

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO: D690/2013
SEE ALSO D950/2013

CATCHWORDS

Building and Property List – Domestic Building Contracts Act 1995; Section 8; flooring; replacement; repair; Expert evidence;

APPLICANTS: Mr Adrian Campagna, Mrs Lara Campagna
RESPONDENT: Stakes and Timber Pty Ltd (ACN: 120 151 984)
WHERE HELD: Melbourne
BEFORE: Member D Calabrò
HEARING TYPE: Hearing
DATE OF HEARING: 25 November 2013, 1 September 2014,
2 September 2014
DATE OF ORDER: 4 October 2014
CITATION: Campagna v Stakes and Timber Pty Ltd
(Building and Property) [2014] VCAT 1288

ORDER

1. The Tribunal orders the respondent Adrian Campagna in file number D950/2013 pay the applicant Stakes and Timber Pty Ltd the sum of \$5,953.00. No order for costs. This amount is set off against the amount ordered against Stakes and Timber Pty Ltd in file number D690/2013.
2. The Tribunal orders the respondent Stakes and Timber Pty Ltd in file number D690/13 to pay the applicants Mr Adrian Campagna and Mrs Lara Campagna the set off amount of \$41,546.10.
3. Costs reserved

MEMBER DOMENICO CALABRÒ

APPEARANCES:

For Applicants: Mr Beck-Godoy, Counsel
For Respondent: Mr T. Carroll, General Manager

REASONS FOR DECISION

Background

1. On 20 August 2009 the respondent provided a quotation to the applicants for the installation of an engineered floor at the price of \$32,760.00 inclusive of GST. On 23 August 2009 the applicants accepted this quotation and agreed to pay a further \$400.00 plus GST for bevelled lengths. The total amount agreed to was \$33,200.00 inclusive of GST. The respondent was to seal the slab with a moisture membrane.
2. Prior to this date the respondent had provided a number of quotations for the installation of an engineered floor using different types of wood.
3. The flooring was delivered onsite on 29 October 2009 and laid on a heated concrete slab by the respondent between the months of November and December 2009.
4. The applicants paid the respondent the sum of \$27,247.00.
5. After the floor was installed and stained the applicants noticed that the staining was irregular and wrote to the respondent.
6. The respondent replaced a number of boards on a number of occasions and re-sanded and stained the entire flooring.
7. A number of reports were obtained by the applicants and supplied to the respondent for rectification.
8. On 14 March 2013 the respondent applied to the Victorian Civil and Administrative Tribunal ('the Tribunal') to recover the sum of \$5,953.00 an amount owing under the agreement. See file number D950/2013.
9. On 14 June 2013 the applicants applied to the Tribunal claiming the sum of \$48,000.00. File D690/2013.
10. Both matters were referred to mediation but failed to resolve.

The hearing

11. The matter came before the Tribunal for hearing on 25 November 2013 for a 1-day hearing.
12. Mr Beck-Godoy of Counsel (the applicants counsel) appeared on behalf of the Applicants and Mr T. Carroll, General Manager (assisted by Mr Crinnigan on the first day of hearing only) appeared on behalf of the respondent company.

13. The Tribunal heard the evidence of the applicants and experts for the applicants. There was insufficient time to hear all witnesses including the respondent and his expert and the matter was adjourned part heard for an onsite viewing on 4 February 2014.
14. Due to illness, the Tribunal member was unavailable to hear the adjourned matter in February 2014. On 9 January 2014 Deputy President Aird (in chambers) further adjourned the matter to 28 March 2014. On 11 April 2014 the Deputy President (In Chambers) referred the matter for a directions hearing on 29 April 2014.
15. At the Directions Hearing the Deputy President ordered that the Tribunal be reconstituted under section 108 of the Victorian Civil and Administrative Tribunal Act 1998 (the Act) and relisted the both proceedings before Senior Member Lothian on 30 July 2014 allowing 2 days.
16. On 3 July 2014 the Deputy President made an order in chambers adjourning the matter following the parties consent and under section 108 of the Act and relisted both proceedings before Member Calabrò.
17. Both parties agreed that both matters be heard together. File number D950/2013 and D690/13 as they relate to the same facts and circumstances.
18. On 1 September 2014 the hearing resumed with a viewing at the applicants' home in Donvale. Both experts; Mr Holthouse and Mr Stringer were present together with counsel for the applicants and Mr Carroll for the respondent.
19. Witnesses for the Applicants:
 - a. Mr Adrian Campagna and Mrs Lara Campagna (the applicants);
 - b. Mr Robert Holthouse (the expert).
20. Witnesses for the Respondent:
 - a. Mr T. Carroll, Managing Director (for the respondent).
 - b. Mr Christopher Stringer (the expert).

