

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP806/2016

CATCHWORDS

Australian Consumer Law ('ACL'); application to contract for construction of driveway, side paths and rear porch; ACL s 60; s 267; s 268; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 184.

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| FIRST APPLICANT | Mr Christopher Cataldo |
| SECOND APPLICANT | Ms Mary Cataldo |
| RESPONDENT | Mr Matteo Tardio |
| WHERE HELD | Melbourne |
| BEFORE | Member C Edquist |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 31 August 2016 |
| DATE FOR FILING OF APPLICANTS' SUBMISSIONS | 13 September 2016 |
| DATE FOR FILING OF RESPONDENT'S SUBMISSIONS | 27 September 2016 |
| DATE OF REASONS | 31 January 2017 |
| DATE OF ORDER | 23 December 2016 |
| CITATION | Cataldo v Tardio (Building and Property) [2017] VCAT 14 |

ORDERS

- 1 By consent, the applicants have leave to be represented at the hearing by a professional advocate.
- 2 Under s124 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') I declare that the contract was made between the applicants and the respondent Mr Matteo Tardio.
- 3 Under s 127 of the VCAT Act I amend the name of the respondent from Mr Matteo Tardio t/as Gargano Paving & Bobcat and Tipper Hire to Mr Matteo Tardio.

- 4 The respondent must pay to the applicants damages in the sum of \$16,450.
- 5 There is liberty to the applicants within 60 days to send to the respondent and to the Tribunal submissions in respect of interest, costs and as to whether under s 115B of the VCAT Act the respondent should be ordered to reimburse to the applicants the filing fee paid by them of \$575.30. Alternatively, the applicants may apply within 60 days to the Tribunal for a hearing in respect of those matters.
- 6 If the applicants send the respondent submissions regarding interest, costs and reimbursement of the filing fee, the respondent may respond with 30 days of receipt. If the respondent does not do so, the Tribunal may make orders regarding interest and costs in any event.

MEMBER C EDQUIST

APPEARANCES:

| | |
|----------------|-------------------------|
| For Applicants | Mr T Dowling of Counsel |
| For Respondent | Mr M Tardio, in person |

REASONS

Introduction

- 1 The Orders set out above were issued on 23 December 2016. I now set out my reasons for those orders.

Background

- 2 Ms Mary Cataldo owns a house in Power Street, Pascoe Vale South, Victoria. Her son, Christopher Cataldo, lives there.
- 3 In late 2015, Ms Cataldo and Mr Cataldo decided to improve the property by having a drive, side paths and a back porch laid in concrete. They spoke to a couple of contractors. One of them was Mr Matteo Tardio.
- 4 After some discussions, the Cataldos entered into a contract for the concreting work. They assert the contract was with Mr Tardio. The contract sum was \$16,500. The parties agree that the contract sum was paid in full by instalments.
- 5 The Cataldos have come to the Tribunal seeking damages from Mr Tardio assessed on the basis that much of the work is defective and must be removed and redone. They assert that the specification for the concrete set out in the quotation was modified by discussions that resulted in two terms being incorporated into the contract, relating to its colour and the appearance of the exposed aggregate. They assert that the driveway, paths and porch are the wrong colour; and that the level of exposure of aggregate contained in the concrete is insufficient. They complain of an uneven surface, stains in the concrete, and cracks. They also assert that water flows off the porch towards the house, not away from it. They pursue a claim for breach of statutory warranty. They primarily assert that the contract had implied into it the warranties arising under s 8 of the *Domestic Building Contracts Act 1995* ('DBC Act'). They make an alternative claim that they are entitled to the benefit of the statutory guarantees applicable to the supply of goods and services under the *Australian Consumer Law* ('ACL'). They rely on the expert evidence of Mr Tom Casamento. They wish to recover in addition to damages the cost of Mr Casamento's report, interest and costs.
- 6 There is a threshold issue about the contract, raised by Mr Tardio. This is whether the contract was made between Ms Cataldo and Mr Cataldo on the one hand, and Mr Tardio, or his company, on the other. The Cataldos say that the other party to their contract was Mr Matteo Tardio trading as Gargano Paving & Bobcat and Tipper Hire. Mr Tardio says the entity that formed the contract on his behalf was Gargano Paving Pty Ltd ACN 610 918 673.
- 7 Mr Tardio disputed at the hearing the relevance of the DBC Act. The prospect that the *Australian Consumer Law* ('the ACL') might apply was

raised by the Tribunal at the hearing. The parties were permitted to file written submissions after the hearing about the application of both the DBC Act and the ACL. Both parties did so.

Who are the contracting parties?

