removal and replacement of the surface and other rectification of the floor at Metricon’s expense.
- 4 Mr and Mrs Borg’s household insurer, AAMI, has brought this proceeding in their name by subrogation. AAMI seeks to recover \$22,125.00 being \$21,032.00 which it paid to the Borgs to compensate them for amounts paid by them to Unique for floor repairs and removal and replacement of the surface, \$500.00 for leak detection, \$490.00 for plumbing assessment and \$103.40 paid by the Borgs to another plumber.
- 5 Metricon seeks an order dismissing the application, and costs.
- 6 Significant portions of the exploratory works were videoed by the Borgs or people on their behalf and put into evidence by Metricon, enabling me to have a much more direct view of what happened than is generally available.

HISTORY

- 7 Unique quoted to provide the surface described as “144 square meters of acid stain – Hazelnut finish” for the Borgs at the price of \$16,632.00 on 17 November 2006. The parties agree that the work commenced the following Monday – 20 November 2006. Mr Grech gave evidence for the Borgs. He said that the process is that the concrete floor is ground and vacuumed, a 2 to 3 mm layer of cement base is applied, it is hand sanded the next day, then the acid colouring is applied and broomed in swirls to give the desired artistic effect, then the epoxy, then a final coat of polyurethane are applied.
- 8 Mr Grech gave evidence that he discovered two small but significant white patches in the epoxy layer on Friday 24 November 2006 and I accept the evidence of Mr Grech and Mrs Borg that he telephoned her that day to report the problem. Mr Grech told the Borgs that the white patches were due to leaks. The next day, Saturday 25th, Mr Grech gave the Borgs another quote to remove the existing layer, patch the concrete in the area of the white patches and reapply the polish. The amount of the quote was for \$21,032.00.

- 9 I accept the evidence of Ms Markovski from AAMI that \$21,032.00 was paid to the Borgs. Both Mrs Borg and Mr Grech said in evidence that the whole of this sum was paid to Unique and that the Borgs had paid Unique the whole of the price originally quoted of \$16,632.00.
- 10 This is somewhat surprising, as the surface was never polished to the satisfaction of the Borgs. The first attempt failed before the final coat was applied. The second attempt failed as there were small white patches throughout the surface, but no photographs were provided. According to the Borgs and Mr Grech this attempt was removed and replaced at his expense. The third attempt was apparently left rough and the Borgs decided to install a floating floor over Unique's work. Both Mr Grech and Mr Borg said that no amount has been repaid by Unique and that there are neither legal proceedings between them nor an agreement to repay any amount.
- 11 The Borgs promptly contacted Metricon and also AAMI. Mr Grech had told the Borgs he believed the white patches were caused by water leaks and they relayed this information. Although there are a number of photographs of the home during construction and the areas of the white patches once investigations began, there are no photographs of them before investigation. Mrs Borg described them as looking like steam on glass. Mr Grech said that the colour change applied to the epoxy layer only, not to the coloured layers beneath.
- 12 I accept the evidence of both Mr and Mrs Borg that Mr Grech said the epoxy had to be removed promptly because if it were in place for more than a week it would be very difficult to remove. I note that AAMI gave the Borgs permission to remove it from the whole area except one room. If removal of any of the epoxy was necessary, removal of all was reasonable because, with the exception of bedroom 5, the whole of the ground floor where the surface was applied is open plan.
- 13 On Monday 27 November 2006, representatives of Metricon visited the site and Mr Grech was present. Mr Grech drilled two holes at the site of the shower patch, which is in the hallway to the garage, adjacent to the ground floor shower. I am satisfied that Metricon did not inspect the vanity patch, which is around the corner in the hall, adjacent to the waste from the vanity basin, until after the concrete had been chipped away by Mrs Borg's father.
- 14 If either white patch is proved to be caused by Metricon's failure to plumb the home properly, the Applicants' case is proven. The Applicants have also pleaded *res ipsa loquitur* – "the thing speaks for itself" – or in this case that the patches are only consistent with water damage and that the water can only have come from a failure of Metricon to build properly. The Borgs have failed to convince me that this is a case of *res ipsa loquitur*. It is possible that the patches have been caused by something other than dampness from leaking plumbing. For example, both patches are in areas where the concrete has been patched and as Mr Carr of Counsel for

Metricon submitted, the concrete patches could react to the acid differently to the main floor.