The Law

The *Domestic Building Contracts Act 1995* ("the Act")

21. The Act in Division 1 of Part 2 sets out the provisions that apply to all domestic building contracts including general warranties concerning general warranties entitlement to compensation.
22. Section 8 sets out the implied warranties, relevantly states:

8 Implied warranties concerning all domestic building work

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract-

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) 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;

- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Actⁱ;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
- (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;
- (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

The Evidence

Mr Campagna, Applicant

- 23. Mr Campagna told the Tribunal that his builder introduced him to the respondent to provide a quotation for flooring. He met Mr Carroll on site and requested that the wood be of maximum width and length to be laid on a heated slab. Mr Carroll told him that his company could lay the flooring for the house and the product and finish would be 'beautiful'.
- 24. He said that he did not have a preference for either European or American oak flooring. The respondent provided a number of quotations and he accepted (via email) the last quotation in August 2009 in the sum of \$33,200.00. The respondent did not advise him that he could not do the work or it would not be a 'good idea' to use the particular product.
- 25. The flooring was delivered in September 2009 and installed in December 2009. After the flooring was laid he was not happy with the flooring (floor boards drumming, uneven staining), and in January 2010 he arranged for Mr Geoff Richardson from ATFA to inspect it.
- 26. After he forwarded Mr Richardson's report the respondent removed and replaced a number of boards in 2010.
- 27. He then noticed that there were splits in the boards, mismatching of staining, uneven sanding and grouping of short boards.
- 28. He arranged for Mr Holthouse to inspect the flooring and provide a report on two occasions.

29. There was a small water leak upstairs that stained the ceiling but there was no damage to the flooring downstairs and he did not notice any water on the flooring.
30. He confirmed that the sum of \$5983.00 is owing to the respondent.
31. On cross-examination by the respondent, Mr Campagna said that the timbers for the flooring were onsite for 3 weeks before they were installed. He did not recall any discussion about temperature of the heated slab. He confirmed that during winter the slab would be usually heated between 19 and 20 degrees and has never found the heating to be above 30 degrees (inadvertently).
32. He confirmed that the respondent had come to rectify some of the defects but had not completed the work. He was given a number of occasions to do so in 2010 but he did not return.

Mrs Campagna, Applicant

33. Mrs Campagna told the Tribunal that she recalled meeting the respondent onsite with her husband and builder after receiving the first quote. She said that when Mr Carroll was asked whether he had installed flooring on a heated slab before he replied yes and they would be very happy with the result. She confirmed that the flooring was delivered onsite in September 2009.
34. After the floor was installed and stained she noticed a problem with the floor including uneven staining, sanding marks and the boards had started to split and crack.
35. She said that she did not direct the respondent to replace the boards but had attempted to contact him about the problem. Mr Carroll finally called in January 2010 and stated that he was waiting on the supplier before he would touch the floor.
36. She confirmed that the report from Mr Richardson was sent to the respondent and they replaced some split boards and re-stained some of the floor.
37. She told the Tribunal that the condition of the flooring got worse after the family moved into the house in June 2010.
38. She said that the respondent did not tell her that there would be a problem with the hydronic heating. She confirmed that her husband set the heating between 19 and 20 degrees and her children could not reach the thermostat to change the temperature.
39. She said that the respondent did not give any warnings about maintenance or any guidelines by the manufacturer.
40. On cross-examination she confirmed that a cleaner using a vacuum and a damp mop cleaned the floor.
41. She said that she did not decide on what type of flooring was to be installed.