- 8 It is appropriate to deal with this issue first, because if it is found that the Cataldos entered into a contract with Mr Tardio's company rather than himself, Mr Tardio will be entitled to have the proceeding dismissed.
- 9 The Cataldos, in their points of claim, allege that the contract, to the extent that it was in writing, was constituted by a written quotation issued by Mr Tardio to them dated 6 November 2015 numbered 1920 ('the quotation'). The quotation was on the letterhead of Gargano Paving & Bobcat and Tipper Hire which, they assert, is owned by Mr Tardio. This explains why, when they instituted the proceeding, they identified the respondent as Mr Matteo Tardio t/as Gargano Paving & Bobcat and Tipper Hire.
- 10 When Mr Cataldo gave evidence, he deposed that he was contracting with Mr Tardio personally. He did not alter his evidence when he was cross-examined. On the contrary, he confirmed that he made payments under the contract to Mr Tardio. He noted that the name of the account shown on the quotation was 'M Tardio'.
- 11 In rebutting Mr Tardio's contention that the entity that entered into the contract was Gargano Paving Pty Ltd ACN 610 918 673, the Cataldos also rely on a company search which indicates that this company was registered only on 23 February 2016. This was some months *after* the formation of the contract.
- 12 I accept the contention of the Cataldos that, as Mr Tardio's company was registered after the contract came into existence, the contracting party must have been Mr Tardio, trading either under a business name or on his own account.
- 13 The quotation dated 6 November 2015 in the name Gargano Paving & Bobcat and Tipper Hire carried the ABN 32 373 988 519. Mr Cataldo put into evidence an ABN Look-up search for this ABN. The search revealed that this ABN related not to Gargano Paving Bobcat and Tipper Hire but to a family partnership carrying the entity name M Tardio & T Tardio. The ABN status shown was: 'Cancelled with effect from 30 Jun 2007' (sic). I conclude accordingly that this entity is not relevant to the contract.
- 14 Mr Cataldo also put into evidence an ABN Look-up search for ABN 74 508 851 230. The entity name was 'Tardio, Matteo' and the entity was described as 'Individual/Sole Trader'. The ABN status was: 'Active from 24 Aug 2006'.
- 15 Of all the registered business names and the company name associated with Mr Tardio referred to in evidence, ABN 74 508 851 230 is the only one

which was active at the time the contract was formed. Accordingly, I find that the contracting party was Mr Matteo Tardio.

The alleged oral terms of the contract

- 16 The first of these terms related to the colour of the concrete. Ms Cataldo, in her evidence, said that she made it quite clear to Mr Tardio that she wanted the concrete tinted cream, to match the house. When she was asked by the Tribunal whether this amounted to a term of the contract, she said that it did.
- 17 Mr Tardio disagreed that he was obliged to colour the concrete cream in order to match the house. He pointed out that the quotation did not refer to the concrete being of any particular colour. His evidence was that the particular cream colour Ms Cataldo wanted was not available. The job took place late in the year, and it was not possible to have the required colour supplied before Christmas. Accordingly, it was ultimately agreed with Ms Cataldo and Mr Cataldo that a colour close to cream would do.
- 18 On the basis of Mr Tardio's explanation, which was not challenged by the Cataldos, I find that it was not a term of the contract that the colour of the concrete had to match the cream colour of the house.
- 19 The second oral term alleged concerned the quality of the exposed aggregate. Ms Cataldo said that her son had shown Mr Tardio, before the job was done, a photograph on his phone of another job, and that her son had said that they wanted the same finish.
- 20 Mr Cataldo confirmed that on or about 30 November 2015 he sent two photographs to Mr Tardio on his mobile phone. The first was of a path made of exposed concrete taken at a friend's place, and the second was a photograph of exposed concrete taken from a brochure. Mr Cataldo said that he told Mr Tardio that the photos showed the standard he wanted. Mr Tardio did not disagree with Mr Cataldos evidence. I accordingly find that it became a term of the contract that the exposed aggregate was to be of the standard shown in the photos.

Is the contract subject to the DBC Act?

- 21 In their written submissions the Cataldos refer to s 5(1) of the DBC Act. This provides:
 - (1) This Act applies to the following work—
 - (a) the erection or construction of a home, including—
 - (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and

- (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;
- (b) the renovation, alteration, extension, improvement or repair of a home;
- (c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;
- (d) the demolition or removal of a home;
- (e) any work associated with the construction or erection of a building—
 - (i) on land that is zoned for residential purposes under a planning scheme under the **Planning and Environment Act 1987**; and
 - (ii) in respect of which a building permit is required under the **Building Act 1993**;
- (f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);
- (g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);
- (h) any work that the regulations state is building work for the purposes of this Act.

22 The Cataldos argue that the effect of s 5(1)(a)(i) is that the erection or construction of a home **includes associated work** including, but not limited to, landscaping, **paving and the erection or construction of any building or fixture associated with the home** (such as retaining structures, **driveways**, fencing, garages, carports, workshops, swimming pools or spas). (Emphasis added).

23 The Cataldos' argument involves two sub-contentions. The first is that the driveway, pathways and porch which are the subject of the proceeding are 'associated works', irrespective of the fact that they were completed at a time after the house itself was built. The second is that, as there was evidence that there was a plan to install a step from the paving into the house, the works were caught by s 5(1)(c) as they were carried out in conjunction with the extension or improvement of the home.

24 The Cataldos contend the decision of the Court of Appeal in *Cardona v Brown*,¹ supports their argument that the DBC Act applies beyond a narrow

¹ [2012] VSCA 174.

definition of 'home'. They quote Tate JA (with whom Bongiorno and Osborn JJA agreed) at [81]:

On one view, s 5 adopts a narrow construction of 'home' and treats garages, workshops, driveways and the like as work 'associated with the home' rather than part of the home itself. In particular, s 5(1)(a)(i) and s 5(1)(c) appear to distinguish between 'the home' and work associated with, or performed in conjunction with, the construction of the home. It may be that, in the context of s 5(1)(a)(i) and s 5(1)(c), the word 'home' has a narrow meaning, reflecting what might be better described as the 'house'. But this is because the purpose of s 5 is to ensure that not only the house, but also the associated work such as a garage, are treated as included within the erection and construction of the home to attract the application of the Act. Section 5 is intended to ensure that the rights and obligations of builders and owners created by the Act apply with respect to all parts of a home, including the construction of associated work such as garages. That is, the distinction made by s 5(1)(a)(i) and s 5(1)(c) is drawn for the purpose of ensuring that the Act applies not only to the house (or to the 'home' narrowly construed) but also to the associated work. In that context, the narrow meaning of 'home' is employed in s 5(1)(a) and s 5(1)(c) as an intermediate step in identifying how extensively the Act is to apply; it is employed to demonstrate that the Act applies beyond the 'home' narrowly understood. The intention of the Act is to apply to 'the home', broadly construed as including associated work such as garages. This is supported by the wide statutory definition given by s 3 to 'home', namely, 'any residential premises'. The object of s 5(1)(a) is clearly to ensure that the erection or construction of a home is, for the purposes of the Act, to include associated work such as garages.