- 15 Further, Mr Grech is the only person who gave any evidence about what might have caused the white or cloudy patches. Neither party led any expert evidence. Mr Grech said that moisture causes failure of the epoxy, but he is not a disinterested party and in support of his view he said he had seen clouding in this type of surface when there was rain on a driveway before it set. This is not necessarily the same as moisture from within a slab. I therefore find that the Borgs failed to establish the causal link between the alleged white patches and dampness even before considering whether there are plumbing failures attributable to Metricon.
- 16 Nevertheless, as Mr McEachern of Counsel for the Borgs said, if there were plumbing defects, the work would have had to be done, regardless of any question about the cause of the white patches.
- 17 Mr Grech gave evidence that he did not notice any dampness in either area before the surface was applied. Mr and Mrs Borg gave the same evidence. Before the coating was applied the Borgs loosely laid coated cardboard material on the floor – Mrs Borg said it is the material from which milk cartons are made.

The shower patch

- 18 The shower patch was above the hallway side of the “shower box” cast into the home’s waffle pod slab. Approximately half the shower box is beneath the hallway floor.
- 19 The shower box is a plumbing void in the concrete floor approximately 285 mm deep and 600 mm long. It is constructed by placing a box of that size in the area where concrete is poured so that the resulting void has a floor and walls approximately 100 mm thick and no top. A waste pipe is cast into the bottom on the hallway side of the shower box, to be attached to the waste pipe from the shower. I accept that the document at tab 4 of the Respondent’s exhibit R3 is a reasonable illustration of the shower box and the plumbing within it.
- 20 Beneath the shower waste there is a “p” trap. P traps are designed to hold water as an air lock to prevent foul air from the sewer drifting back into buildings. The relevant p trap was tendered as evidence by the Borgs.
- 21 Adam Williams gave evidence for Metricon. His family firm was the plumber whom Metricon engaged to install the shower plumbing, and he did the work. I accept Mr Williams’ evidence about the way the shower base and waste plumbing were installed. He said that a carpenter installed the pre-formed poly-marble shower base, then Mr Williams removed any free water in the shower box. He installed the shower waste and connected it to the shower base and the waste pipe cast into the bottom of the shower waste. He tested it for water-tightness, packed damp bricklayer’s sand into the shower box by hand, concreted above the sand but beneath the shower

base by hand to eliminate any air pockets and concreted the top of the hall side of the shower box.