Mr Carroll, for the Respondent:

42. Mr Carroll told the Tribunal at the end of May he was contacted by Mr Freeman (the architect) and Mr Quilty (the builder) for the applicants and asked to quote

- on the supply and finish of a floor. He provided a quote to the architect on 4 June 2009 and was asked to provide another quote on 19 June 2009. At a meeting with the architect he was provided with 2 boards of American oak (he was not aware of a 220 engineered floor board before) given a business card of a supplier and asked to provide another quote.
43. He went to the supplier and obtained quotations and provided a quotation to the applicants dated 20 August 2009. He had never dealt with the supplier before.
 44. The quoted price was \$32,760 inclusive of GST. On 24 August 2009 he received an email from Mr Campagna accepting the quote.
 45. After having ordered the flooring he met with the applicants and asked them to turn on the underfloor heating to 20 degrees Celsius. On 20 October 2009 the flooring was delivered and placed in the multipurpose room. The flooring was to be installed after a few weeks of acclimatising.
 46. He told the Tribunal that the flooring was installed as per the manufacturers instructions. After the floor was laid, both he and the architect inspected it and there were no objections.
 47. After the floor was stained it was noticed that there were knots and gum veins and irregular staining. The applicants told him that they were not happy with the knots and gum veins and asked him to replace three boards. He replaced the boards and then the applicants asked him to replace more and more boards. He replaced an estimated total of 30 boards. There was a lot of work required to pull up the boards, to sand stain and coat them.
 48. He said that the flooring product contained C and D grade boards, although he did not quote to the applicants on the grade of the boards.
 49. He told the Tribunal that there was nothing wrong with the boards except for the staining that was due to the variation in the boards.
 50. Mr Carroll said that work stopped in December 2009 because he was not able to get replacement boards. By the third week in February 2010 the applicants were still complaining about the boards.
 51. In the third week in March 2010 he decided to re sand, re coat and re stain the entire floor. It required 5 ml of sanding to take off the coat. After the work was completed the applicants provided him with a copy of Mr Richardson's report. He believed that the floor was completed to industry standard except for the boards that were splitting.
 52. He told the Tribunal that Mr Stringer's report noted that when he took the temperature of the floor it was 27 degrees in the shade and 43 degrees in the sun and this could of concern if the temperature was changing regularly.
 53. In December 2012 he noted water stains on the ceiling in the multipurpose room and concluded that this could have lead to some of the damage to the flooring.
 54. On cross examination he confirmed that he entered into a contract with the applicants n 23 August 2009 and there was nothing in the documentation that stated he was forced to use American oak, although he had quoted other timbers that he recommended previously.

55. He confirmed that his employees prepared the slab using 2-pack membrane. He said he brought the membrane to them and his employees sanded and swept the slab. The employees applied the membrane in two coats during the day.
56. He said that he did not have a copy of the flooring specifications and recommendations for laying as it was not provided. He asked for the specifications from the supplier Floor Group and they gave him verbal instructions, as there were no manufacturers specifications. If manufacturers specifications were not available he would follow Australian Standards.
57. He agreed that the purpose of manufacturers specifications were important to fixing and laying the floor. He said that he had installed timber floors on slabs before and he has installed this type of flooring onto heated slabs before.
58. He said that in previous jobs he has not departed from manufacturers specifications.
59. He told the Tribunal that the flooring was a work in progress and that he was responsible for that work in progress and there were problems with the floor.
60. He agreed that the applicants should not be happy with the floor they have at the moment. He said that the floor was adversely affected by water and heat, but he did not know where the water came from.