- 25 On this basis, Tate JA found that the garage in question formed part of the house.
- 26 Instructive as her Honour's observations in *Cardona* on the operation of s 5(1) of the DBC Act are, they are not, in my view, determinative of the issue in the present case. In *Cardona*, the home owners had entered into a building contract for the construction of a new home. The contract called for the construction of a brick veneer dwelling including a garage. The house and the garage were to be covered by the one roof. An issue which arose in the appeal was whether the builders had been entitled to issue a progress claim for the lock up stage at a point where the doors to the garage had not been fitted. Having determined that the garage formed part of the house, Tate JA went on to hold that the failure of the builders to install either the roller doors specified in the plans, or temporary doors, left the home in a state where the external doors were not fitted. Accordingly, the dwelling did not satisfy the definition of 'lock-up stage' at the time the builders made their progress payment claim for completion of the lock-up stage.

27 In the current proceeding, the evidence was that the house was pre-existing. I note it was apparent from the inspection that the house had been standing for many years. The driveway, side paths and porch were constructed under a contract which had nothing to do with the construction of the house itself. In these circumstances, I am satisfied that the concrete work in this case is not caught by s 5(1)(a), that is to say, the construction of the driveway, side paths and the porch are not work ‘associated [with] the erection or construction’ of the home.

28 I consider that the need for a nexus between the construction of the driveway, side paths and the porch and work on the home itself, arises from s 5(1)(c) which has the effect of expanding the type of work to which the DBC Act applies. Section s 5(1)(c) refers to:

... any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas **that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;** (Emphasis added)

29 I acknowledge the point made by the Cataldos regarding the effect of s 35(a) of the *Interpretation of Legislation Act 1984* (Vic), to the effect that a construction of a provision that would promote the purpose or object underlying the DBC Act is to be preferred to a construction that would not do so.

30 I agree with the Cataldos further submission that a relevant object of the DBC Act appearing in s 4 is:

to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as possible having regard to the needs of fairness.

I note that Mr Tardio concedes those points in his written submissions.

31 However, I do not think that it can be said that the over-arching principle set out in s 35(a) of the *Interpretation of Legislation Act 1984* assists in determining how s 5(1)(c) of the DBC Act is to be interpreted. This is because s 5(1)(c) is, in my view, unambiguous, and so no particular interpretation is to be preferred over another.

32 Turning to the Cataldos final submission regarding the application of the DBC Act, I consider the evidence that there was a plan to install a step from the paving into the house does not improve the situation from the Cataldos point of view. This is because, in my view, the construction of a step connecting the paving to the house does not itself mean that the construction of the paving was to be carried out in conjunction with the ‘renovation, alteration, extension, improvement or repair’ of the home. I do not regard the construction of a step as a material renovation, alteration, extension or improvement of the home. To accept that the mere construction of a step had such a characteristic would, in my view, fly in the face of Parliament’s intention when it passed s 5 of the DBC Act, which

was clearly to draw a distinction between work to be constructed outside a home but in conjunction with its construction, and work which is to be constructed separately to the home and at a different time. Work in the first category is to be considered *domestic building work* for the purposes of the DBC Act, and work in the second category is not.

- 33 If I am mistaken in my view as to the importance of the construction of a mere step, I note that, in any event, the facts are against the Cataldos. Even if it is accepted that there was a plan to install a step from the concrete paving to the doorway of the house, there was no suggestion that the step was to be constructed by Mr Tardio, and there was no evidence as to the timing of the construction of the step. Accordingly, I am not satisfied that the construction of the step – if it was an act of renovation, alteration, extension, improvement or repair of the home – was carried out ‘in conjunction’ with the construction of the driveway, pathways and porch for the purposes of enlivening s 5(1)(c) of the DBC Act.
- 34 I accordingly find that the DBC Act does not apply to the driveway, pathways and porch. In reaching this conclusion, I have arrived at the outcome contended for on this issue by Mr Tardio.

Mr Tardio’s submissions regarding the application of the ACL

- 35 In his written submissions, the first substantive argument put by Mr Tardio is that, in their points of claim, the Cataldos alleged that a contract existed between them and himself and that such a contract was a ‘domestic building contract’. He says that in no part of their application did the Cataldos make any allegation that he was in breach of the ACL, and that such an allegation was only raised in the Cataldos’ written submissions dated 12 September 2016 (that is to say, after the conclusion of the hearing). Mr Tardio denies the Cataldos have any cause of action against him under the ACL. He says further that, having failed to make any proper reference to and/or particularisation of breach of the ACL in either their application or in their points of claim, the Cataldos are now barred from introducing any allegation regarding breach of the ACL. He goes on to say that the purpose of the submissions filed pursuant to the Tribunal’s orders of 31 August 2016 was not to allow the Cataldos to raise new causes of action, allegations or evidence. He asserts that if the Cataldos want to make any allegations under the ACL regarding his conduct then they ought to amend their pleading ‘through the proper channels and seek orders to amend their points of claim’. Mr Tardio says that if allegations of breach of the ACL are particularised then he should be given an opportunity to defend, and respond to the allegations. Finally, Mr Tardio says that if the Cataldos propose to continue with a claim against him based on the ACL, they cannot do so in the Tribunal’s Building and Property List, but must do so in the Civil Claims List.

