

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP958/2016

CATCHWORDS

DOMESTIC BUILDING DISPUTE – whether manganese staining of brickwork constitutes a breach of the warranties under s 8 of the *Domestic Building Contracts Act 1995* – whether manganese staining is caused by a natural phenomenon.

APPLICANT	Dorothy Lo Tauro
RESPONDENT	Metricon Homes Pty Ltd (ACN 005 108 752)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	22 September 2016
DATE OF ORDER	26 October 2016
DATE OF WRITTEN REASONS	4 November 2016
CITATION	Lo Tauro v Metricon Homes Pty Ltd (Building and Property) [2016] 1819

REASONS

INTRODUCTION

1. On 22 September 2016, I heard and determined an application by the Applicant against the Respondent, concerning staining to feature brickwork used by the Respondent in the construction of the Applicant's residential dwelling
2. Orders were pronounced at the conclusion of that hearing requiring the Respondent to pay the Applicant \$3,320 on the Applicant's claim, plus \$204.90, being reimbursement of the application filing fee.
3. On 18 October 2016, the Respondent wrote to the Tribunal and requested written reasons, which I now provide.

BACKGROUND

4. In 2010, the Applicant entered into a house and land package, under which she purchased land in Berwick, Victoria and, simultaneously, entered into a domestic building contract for the construction of a residential dwelling by the Respondent on that land.
5. Under the terms of the building contract, the Applicant was given the option to upgrade the type of feature brickwork to be used in the construction of the building works. To that end, the Applicant selected a chocolate brown feature brick, which then increased the contract price by \$8,760.
6. The contracted works were completed in August 2010, following which the Applicant took possession of the property. At that time, there were no discernible defects in the brickwork. However, approximately 1 ½ to 2 years after taking possession, the Applicant noticed discolouration of the brickwork in certain areas.
7. As a consequence, the Applicant contacted the Respondent in late 2012, following which the Respondent initiated, what the parties have referred to as, a *warranty case*. After investigating the discolouration, the Respondent formed the view that the bluish tinge appearing in sections of the brickwork was manganese staining. Manganese staining is a form of efflorescence that develops when moisture in the brickwork draws salts and colour from the brick composition to the surface of the masonry. As the moisture evaporates, the colour from the manganese, which is used in the brick composition as a colorant, is left behind leaving a stain on the surface of the brick.
8. According to the Respondent, the process is quite common but the degree of staining will differ depending on how much manganese was used in the production of the bricks and the environment where the bricks have been laid.
9. In order to remove the staining, the Respondent engaged *Claytek*, a business that specialises in removing manganese staining, amongst other things. Peter Blake of *Claytek* attended the Applicant's property and undertook specialised cleaning to remove the manganese staining. However, the cleaning process did not completely remedy the problem. Further staining manifested, which resulted in further cleaning attempts being made over a period of three years. It is common ground that despite those three attempts, the manganese staining is still apparent.

THE CLAIM

10. The Applicant claims \$15,000 from the Respondent, made up as follows:
 - (a) \$8,760 being a refund of the cost to upgrade to the bricks supplied and laid;

- (b) \$6,240 comprising:
- (i) an ongoing cost of cleaning the brickwork in order to remove or diminish the effect of manganese staining, which the Applicant contends would require at least 10 further cleaning applications; and
 - (ii) an amount representing depreciation of the property value; and
 - (iii) six days for loss of work, which she says was caused by the time spent in dealing with the ongoing problem of manganese staining (unspecified amount).

THE EVIDENCE

11. Diane Anderson, the customer relations manager of the Respondent, gave evidence on behalf of the Respondent. She said that after the Applicant first raised the issue, the Respondent contacted the manufacturer of the bricks; namely, Boral. She said that Boral advised the Respondent that there was nothing wrong with the bricks and that the staining was a natural occurrence.
12. Ms Anderson said that the Respondent did not accept that explanation and as a consequence, engaged *Claytek* to remove the stains. She said that *Claytek* had a unique process which brought the manganese to the surface of the affected bricks. This allowed the stains to be cleaned off with high pressure water, leaving a stain free surface on the brickwork. She agreed that three attempts had been made by *Claytek* to remove the staining, with some success but not completely eliminating the problem.
13. Mr Blake of *Claytek* also gave evidence in the proceeding. He said that he had 40 years of experience in the industry and had operated *Claytek* over the last 15 years. He confirmed that the brickwork had manganese staining. To that end, he recounted that he had tested areas of the brickwork and found that the staining only responded to a manganese stain remover. He also said that he had significant experience in removing manganese staining and in his opinion, the staining of the brickwork was clearly manganese staining.
14. Mr Blake said that it sometimes takes three or four attempts to finally eliminate the manganese staining. He confirmed that much would depend on how much manganese was in the bricks and whether it was concentrated close to the surface of the bricks. Mr Blake said that he had completed between 50 to 100 different projects affected by manganese staining. On some occasions he would need to return three or four times to finally remedy the problem. He said the costs of cleaning usually ranged between \$1,000 to \$3,000 per cleaning treatment, depending on the degree of staining and access. He opined that with the Applicant's property, a

further three or four treatments would be necessary. He said that would cost \$600 to \$1,000 for each treatment.