Mr Holthouse (expert for the Applicants):

61. He told the Tribunal that he has 17 years experience in the laying of floors.
62. He confirmed that he inspected the floors on two occasions and in his first report he noted that about 15 or 20 percent of the boards had split. He noted that there were uneven staining marks and a significant degree of colour variation and sanding marks.
63. He said that whenever a floor is sanded it takes off the timber veneer and affects the floor. Depending on the type of floor, sanding can take off up to 1 millimetre of the veneer. Veneer can be less than 6 millimetres. It is not expected that this floor would be sanded this many times.
64. In his second report he noted that the study floor was acceptable but other areas were not. There was cupping caused by drying and delaminating in some boards. The gaps in the flooring had increased and the product had not 'behaved well'.
65. There should not be a problem laying flooring over a heated slab if the wood is stable.
66. He was of the opinion that the whole of the floor needs to be replaced, as there was a better chance of the issues not repeating.
67. He disagreed with Mr Stringer's report regarding replacing boards; he said that the number of boards needing replacing would compromise the integrity of the floor. He was of the opinion that previous repairs carried out were not successful.
68. On cross-examination he agreed excessive temperature would be of concern if it was an ongoing basis and the temperature should not exceed 27 degrees.
69. After viewing:

- a. Mr Holthouse told the Tribunal that nothing had changed his opinion that the flooring needs to be replaced. The whole floor had tended to get worse.
70. He confirmed his report of 22 November 2012 and it was consistent with what he saw at the onsite viewing.
71. On cross-examination he said that the first visual impact of the floor was a pleasant one. The bevelling and gapping issues were not as 'large' as others issues. He said he noticed sanding marks and this was not acceptable according to industry standards.
72. He said that replacing the boards would affect the structural integrity of the flooring.
73. He agreed that there was less cupping and warping in the flooring now. He said that given the history of the flooring that it would continue to deteriorate and that the most likely reason for the deterioration was the ongoing heat and the floorings inability to cope with the conditions it is in. It is the product in the environment.
74. He said a floor should last 50 years or more if cared for.

Mr Stringer (expert for the Respondent):

75. He said since his first inspection there were more boards delaminating.
76. He opined that the colour variations could be caused by sun, sanding and staining. He could not recall if the stain used was fade resistant.
77. He could not see any signs of water on the flooring (at its lowest point) in the multipurpose room. He said that 3 things caused cupping and all were moisture related, it could also be incorrect drying of the timber at the manufacturing stage.
78. He was of the opinion that the damaged boards could be replaced and sections sanded then coated. All boards that were delaminating needed to be replaced.
79. He agreed that a floor should last in excess of 50 years.
80. On cross-examination he said that he was not supplied with the manufacturers specifications and as such he was not able to determine whether the floor was laid in accordance to those specifications.
81. He agreed that the floor had not 'behaved properly'. He said it was highly unusual to have 72 splits in the floorboards. When there is underfloor heating it is expected that there will be splits in the wood but in this case there are many.
82. He said that removing in excess of 70 boards would not affect the integrity of the flooring because they are glued onto the slab. He said that sanding would not affect the floor if it were sanded properly.
83. He said that his approach does not offer a successful outcome. He did not know how the floor would perform as there are a lot of variables that could influence the outcome.

Expert Reports for the Applicants

84. The Tribunal notes the following expert reports tendered:
- a. Mr Jeff Richardson, Australian Timber Flooring Association (ATFA), (undated) inspected January 2010 provided a report to the applicants. The applicants did not call him to give evidence at the hearing.
85. Mr Richardson noted upon inspection:
- a. Some boards had developed ‘fine splits’ since the laying of the floor in mid December 2009.
 - b. There were many drummy boards in many areas.
 - c. There was some miss-alignment and gapping of bevel edges adjacent to the end of the joints of boards
 - d. There were uneven staining and overlap marks.
 - e. Putty filled areas and splits (surface cracks) in some sun affected areas.
 - f. Unevenness in the floor
 - g. There were no expansion gaps provided at walls.
- Conclusion (at pages 5 & 6)
- h. Failure to follow manufacturers instructions and recommendations regarding preparation.
 - i. ‘The main cause of these problems (many drummy areas) are the lack of bonding of the blocks to the subfloor. It is likely due to incorrect subfloor preparation, and adhesive application. It is also considered that work practices have not been followed as listed in the recommendations of the Bostik adhesive instruction sheet...’
 - j. He considered that further remedial work was necessary to rectify the drummy areas. Diligence was required when re-sanding, re-staining and recoating.
 - k. He noted that the environment and handling and stacking method after the bevelling might have affected the profile of the boards.
86. Mr Robert Holthouse, Wood Flooring Association (WFA), (report undated) inspected September 2011.
87. Mr Holthouse observed:
- a. There was one board lifting up of (sic) the subfloor along one edge.
 - b. Many boards had long splits running along most of their length.
 - c. Numerous short boards in the floor some adjoining lengthwise giving an unsightly appearance.
 - d. The stain was uneven in some areas with lap and stop marks evident and some replacement boards are a different colour.
 - e. Sanding marks were noticeable