The Cataldos' response to Mr Tardio's submissions

36 After Mr Tardio had filed his submissions, the Cataldos' lawyers wrote to the Tribunal highlighting the limited nature of the leave to file submissions granted by the Tribunal on 31 August 2016. The Cataldos' lawyers went on to note that Mr Tardio's submissions appeared to make a pleading point with respect to the Cataldos reliance on the ACL. They noted that no objection was taken by Mr Tardio to the introduction of the ACL claims at the hearing. They also pointed out that no defence had been filed prior to the hearing notifying the jurisdictional argument now raised. They formally objected to the contents of the submissions in so far as they related to anything beyond a response to the limited question of the application of the DBC Act or the ACL.

Reply of Mr Tardio to the Cataldos' response

37 Mr Tardio's lawyers then wrote to the Tribunal noting their surprise that the Cataldos had taken the liberty of responding to their client's submissions. With respect to the failure of Mr Tardio to file a defence, they went on to reiterate their view that the pleading had no place in the Building and Property List and accordingly 'there is no claim to respond to'. They went on to say:

Indeed, this jurisdictional issue was identified by the Tribunal on 31 August 2016, which led the Tribunal to make orders that it did.

38 Mr Tardio's lawyers also said that if the Tribunal determined that the proceeding should continue in the Building and Property List, then their client would defend the matter and would require orders for access to the property for the purposes of inspection, so that an expert report could be prepared, and for points of defence to be prepared.

The Cataldos' rebuttal

39 The Cataldos responded through their lawyers on the same day. Not only did they reiterate some points previously made, but they pointed out that the evidence had been concluded, and submitted that the Tribunal was 'all but *functus officio* subject to its judgment'. They stated Mr Tardio had attended the hearing and had not sought an adjournment. They notified that if Mr Tardio sought to re-open his case, the Cataldos would seek costs on a full indemnity basis.

Discussion

40 I acknowledge the point made by Mr Tardio's lawyers that the Orders of 31 August 2016 did not expressly grant leave for the filing of any response submissions by the Cataldos. However, neither party ought to be shut out from making a submission if it considers that it has a legitimate point to make. Accordingly, I have considered each response made by the Cataldos, and the comments made by Mr Tardio's lawyers in respect of those responses, and the Cataldos' rebuttal of those comments.

- 41 I consider that the Cataldos make a sound point in that the Orders made by the Tribunal dated 31 August 2016 did not constitute an invitation to Mr Tardio to make general submissions, including an attack on the Cataldos' alternative claim under the ACL made at the hearing.
- 42 I turn now to Mr Tardio's response submissions concerning the Cataldos' contentions about the ACL. The central argument put forward by Mr Tardio, namely, that the ACL was not raised the hearing, is inaccurate. The proposition that the DBC Act applied was questioned by the Tribunal at the hearing, and the possible application of the ACL was discussed extensively. These are the reasons why the orders made on 31 August 2016 allowed the parties to make submissions both as to the application of the DBC Act and the ACL. The jurisdictional issue arising at the hearing was limited to the question of whether the claim was properly made under the DBC Act, not whether the Tribunal, sitting in the Building and Property List, had any jurisdiction at all.
- 43 Mr Tardio's supplementary submission to the effect that a case involving the ACL cannot be heard in the Building and Property List is misconceived. One of the enabling enactments providing jurisdiction to the Tribunal for the Building and Property List set out in cl 7 of Schedule 1 to the *Victorian Civil and Administrative Tribunal Rules 2008*. Clause 7.1 refers to the *Australian Consumer Law and Fair Trading Act 2012* ('the 'ACLFT Act'), which is the Victorian legislation which brings the ACL into Victorian law.
- 44 There is no basis for Mr Tardio to be given any further opportunity to defend the matter. A claim for damages of \$18,190 was made against Mr Tardio in the application filed with the Tribunal. The application referred to points of claim. The points of claim articulated a claim for breach of a contract for concrete paving works to a driveway on Ms Cataldo's property for a sum of \$16,500. The date of the contract was erroneously referred to as 5 May 2015, but Mr Tardio can have been under no misapprehension as to what contract was being referred to. The points of claim particularised the defects in the work complained of, and made it plain that damages of \$17,200 were sought to cover the cost of rectification. It is true that the claim was based on the statutory warranties implied by the DBC Act. However, in my view, whether the claim was based on the warranties implied into the contract by the DBC Act, or on one or more of the consumer guarantees created by the ACL, is a secondary issue. The primary issue relates to the quality of the works performed or the services provided by Mr Tardio. Mr Tardio did not file a defence asserting that the DBC Act did not apply. He came to the hearing prepared to defend the claim. He elected not to engage any expert witnesses. At the hearing, it was the Tribunal, not Mr Tardio, which raised the proposition that the DBC Act might not apply, but that the ACL might. The relevant sections of the ACL were discussed. Mr Tardio did not seek an adjournment. Evidence was heard from both sides, and the hearing was concluded. Both sides were given the opportunity to make written submissions after the hearing about

the relevance of the DBC Act and/or the ACL to the proceeding. There is no basis for the hearing to be re-opened.