- 22 The concrete on the top of the shower box was at least 100 mm thick. The pipe from the sewer side of the p trap rose to less than the height of the shower and sloped slightly back toward the point where it joined the vertical waste pipe, which penetrates the base of the shower box.
- 23 I accept Mr Borg's evidence that the ground floor shower had only been used half a dozen times since his family moved into the home as they usually use the first floor bathroom near their bedrooms.
- 24 On 28 November 2006 three representatives of Metricon visited the home in the morning. They were Mr Adam Williams, Mr Charlton Cefai and Mr Graham Askew. Mr Grech was not present. He said in evidence that he had been told by Mrs Borg that Metricon would attend in the afternoon, and she said she was taken by surprise when she was telephoned that morning to say that the inspection would take place immediately. I accept the evidence of Mr Cefai that no firm time for the inspection had been arranged – it had to be confirmed with Mr Williams – but consider that disagreement over the time for the inspection is consistent with a genuine misunderstanding between the parties.
- 25 Mr Grech's drilling on the 27th is shown on the video tendered by Metricon. It produced concrete that looked dry – as dust rose from it – and damp sand. On the 28th Mr Adam Williams used a kanga hammer to remove a section of the top of the shower box in the hallway, from directly above the vertical pipe toward the middle of the hallway and this was also videoed. I accept Mr Adam Williams' evidence that he dug the sand out of that area to near the base of the shower box and that while the sand was damp, it was not wet. There was certainly no free water visible. I also accept the evidence of both Mr Adam Williams and Mr Cefai that when they removed the grate in the shower and looked into the p trap, it was holding water. This is inconsistent with a leak, fast or slow, unless the sand is saturated to the same level as the water in the p trap. There is also a mark consistent with a "high water mark" inside the p trap, but not on the outside.
- 26 Mr Graham Askew and Mr Adam Williams both said under cross examination that if the p trap was leaking before the investigations were undertaken, they would expect the sand to be discoloured or black and smelly because of the body fat and soap that would have been deposited there. The video showed that the sand was not discoloured.
- 27 That afternoon, 28 November 2006, Mr Grech visited the home. Neither Mr nor Mrs Borg were able to be present, but Ms Connie Celia and her daughter Lisa were present. Ms Connie Celia is Mrs Borg's aunt and she and Lisa Celia gave evidence for the Borgs. Ms Connie Celia said that when Mr Grech was told that the Metricon representatives said there was no leak, he said "This can't be – there has to be a water leak" or words to that

effect. She also said in answer to my question that she was with Mr Grech the whole time he was at the home on the 28th.

- 28 Mr Grech said in evidence that he dug the sand out toward the shower p trap by hand and that as he dug further, the sand got wetter. He said that when he felt the bottom of the p trap he discovered it was rough to the touch and dripping freely. He said he ran the shower for “five or ten minutes”. Mrs Borg asked the Metricon representatives to return, which Mr Cefai and Mr Askew did on the 29th while Mr Borg was present. Photographs taken after Mr Grech’s investigation show the sand saturated and water pooling. The video shows water dripping out at between two and three drips per second.
- 29 Mr Cefai was invited by the Borgs or their family members to feel the crack which he declined to do, however he said on the video that he had no doubt that the pipe was cracked.
- 30 Mr Gretch expressed the view that the sand had been packed so tightly that the water would not leak freely from the pipe until after the sand was removed. As Mr Carr said, either water could leak freely from the pipe or the sand did not become wet enough to make the hallway patch damp. I find it impossible to believe that if there were significant water in the sand, it would not collect at the bottom of the shower box. Therefore it should have been visible when the shower box was opened by Mr Adam Williams for Metricon.
- 31 Not long after the investigations were undertaken, the Borgs had plumbing work undertaken by Mr DeLuca of Vikingz Plumbing Contractors to replace the p trap. Mr Borg said the work was necessary because there was an intolerable stench in the ground floor bathroom. He said it was the first time there had been a smell.
- 32 Mr DeLuca said in a short letter to the Borgs of 28 November 2006:
- It is my opinion that the t[r]ap was cracked either on installation or when the sand was packed under the shower base with the tool they were using to compact the sand.
- I am not satisfied that any tool would exert enough force on the p trap to produce the damage the pipe has suffered. In contrast, I accept the evidence of Mr Adam Williams that he did not use a tool to pack sand into the shower box.
- 33 Document 16 in the Applicants’ bundle is a report/tax invoice from Anderson & Associates Assessors Pty Ltd which says in part “We reached into the trap and could feel a crack on the bottom of the trap. This could only have occurred during construction.” The report is not in accordance with Practice Note VCAT 2: Expert Evidence, does not provide reasons to support the conclusion reached and the author was not called to be cross examined. I am not convinced by it; particularly as there is clearly at least one other explanation.