- f. Cupping and warping is evident across many boards with height variation of 3mm+.
- g. He was unclear whether the boards were spread out over the slab for acclimatisation.
- h. He referred to the previous report from Mr Richardson and did not find the 'drumminess' in the boards to be a significant issue but may arise where boards have been replaced and the integration into the sheet lost.
- i. The grouping of short boards adjacent to one another at the window end of the family room was unsightly and did not meet industry installation standards.
- j. The uneven sanding could be easily remedied however given the degree of cupping and warping could significantly compromise the life of the floor.
- k. The continuous board splitting is more of a concern and raised the question of whether the product was fit for the purpose.
- l. The European Oak veneer is continuing to lose moisture and it was unusual for a timber floor to continue to change over the period of time.

“Conclusion:

- m. The floor needs to be replaced and thought needs to be given to a product that has some guarantees with regard to performance in this particular environment.”

88. Mr Robert Holthouse, WFA, (report dated 4 January 2013) inspected November 2012.

- a. He concluded that the study floor was at an acceptable standard with only a minor split in one of the boards.
- b. There was an increase in the number of spits in the floor viewed (approximately 20% of the viewed area). Two splits had become larger than when last viewed and one had caused the veneer to lift.
- c. Cupping was evident in at least 40% of the floor viewed. A number of boards had lifted at the edge.
- d. Gapping between the boards had appeared to become more uneven.
- e. He concluded that the flooring had been adversely affected by heat.
- f. The lifting would appear to be as a result of replacement and having lost tongue and groove patency.
- g. The fact that the walls on the North and South are glass may have contributed to the drying of the surface layer of the Oak veneer, however as the faults spread across the floor where the sun would not reach it is unlikely to have been a significant factor.
- h. He was of the opinion that the floor problems had noticeably worsened over the last year and confirmed that replacement is the best option.

- i. He estimated the costs for the work to be between \$48,000 and \$53,000 including GST.

Expert Reports for the Respondent

89. Mr Chris Stringer, ATFA, (report undated) inspected September 2013
 - a. He conducted a number of moisture tests on the flooring. He stated that it was unlikely that the splitting of the boards was due to poorly dried flooring given the moisture reading.
 - b. He noted the temperature measured in the shade was 27 degrees and 43 degrees in the direct sunlight.
 - c. He found the repairs undertaken previously had been done with a varying degree of success and some were still in need of attention.
 - d. He concluded that the patchiness of the staining and the quality of sanding was not of an industry standard and would require remedial work.
 - e. He could not find any significant cupping of the boards.
 - f. He found that there were raised edges of boards and in regard to splits in the boards he opined that this could be caused by hydronic heating and direct sunlight from windows could contribute to this.
 - g. He considered that the floor could be repaired and brought back to a level that could be 'commercially acceptable'. He did not consider drumminess to be of structural or safety concern.
 - h. All boards that had lifted and delaminated would need to be removed and all split boards cut out and replaced or splits filled with epoxy filler.
 - i. After all boards replaced and splits filled the floor would have to be re-sanded, stained and coated.
 - j. He was of the opinion that the flooring had a 6 millimetre wear layer and could be sanded a number of times without destroying the structural integrity of the flooring.

Site View 1 September 2014:

90. The Tribunal attended the applicants' home in Donvale, present were the applicants, their counsel, the respondent and both experts (Mr Holthouse and Mr Stringer).

The Study:

The experts noted the following:

91. There were splits (ranging from large to minor) in 11 floorboards near the bookshelf. Three boards were lifting (some delaminating). Mr Stringer was of the opinion that he was not sure whether the boards were delaminating or whether it was likely that the cracks on the flooring got bigger.