Jurisdiction of the Tribunal with respect to the ACL

- 45 As this proceeding involves a dispute or claim arising between a purchaser of goods or services and a supplier of goods or services in relation to a supply of goods or services, it falls within the definition of a *consumer and trader dispute* under s 182 of the ACLFT Act. Accordingly, the Tribunal has jurisdiction to hear the dispute pursuant to s 184(1) of that Act.
- 46 As the contract had a value of under \$40,000, each of the Cataldos is a consumer within the meaning of that term given in s 3 of the ACL. Moreover, the relevant services, rendered as they were in relation to the construction of a concrete driveway/carport, side paths and porch at a house, were services which were inherently of a kind acquired for domestic household use and consumption. On this basis also, the definition of consumer in s 3 is enlivened. The Cataldos are therefore potentially entitled to the protection available in respect of consumer transactions in the form of guarantees created under Division 1 of Part 3-2 of the ACL.²

THE DEFECTS COMPLAINED OF

Mr Casamento's evidence

- 47 The Cataldos' principal complaints are catalogued in a report prepared by their expert witness, Mr Tom Casamento, of TMC & Associates dated 1 May 2016. Mr Casamento was called and was cross-examined on his report.
- 48 Mr Casamento inspected the house on 5 March 2016. He had been instructed by 'the Owner' to inspect the recently installed concrete driveway, and the concrete on the side and rear of the building, and advise if the finish of the exposed concrete was defective.
- 49 In respect of the carport and driveway, which had been installed with light coloured exposed aggregate, he found that the quality of the workmanship was considered to be 'very substandard with many defects observed'. In particular, he said at [5.3-5.80:

The river pebble aggregate is very sparsely installed with a very patchy surface appearance. Many areas have very poor coverage of aggregate ...

The surface is undulating and wavy caused by very poor screeding technique. There are depressions in the surface of 12 mm over a 1200

² As provided in s 7 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* the *Australian Consumer Law* text is found in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* and in the regulations made under s 139G of that Act. The *Australian Consumer Law* text applies as a law of the State of Victoria pursuant to s 8(1)(a) of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*.

mm length, which would cause water bondage. This is considered well outside of acceptable tolerances ...

The surface is scarified with float marks ...

There are multiple cracks throughout the slab ...

There appears to be pigmentation seeping through to the surface in some areas, causing a stained appearance.

The join between the driveway and cross-over was not formed, and the driveway concrete merely cast up against it. This is considered extremely poor workmanship and unacceptable.

50 With respect to the rear paving, Mr Casamento said:

Rear paving is sloping towards the building rather than away from the building. As a consequence water is ponding along the wall, which will eventually have an effect on foundation performance. Footing must be kept dry at all times.

Concrete has been left covering the drainage grate, and poor finish along the edges.

Fine hairline cracks to re-entrant corners may be due to the non-installation of diagonal reinforcing bars.

51 When in the witness box, Mr Casamento confirmed the contents of his report, and made some additional comments. Regarding the colour, he explained that there could be variations in the aggregate, but said that the cement paste itself should be constant. It was patchy.

52 Regarding the unevenness of the surface, Mr Casamento referred to photographs 8-10 in his report, and said that they demonstrated that there was a 12mm depression which exceeded the 'acceptance tolerances'.

53 As to cracking in the concrete, Mr Casamento deposed that all concrete shrinks, but that it ought to be cut within 24 hours in order to achieve cracking in the saw-cuts. He referred to a photo showing cracks in the concrete. He said the acceptable thickness of cracking was 0.3-0.5mm. Here, he said, 'there are cracks 2mm wide'.

54 With respect to the cross-over, Mr Casamento deposed that it was good building practice to create a straight edge. Although he conceded that Mr Tardio was correct in saying that he could not rebuild the cross-over without council permission, patching would have been permissible.

55 As regards the slope of the concrete at the rear, he confirmed that he had sighted water stains on the wall, demonstrating that water was ponding at the building, which established a breach the relevant Australian Standard AS 2870 which related to footing design. He also referred to BTF 18 published by CSIRO.³

³ No doubt a reference to CSIRO Building Technology File 18 - Foundation Maintenance and Footing Performance: A Homeowner's Guide.

- 56 Mr Casamento referred to his photographs 29 and 30 which showed the presence of concrete on the drainage grate. He said that the concrete could be removed, but that it should not have been left in that state.
- 57 Finally, Mr Casamento opined that cracks in the corner joints suggested that the diagonal reinforcing bars had been placed above the reinforcing mesh.

Mr Cataldo's evidence

- 58 Mr Cataldo gave evidence at the hearing. He deposed that, after the concrete had been laid and sandblasted, he could see no 'rocks' (no doubt meaning aggregate). He also said he could see 'no colour'. There were no saw-cuts in the concrete. He said he spoke to Mr Tardio. He was told by Mr Tardio that the concrete would take 30 days to dry and that if it started to crack, he would come out and cut the concrete. In the event, Mr Tardio did not come back until February 2016.
- 59 Mr Cataldo also said that he discussed with Mr Tardio the fact that the concrete laid at the rear sloped back to the house. He said that Mr Tardio said that if additional concrete was laid (to reverse the flow) it would not look good, and that the appropriate solution was to drill (drainage) holes.

Ms Cataldo's evidence

- 60 Ms Cataldo also gave evidence. She attested that she also was not happy with the colour of the concrete when it was laid, and told her son that she was not happy.

Mr Tardio's evidence

- 61 Mr Tardio agreed that the contract required the concrete to have exposed aggregate. He acknowledged that this was referred to in his quotation. He also agreed that he had been shown photographs by Mr Cataldo showing the quality of finish expected. However, he disputed he had not met the contractual requirements. He said that the clients could determine how much stone they wanted exposed. He says he consulted the Cataldos. He contended that they were happy with the degree to which he had washed away the surface concrete leaving aggregate exposed, and noted they had paid his account in full.
- 62 With respect to the colour of the concrete, he disputed, as already noted, that there is a contractual term that the concrete was to be a tone of cream, to match the house.
- 63 As to the other defects alleged, Mr Tardio:
- (a) denied the surface of the concrete was uneven;
 - (b) did not dispute there were cracks, but said there was no guarantee regarding their absence in his quotation;
 - (c) disputed there was any staining in the concrete;

- (d) acknowledged the lack of connection between the driveway and the cross-over, but said the cross-over needed to be extended;
- (e) denied the concrete sloped towards the house, but at the same time asserted that the concrete was ‘undercover’, thereby implying that if it did slope towards the house this would not matter;
- (f) denied that any concrete had been left on the drainage grate; and
- (g) denied the absence of any reinforcing bars at the diagonal joints.