15. Karl Laurens, the warranty site manager of the Respondent, also gave evidence. Initially he said that the problem was largely due to the environment in which the bricks were exposed, given that some of the affected areas had very little direct sunlight. However, he conceded that there were other areas which were exposed to direct sunlight but still suffered from manganese staining. He said that the problem was rare and had only arisen in one or two other projects undertaken by the Respondent, where the same bricks were used. He said on those other occasions, the Respondent engaged *Claytek*, who eventually removed the staining usually with one or two cleaning treatments. He conceded that the Applicant's property was the worst case the Respondent had experienced.

FINDINGS

16. The claim made by the Applicant is brought both under the warranties set out under s 8 of the *Domestic Building Contracts Act 1995* and also under the guarantees provided under the *Australian Consumer Law and Fair Trading Act 2012*.
17. The complaint, put simply, is that the brickwork supplied by the Respondent is defective because it has excessive amounts of manganese staining. If proven, that would constitute a breach of s 8(b) of the *Domestic Building Contracts Act 1995* which states:

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; ...
18. It is common ground that the staining affects various sections of the brickwork and this does not appear to be related to parts which are exposed to sunlight as opposed to other parts which are not.
19. However, the Respondent contends that it is a natural phenomenon. It occurs because manganese oxide, used as a colouring agent, is exposed to moisture leading to efflorescence. In particular, the magnesium leaches to the surface of the brickwork, which then causes the bluish stains.
20. Mr Blake who specialises in cleaning manganese staining has a product which is alkaline based, which he uses to clean manganese staining on brickwork. He gave evidence, which I accept, that in the present case continuing the cleaning process will eventually lead to the removal of the stains.
21. I do not accept that the manganese staining on the Applicant's property can simply be described as a natural phenomenon. Although it may be true that the leaching of the manganese arises through natural forces, the

anecdotal evidence suggests that there is something different with the bricks used on the Applicant's property to similar bricks used by the Respondent on its other projects. As highlighted by Mr Laurens, the manganese staining of dark brickwork has only arisen in two or three other instances and in those cases, was able to be cleaned with one or two cleaning treatments. That is not the case in relation to the Applicant's dwelling.

22. In my view, if the manganese staining were a natural phenomenon, one would expect the manganese staining to be more widespread in the building industry. If that were the case, which I do not accept, then it would have been incumbent upon the Respondent to advise the Applicant of the potential risk for manganese staining. There is no evidence that this occurred, which is consistent with this staining not being widespread in the building industry.
23. In my view, the staining of the brickwork is significant, such that I find that the stained bricks are not good and suitable for the purpose for which they are used. In particular, those bricks were chosen by the Applicant because of their aesthetic feature. The staining of the bricks substantially detracts from that feature, such as to constitute a breach of the warranty cited above.
24. Accordingly, I find that some of the bricks used in the construction of the Applicant's dwelling were defective. I do not accept that the staining arose simply because of a natural phenomenon. Something was wrong with some of the bricks used in the construction of the Applicant's dwelling, which has led to an inordinate amount of manganese staining.

DAMAGES

25. The Applicant contends that she should be refunded the full amount paid for the brick upgrade. I do not accept that proposition. The evidence of Mr Blake indicates that the manganese staining can be remedied at a relatively minimal cost. As indicated above, Mr Blake is of the opinion that a further three or four cleaning applications would be sufficient to eliminate the manganese staining. He said that the cost to undertake that work would be \$660 to \$1,000 for each application.
26. In my view, it is appropriate to allow four cleaning applications in order to finally remove the manganese staining. Taking a midway point between the \$660 and \$1,000, I find that the reasonable cost of undertaking the work is \$830 per session, which totals \$3,320. I will allow that amount in respect of the Applicant's claim.
27. The Applicant also claims depreciation of the house value. No expert evidence was adduced in support of that aspect of her claim. However, a letter from a real estate agent was produced in support of that claim. Having regard to my finding that the manganese staining can be

eliminated with further cleaning applications, I do not accept that the value of the house has depreciated by reason of this defect. Once the manganese staining has been eliminated, the problem will disappear.

28. Finally, the Applicant claims an unliquidated amount in respect of the time that she spent in dealing with this problem. Ordinarily, the time spent by a self-represented party in pursuing a claim is not usually recoverable. In any event, no particulars have been provided as to when and for how long the Applicant spent dealing with the problem. In those circumstances, even if this head of damage was recoverable, this aspect of the Applicant's claim is unproven.
29. The Applicant also claims reimbursement of the application filing fee in the amount of \$204.90. Having regard to s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*, I find that as the Applicant has substantially succeeded in her application, it is fair for an order to be made that this amount be reimbursed to her.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	In person
For the Respondent	Ms D Anderson