92. The gaps between the boards were relatively even but there were a number of boards that had larger gaps than others. The respondent's expert was of the opinion that one gap was as a result of a piece of the floorboard being taken out when the floorboard was bevelled. This gapping could be easily rectified.
93. Both experts agreed that the staining in the room was acceptable and the applicant's expert agreed that the staining in the study 'looked pretty good and not a fault'.

Multipurpose room:

94. Both experts agreed that there was one board that appeared uneven in colour; the most likely cause was that the board was not taking the stain and not a defect.
95. There were a number of boards that were incorrectly stained and coloured. The staining of the flooring in this area was uneven and not as a result of the sun fading the colour.
96. Mr Holthouse noted that the whole of the floor had 'gone from better to worse' and Mr Stringer said that he could not comment on this.
97. There were 39 floorboards that had cracks and splits, although Mr Stringer disputed that one board was split. Five boards were lifting and two delaminating. Mr Stringer said that some of the delaminating could have occurred at the factory.
98. There were a number of short boards in this room. Mr Holthouse stated that it was not standard practice to have two or three short boards abutting each other and it was not aesthetically acceptable. Mr Stringer accepted that while there was a defect in the size of one of the short boards that there was no issue aesthetically and there was no standard for this.
99. Both experts agreed that there were no issues regarding gaps in the floorboards.

Kitchen area:

100. Both experts agreed that there were 23 splits in floorboards of varying sizes. There was one board that was lifting and delaminating and two boards were lifting but were normal timber movement.
101. Both experts also agreed that the staining was not at fault.

Resumed hearing 1 and 2 September 2104:

102. Mr Holthouse told the Tribunal that he had not changed his opinion that the whole of the flooring needed to be replaced. He was of the opinion that the whole floor had tended to worsen over time.
103. On cross-examination Mr Holthouse was of the opinion that the most likely cause of cupping and splitting was heat. He confirmed that he agreed with his comments in the report of 22 November 2012 and it is consistent with what he saw at the viewing.
104. He said that the bevelling and gapping were not as big an issue compared to the other issues the flooring had. He noticed train line ridges (sanding marks) on the flooring that were not acceptable industry standards. He agreed that there was less cupping and warping of the floorboards than when he first inspected the floor.

105. He said that the most likely cause of the splitting was the heat and the inability of the timber to cope with the conditions it was in. He was of the opinion that the problem was the product in its environment. That flooring such as this should last for 50 years if cared well and it is likely that this floor would continue to split, crack and delaminate.

Mr Stringer:

106. Said that from his first inspection to the viewing he noticed deterioration in the flooring. There were more floorboards delaminating. He did not recall seeing any delaminating in the floorboards in the study.

107. He was of the opinion that the colour variations in the flooring could be due to the sun, sanding or staining. He did not recall noting whether the stain used was fade resistant.

108. When asked by counsel for the applicants whether he noticed any water going to the low spot in the floor and affecting the floor, he did not notice any water damage. He said that there were three things that caused cupping in floors and all were moisture related. It could be incorrect drying of the product at the manufacturing stage.

109. When asked if the flooring should be replaced or sanded he stated that the floor could be repaired, that some sections replaced and then sanded and recoated. All boards that were delaminated and had bad splits needed to be replaced and the minor splits filled with epoxy.

110. He told the Tribunal that he was not provided with the manufacturers specifications and was not able to determine if the floor was laid in accordance with those specifications. He could not comment on whether the floor not being laid in accordance with a manufacturers specifications would have problems.

111. He agreed that the floor has not behaved properly. He agreed that it was highly unusual to have 72 boards with splits in the flooring. When 'you introduce underfloor heating you will get splits but in this case it is a lot'.

112. He could not comment on whether it was unusual for an installer to return 12 to 15 times to repair the floor because he did not know the extent of the work done during these times.

113. He commented that there was no certainly that the floor was going to get worse next week. If the worse boards were replaced and repaired then sanded and recoated the floor would be 'good'.

114. When asked by counsel if the integrity of the flooring would be compromised if a significant number of boards were replaced, he said that as the boards are glued onto concrete, the integrity of the flooring would not be compromised.