Observations at site inspection

64 A site inspection took place immediately after the luncheon adjournment. At the site inspection, I observed that the defects identified by Mr Casamento in his report were present. In particular, in the driveway /carport area at the front of the house:

- (a) there was poor coverage of stone aggregate;
- (b) the surface was uneven, indicating that the concrete had not been screeded level;
- (c) there were pigmentation marks in the concrete;
- (d) there was a gouge mark in the concrete;
- (e) there were cracks in the concrete;
- (f) no straight edge had been created in the driveway along the property line, as an attempt had been made to join the driveway to the cross-over.

65 At the rear, I observed that the concrete porch had not been constructed so as to slope away from the house. I also observed that concrete had been left on the drain grate on the east side path. Finally, I observed a substantial crack at a re-entrant corner.

FINDINGS REGARDING DEFECTS

Driveway/carport

66 On the basis of my observations at the site inspection, I find that the amount of aggregate exposed was such that the Cataldos have received a driveway/carport with an appearance well short of that which they contracted for, namely, an appearance to the standard shown in the photographs which were produced to Mr Tardio prior to the contract pour.

67 I was not satisfied that the concrete was of a shade of cream that exactly matched the house, but also note that I have found that Mr Tardio was ultimately relieved of a contractual responsibility to achieve this. There is thus no breach of contract arising from the colour of the concrete.

68 I find that the concrete in the driveway/carport had been defectively laid in so far as the surface was uneven to an extent which exceeded the allowance

stipulated in the Guide to Standards & Tolerances of more than 4mm in any 2m length,⁴ as Mr Casamento had demonstrated that the level was 12mm out over a distance of 1200mm.

- 69 Furthermore, I find that the concrete in the driveway/carport had unsightly cracks which could have been avoided had the concrete been saw-cut properly promptly after it was laid, rather than at least a month later.⁵ I also note there was a gouge in the concrete.
- 70 For these reasons, I find that the concrete in the carport/driveway is defective. Whether the defect is a major defect for the purposes of the ACL is a matter which is discussed below.

Rear porch

- 71 As my observations at the site inspection verified Mr Casamento's contention that the porch sloped towards the house, I find that this concrete is also defective.

Side paths

- 72 There was a crack at the re-entrant corner which I find to be a defect.
- 73 The fact concrete had been left on the drain grate I also find to constitute a defect.

APPLICATION OF THE ACL

- 74 If the contract is regarded as a contract for the supply of goods or services, it will be subject to at least one consumer guarantee.
- 75 In the ACL, '*services*' are defined in s 2 as including:
- (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
 - (b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
 - (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; ...
- 76 In my view, the contract is to be characterised as a contract for the supply of services rather than as a contract for the supply of goods. The services

4 The Victorian Building Authority Guide to Standards and Tolerances 2015 at Section 2.08 relevantly provides:

Except where documented otherwise, new floors are defective if within the first 24 months of handover they differ in level by more than 10 mm in any room or area, or more than 4 mm in any 2 m length.

5 Mr Tardio, at the hearing, disputed that he had come back to do the saw-cutting in February, and said it was in January.

include (or should have included) purchasing materials, clearing the site, excavating the site, placing crushed rock, creating formwork, placing reinforcement, mixing materials to make concrete, pouring concrete, levelling concrete, applying retardant and later removing retardant, sandblasting to expose pebbles (in the area with exposed aggregate), saw-cutting, and clean-up. I formally find that the contract is a contract for the supply of services.

77 On the basis that the contract is a contract for the supply of services, the Cataldos are entitled to the benefit of the guarantee which attaches by reason of s 60 of the ACL, which provides:

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

78 Because I have found that defects exist in the concrete poured in the driveway/carport area, I find that there has been a breach of the guarantee contained in s 60 of the ACL with respect to the driveway/carport area.

79 Because I have found that the porch at the rear has been constructed in such a way that the concrete slopes towards the house, I also find that there has been a breach of the guarantee contained in s 60 of the ACL with respect to the porch.

80 Because I have found that the crack at the re-entrant corner is a defect, I find that there has been a breach of the guarantee contained in s 60 of the ACL with respect to this issue also.

81 Finally, I find the failure to remove concrete from the drain grate also constitutes a breach of s 60 of the ACL.

What remedies are available to the Cataldos under the ACL?

82 It remains for me to consider what remedies are available to the Cataldos.

83 An action against a supplier of services is created by s 267(1) of the ACL, which relevantly provides:

(1) A consumer may take action under this section if:

(a) a person (the *supplier*) supplies, in trade or commerce, services to the consumer; and

(b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; ...

84 As s 60 sits within Subdivision B of Division 1 of Part 3-2 of the ACL, I find that s 267(1) is engaged because there has been a breach of the s 60 guarantee.

85 The Cataldos contend that the defects, taken collectively, constitute a major failure for the purposes of the ACL. As a result, it is necessary to have regard to s 268 of the ACL, which provides:

A failure to comply with a guarantee referred to in section 267(1)(b) that applies to a supply of services is a *major failure* if:

- (a) the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or
- (b) the services are substantially unfit for a purpose for which services of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- (c) both of the following apply:
 - (i) the services, and any product resulting from the services, are unfit for a particular purpose for which the services were acquired by the consumer that was made known to the supplier of the services;
 - (ii) the services, and any of those products, cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- (d) both of the following apply:
 - (i) the services, and any product resulting from the services, are not of such a nature, or quality, state or condition, that they might reasonably be expected to achieve a result desired by the consumer that was made known to the supplier;
 - (ii) the services, and any of those products, cannot, easily and within a reasonable time, be remedied to achieve such a result; or
- (e) the supply of the services creates an unsafe situation.