- 34 The p trap has a crack approximately 45mm long on its base and a “v” shaped piece protrudes below the undamaged portion of the base. The cause of the damage is unknown, but it is consistent with a long thin instrument being struck down firmly from the waste opening at the shower base.
- 35 It is inconsistent with water leaking from the p trap that no smell was evident until after the investigations were undertaken. Either sufficient water leaked from the shower to wet the sand and then the concrete on the five or six occasions that the shower was used, and the water would also have drained from the p trap and caused a smell then, or it did not. As there was no smell before the investigations, the Applicants have failed to prove that a plumbing failure led to a water leak which in turn led to failure of the epoxy layer.
- 36 It is for the Applicants to prove their case, which they have not done regarding the shower patch.

The vanity patch

- 37 Photographs tendered by both parties show that the vanity waste pipe leaked. The issue is whether the waste pipe leaked before the surface was laid.
- 38 The waste pipe for the ground floor vanity unit should have protruded through the slab in the middle of the bathroom stud wall. It was a little misplaced and the slab had to be jack-hammered by Metricon before the house was handed over to the Borgs, to enable two 45 degree bends to be incorporated to bring the vertical pipe within the wall. The floor was then patched with concrete. I accept Mr Borg’s evidence that the pipe was still a little off centre and caused the skirting board to bow.
- 39 I accept Mr Cefai’s evidence that the Borgs did not draw the leak in this area to his attention until his fourth visit to site. I also accept his evidence that the skirting board was composed of MDF, that it swells readily if exposed to water, and that such swelling is also likely to cause the paint to fall off. There is no evidence of such damage to the skirting board. Had such damage been present it would have been evidence of the presence of moisture in the slab. However, the lack of such damage, alone, is insufficient to prove that there was no moisture. Although Mr Grech agreed in cross examination that the pipe was touching the skirting board, the evidence was consistent that the source of the leak was below finished floor level and there was no evidence that the skirting board touched the concrete floor.
- 40 Mrs Borg said her father removed the concrete patch and after that dampness could be seen near the pipe. The photographs show dark concrete which indicates significant moisture. The video did not show this work being done. As Mr Grech said, there was no sign of dampness before he commenced coating the floor. I also accept the evidence of Mr Michael Williams, the father of Mr Adam Williams and a director of the plumbing

sub-contractor for the home, that the pipe was vulnerable to damage and likely to be damaged when the concrete around it was chipped out. He said that he observed a dent in the vertical riser and a crack in the collar to the lowest 45 degree bend.

- 41 I accept the evidence of Mr Adam Williams that he tests pipes as he installs them and if there had been a fault which allowed the amount of water to escape which was escaping before the pipe was repaired the last time, it would have been made obvious by the test. I note that the person most qualified to give factual evidence about the vanity patch was Mrs Borg's father. He was not called for the Borgs and no explanation was given for the failure to call him. The Tribunal is not bound by the rules of evidence but the rule in *Jones v Dunkel* (1959) 101 CLR 298 provides a useful guide. The Borgs could have called him to give evidence but did not, so I assume that his evidence would not have assisted them.
- 42 Although there is clear evidence that there was significant water present after the concrete was chipped out, the Applicants have failed to satisfy me that the pipe leaked before investigations were undertaken.
- 43 I accept the evidence of Mr Michael Williams that his firm repaired the vanity pipe after the investigations but that his firm was neither requested to do so by Metricon nor paid for it. I note that Metricon ordered and paid for the repairs to the plaster and skirting board necessitated by the plumbing repairs in that area.

Conclusion regarding leak allegations

- 44 The only evidence before me that the white patches were caused by leaking plumbing were Mr Grech's assertions that it is water which causes the epoxy to turn white. I am not satisfied, on the balance of probabilities, that any failure by Metricon to build with reasonable competence caused the failure of Unique's product and I am not satisfied that the damage to the plumbing at either the shower box or the vanity waste occurred before exploratory work was undertaken by the Borgs.
- 45 I therefore dismiss the application and reserve costs with liberty to apply.

SENIOR MEMBER M. LOTHIAN