115. While there were sanding defects, sanding will not affect the floor. He did not know how a floor would perform once laid, as there were a lot of variables that can influence its performance.

116. Both experts agreed that the flooring is deteriorating since it was laid in mid December 2009. However, they differ on how to remedy the defects in the flooring. Also not in dispute is that the flooring has continued to deteriorate since they both inspected it.

FINDINGS

117. The applicants and respondent are parties to a contract to lay flooring at the applicants' house in Donvale as evidenced by a series of emails in August 2009.
118. The work was completed in mid December 2009.
119. The applicants paid the respondent company the sum of \$27,247.00 and withheld the balance of \$5953.00. There is no dispute that the applicants owe this sum to the respondent company.
120. Both experts who gave evidence agree that the flooring has faults that are summarised as:
 - Staining
 - Sanding marks
 - Cracking
 - Splitting
 - Lifting and delaminating
121. The major defects are:
 - Cracking or splitting of the wood
 - Lifting or delamination
 - Approximately 70 boards are affected across all rooms
122. The respondent has been to the premises on 14 – 15 occasions to rectify the problems.
123. The 14 or 15 occasions were required because each plank requiring rectification needed a number of visits to remove, replace, sand, stain, and coat.
124. The flooring is deteriorating and has done so since it was laid. In the last 3 years the floor has deteriorated significantly in that it has significantly more cracks, splits and some delaminating of boards.
125. The Tribunal accepts the evidence of both experts that the flooring has deteriorated since their inspection in 2010 – 2011, although they do not agree on whether the floor can be rectified or needs to be removed and re-laid. It is reasonable for the Tribunal to conclude based on the evidence before it that the flooring will continue to deteriorate in the future and replacing boards and sanding is insufficient to rectify the defects.
126. The respondent has attended the premises on 15 occasions to rectify some of the work and this has not been successful. Mr Stringer in his report also notes the rectification work will require further rectification. I accept the opinion of Mr Holthouse that replacing this number of boards could affect the integrity of the floor. This is evidenced by the fact that the respondent has replaced a number of the boards previously and the flooring is still continuing to deteriorate, despite them being fixed onto the slab.
127. The respondent laid the flooring without manufacturers specifications and requirements. He told the Tribunal that he had not laid flooring that was 2200mm wide before but had laid similar floors on slabs. He said that he laid the floor according to 'industry standards'. No details were provided to the Tribunal on what the industry standards were or whether they related to this particular

type and size of flooring. He said that his company was not provided with manufacturers specifications and directions on installation. He had discussions with the retailer about the installation. There was no evidence on what this discussion entailed and the process recommended by the supplier. The respondent did not call the supplier to give evidence.

128. I note that the respondent did not call any of his installers to give evidence about the preparation, installation or repairs made. This is crucial to whether the flooring was laid in accordance with the manufacturers requirements or the supplier's recommendations, and whether due skill and diligence was used. While I accept that Mr Carroll supervised the job, he was not present during the preparation and laying for all of the work and could not give direct evidence on the total work done when the floor was first laid.
129. The respondent did not subpoena the builder or architect to give evidence regarding his assertions that he was instructed to purchase the type of wood and product. I accept the applicants' evidence as credible that the respondent not instructed to use a particular product.
130. The respondent did not provide evidence on how the slab was prepared prior to applying the waterproof membrane. There was no evidence whether the slab was level when the company applied the membrane prior to laying the floor.

The flooring:

131. There is uneven staining across the whole of the wooden floor in the study, multipurpose room and kitchen areas.
132. There are 11 boards splitting and cracking and 3 boards lifting and delaminating in the study.
133. Both experts agree that the staining in the study looks good and is not a fault
134. I do not find the gaps on the flooring, between the boards to be a defect, having regard to the evidence by both Mr Holthouse and Mr Stringer. I note the agreement between both experts (at the viewing) that gaps are aesthetic, and 'in the eyes of the beholder'. The gaps can be rectified easily.
135. There are 33 boards splitting and cracking and 5 boards lifting and in some cases delaminating in the multipurpose room.
136. There are 23 boards splitting and 1 board lifting and delaminating in the kitchen area.