86 When s 268 was discussed at the hearing, Mr Tardio contended that there had not been a major failure of the works. However, he passed up the opportunity presented to him to address the operation of s 268 in his written submissions.

Discussion as to whether there has been a *major failure*

87 The Cataldos contend they would not have ‘accepted’ the works if they had been aware of the deficiencies explained by Mr Casamento. I take it that they are equating ‘accepted’ with ‘acquired’, and that they are accordingly contending that s 268(a) is engaged.

88 I accept the contention that the Cataldos’ would not have acquired the works performed by Mr Tardio if they had been aware of the deficiencies explained by Mr Casamento. They were not happy with the works when they were finished. Mr Cataldo gave evidence, which I accept, that he initially complained about the lack of ‘rocks’ and ‘no colour’, and later called Mr Tardio about cracks. The Cataldos paid the balance of the contract sum, but that act, in my view, does not mean that they would have

done so had they been aware of the full extent of the issues with the concrete as identified later by their consultant. I accordingly find that s 268(a) is engaged, with the result that the concreting works contain a major defect.

- 89 If I am wrong about the conclusion I have just expressed, I note the Cataldos also say:

The failings outlined in the Casamento Report and his oral evidence were substantial and the rectification work he deemed necessary was extensive and required expenditure well in excess of the original contract price.

- 90 It accordingly appears that the Cataldos are invoking s 268(d) on the basis that the services, and the product resulting from the services, are not of such a nature or quality, state or condition that they might reasonably be expected to achieve the result they desired, that was made known to Mr Tardio, and the defects cannot be remedied easily and within a reasonable time be remedied to achieve such a result.

- 91 In my opinion, the works in the driveway/carport area enliven the first limb of the definition of a *major failure* set out in s 268(d) because the appearance of the exposed aggregate, the unevenness of the concrete, and the extensive, uncontrolled cracking, are such that the works are not of a nature, quality or condition that they might reasonably be expected to achieve a result desired by the Cataldos which was made known to their supplier. For clarity, I confirm that the desired result as regards the exposed aggregate was made express when Mr Cataldo showed Mr Tardio the photographs showing the appearance of the aggregate that he was seeking. Furthermore, I consider the requirements regarding evenness of the concrete and reasonable, controlled cracking are so obvious that they go without saying, and they are accordingly implied requirements which must be taken to have been obvious to Mr Tardio.

- 92 It is also necessary to consider whether the second limb of the definition of major failure under s 268(d) is engaged.

- 93 With respect to the driveway/carport, Mr Tardio suggested there were two methods of rectification. The first was to have the concrete sandblasted. The second was for an aggregate mix to be laid over the existing concrete.

- 94 Mr Casamento addressed rectification of the driveway/carport at [6.1] in these terms:

It is very difficult to rectify the existing slab surface. An epoxy based overlay can be installed over it, however in my opinion, the slab surface finish required by the owner would not be able to be achieved. There is also the issue of the level being too high with an overlay. The levels would need to blend in with the crossover level and existing paving along the side of the house.

There are other issues with epoxy overlays in that the exposed aggregate may need to be spread manually to achieve some resemblance of what is required as a finish.

The only other option would be to remove the slab and re-install it to the required finish.

- 95 Mr Casamento confirmed these comments in his evidence at the hearing, and also confirmed that the appropriate method of rectification was to lift and replace the front driveway/carport concrete.
- 96 At the hearing, Mr Tardio disputed the driveway needed to ‘come out’. He said that it could be sandblasted.
- 97 Mr Tardio’s evidence that the driveways could be rectified by sandblasting is to be questioned because Mr Cataldo’s evidence was that he complained to Mr Tardio about the aggregate *after* it had been sandblasted. I see no reason to doubt this evidence. Accordingly, I query what good further sandblasting might be expected to achieve.
- 98 I note from Mr Casamento’s report that he is a consultant structural and building consultant who holds a bachelor of engineering (civil) degree and a diploma of civil engineering, and has 46 years’ experience in residential, commercial and industrial design and construction. I consider he has the relevant expertise and experience to provide expert evidence in a case of this nature. I note that Mr Tardio elected to come to the hearing without bringing any evidence at all from an independent expert. I prefer Mr Casamento’s evidence on the appropriate method of rectification to that of Mr Tardio because Mr Casamento’s evidence on the topic was credible, and was not shaken during cross-examination. Also, it had the virtue of independence.
- 99 Accordingly, I find that the appropriate method of rectification for the driveway/carport is to lift and replace the concrete. The upshot is that the second limb of the definition of major failure set out in s 268(d) of the ACL is engaged, because the concrete in this area cannot be easily remedied within a reasonable time. I find that there has been a *major failure* of the concrete in the driveway/carport area.

Remedy in the event of a major failure

- 100 On the basis of this finding, and also on the basis that s 268(a) is engaged, s 267(3), potentially comes into play. It provides:

If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

- (a) terminate the contract for the supply of the services; or
- (b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.

101 The Cataldos are not seeking to terminate the contract, as it has been discharged by performance, albeit inadequate performance. Furthermore, they are not seeking damages by way of compensation for any reduction in the value of the services below the price paid. On the contrary, they are seeking damages for the loss or damage suffered by them. This brings into play s 267(4).