The leak:

137. There is no evidence before me to conclude that the deterioration of the floor in the multipurpose room is because of a leak in that room. While it is accepted that there was a minor leak upstairs, staining the ceiling, there is no evidence of the leak having damaged anything except staining the ceiling in the multipurpose room.

CONCLUSION

138. I accept that the applicants were the persons who contracted with the respondent as evidenced by the emails of 20 August 2009 and the acceptance email dated 23 August 2009.
139. I find that the floor laid by the respondent company in the study, kitchen/dining room and the multipurpose room was defective because of the respondent's workmanship and the product was not fit for the environment that it laid in. The respondent company is in breach of the warranty implied by s 8 of the Act in that the respondent purchased the product and laid the product without recourse to the manufacturer's recommendations on laying. He did so at his peril given his evidence that he had not worked with boards that were 220mm wide despite his experience.
140. I accept the evidence of Mr Holthouse over the evidence of Mr Stringer as to whether the floor could be repaired or replaced. Mr Holthouse inspected the floor on three occasions including the viewing. His reports and evidence to the Tribunal is that the floor will continue to deteriorate and replacing boards will not in his opinion remedy the situation. This is evidenced by the continuing deterioration of the flooring including some of the boards that were replaced by the respondent.
141. Both experts agree that there has been deterioration of the flooring since it was laid. They agreed that the cupping and lipping of the boards had diminished and the cupping in the study had reduced. The splitting in the boards in all rooms had continued and in all areas extended. On viewing it was agreed by the experts that some boards that had minor splits previously had deteriorated and boards that did not have any splits now had splits developing. I find that the floor as deteriorated and will continuing to deteriorate because of the flooring product and its installation by the respondent.
142. It is not in dispute that the flooring has deteriorated since it was laid in 2009, I conclude on the evidence before me that it was as a result of the respondent having laid the flooring without the manufacturers specifications and requirements and not having proper regard to the type of product for the environment that it was to be placed in. As a result the flooring is defective in that it has continued to deteriorate since its installation and will require total replacement.
143. I accept the evidence from the applicant's expert that the cause of the failure by the product was because of the installation of the product by the respondent and the product itself.
144. On the evidence before me I do not accept that the defects in the floor can be rectified. I accept that the floor has continued to deteriorate since it was laid and in a majority of areas it has significantly deteriorated during this period. The Tribunal concludes that the floor will continue to deteriorate in the future and replacing the boards, sanding and staining will not cure the defect. The only proper course is to order that the respondent pay for the floor to be removed and replaced.

145. The Tribunal orders the respondent Stakes and Timber Pty Ltd in file number D690/13 to pay the applicants Mr Adrian Campagna and Mrs Lara Campagna the sum of \$47,499.10 for removal and replacement of floor.
146. The Tribunal dismisses the claim for \$4233.00 for accommodation. There is no evidence to before me that the work will require the applicants to move out of the house or that the work cannot be completed unless they move house during this time.

Counterclaim by Stakes and Timber Pty Ltd v Adrian Campagna D950/2013

147. There is no dispute by the respondent (Mr Campagna) that he did not pay the full amount owing under the contract. He withheld the final payment of \$5953.00 (inclusive of GST).
148. The applicant completed the work (the issue of how it was completed and any rectification or compensation payable is discussed above). \$5953.00 remained outstanding.
149. The respondent's counsel submitted that the Tribunal should set off any amount owed by the respondent in this case (D950/2013) against any monetary order the Tribunal makes in the case D690/2013.
150. The Tribunal orders the respondent Adrian Campagna in file number D950/2013 pay the applicant Stakes and Timber Pty Ltd the sum of \$5953.00.
151. The amount of the claim is less than \$10,000. I follow the provisions of section 109 of the *Victorian Civil and Administrative Tribunal Act 1997* and make no order for costs.

The claim by Mr and Mrs Campagna

152. This amount is set off against the amount ordered against Stakes and Timber Pty Ltd in file number D690/2013, so that the amount payable by Stakes and Timber Pty Ltd must pay the applicants Mr Adrian Campagna and Mrs Lara Campagna the sum of \$41,546.10.
153. Costs reserved.

Domenico Calabrò
Member