102 Section 267(4) of the ACL provides:

The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was recently foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

103 I consider that the Cataldos' loss and damage arising out of the faulty concrete in the driveway/carport was reasonably foreseeable to Mr Tardio. I accordingly find that s 267(4) is engaged. I further find that the Cataldos are entitled to an award of damages which includes an award based on the cost of lifting and replacing the concrete in the driveway/carport.

Assessment of damages arising from lifting and replacement of concrete in the driveway/carport

104 The Cataldos put into evidence a quotation obtained from Cutting Edge Concrete dated 5 May 2016. This contained costings for excavating and removing the driveway, replacing the driveway with exposed aggregate, and excavating and removing the west 'sideway' and replacing it. The total value of the quotation was \$17,200. The components relevant to the driveway/carport area are:

| | |
|---|-----------------|
| Concrete cutting, jack hammering, bobcat and tipping fees: | \$ 1,950 |
| Re-pour new driveway in exposed aggregate North Beach: Beige Base 7mm pebble mix; | |
| F72 steel mesh reinforcement and Y12 dowel bars; | |
| 50mm compacted crushed rock sub base; | |
| Able Flex installation; | |
| Diamond blade expansion joints: | \$12,000 |
| TOTAL | \$13,950 |

105 Mr Casamento was asked at the hearing to comment on the cost of rectification. He said that he had not been asked to provide an opinion in his report as to the cost of rectification. Working from first principles, he said that to lift concrete would cost \$70-\$75 per square metre, and to re-lay would cost \$150 per square metre. On this basis, he put the total

replacement cost for the concrete including the rear at \$29,000. He suggested that the figure proposed of \$17,000 was 'very surprising'.

106 While I do not place great weight on this particular aspect of Mr Casamento's evidence, on the basis that he came to the hearing without formally preparing to answer a question about quantification, there is certainly nothing in his evidence to suggest that the quotation from Cutting Edge Concrete is unreasonable.

107 I am accordingly prepared to assess the damages arising from lifting and replacing the driveway/carport using the figures provided by Cutting Edge Concrete. I find that an award of \$13,950 in respect of this aspect of the rectification works is justified.

108 I turn now to the rear porch, in respect of which I have made a finding that there is a defect because it was constructed in such a way that water flowed off it towards the house rather than away from the house.

109 In his report, Mr Casamento did not suggest that the porch had to be lifted and replaced. What he said at [6.3-6.4] was:

The slab itself appears structurally sound, however, it's sloping the wrong way. An epoxy overlay installed to manufacturer's specifications can be installed over the existing slab to the correct fall. Note the overlay will need to carry through along the side paths as well.

If an overlay is going to be installed, it must be undertaken by experienced Contractors who specialise in this work, and not by general concretors.

110 No costings were provided by Cutting Edge Concrete in respect of the placement of such an epoxy overlay, and no evidence was provided by the Cataldos as to the cost of having a specialised contractor perform this work.

111 Mr Tardio did not address the costing of this item in his evidence either.

112 I consider that some assistance can be derived from the quotation of Cutting Edge Concrete, as it contains a note that 'additional concrete' was to be costed as follows: 'Plain = \$58.00 Exposed \$90.00'.

113 I note that the porch was constructed of plain concrete. In the absence of any evidence to the contrary, I will assume for the purpose of assessment of damages that the rate for placing overlay to correct the fall in the rear porch could be performed at the rate of \$58 per square metre. No evidence is available as to the actual area of the rear porch, but I have had the advantage of inspecting the property, and I consider that 40-45m² is a reasonable assessment of the area of the rear porch, which runs along the whole back of the house. On this basis, I assess the cost of rectifying the fall in the rear porch at \$2,500, and make a finding accordingly.

114 I make no allowance for the placing of overlay on the side paths to fix their fall as I am not satisfied that this is necessary.

- 115 I consider that the replacement of the rear porch will involve the replacement of the concrete at the re-entrant corner, and accordingly no separate award of damages in respect of this defect is justified.
- 116 The remaining defect to be rectified is the cleaning of concrete left on the drain grate. This could be acid washed and scrubbed. In the absence of any evidence, I am not satisfied that this is an item worthy of an award of anything but nominal damages, and I allow nothing for it.

Summary of findings regarding damages

117 I have found that the following assessments are appropriate:

| | |
|--|---------------------|
| Lifting and replacement of the driveway/carport: | \$ 13,950.00 |
| Cost of rectifying the fall in the rear porch: | \$ 2,500.00 |
| TOTAL | \$ 16,450.00 |

The claim for damages in respect of Mr Casamento's report

- 118 Mr Casamento charged \$990 inclusive of GST for his attendance at a site inspection on 5 March 2016, and the preparation of his report. His account was put into evidence by Mr Cataldo. As noted at the outset, the Cataldos wish to recover this sum.
- 119 Ordinarily, the cost of obtaining an expert's report is regarded as a disbursement which should be claimed as costs. Sometimes an applicant in the Tribunal will seek an order for payment of the costs associated with obtaining a consultant's report as damages in the proceeding, on the basis that the need to obtain the report arose directly and naturally from the respondent's breach of contract, and the cost is therefore a type of damage recoverable under the principles set out in *Hadley v Baxendale*.⁶ No such argument was presented in the present case, and I accordingly find that the Cataldos cannot recover the \$990 charged by Mr Casamento as damages. If they still seek to recover that expense, they must do so as part of a claim for costs.

The claim for damages in the nature of interest

- 120 The Cataldos, in their points of claim, sought an order for interest in addition to damages. The Tribunal does not have a general power to award interest arising under the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). However, it may award interest if it is empowered to do so by an enabling Act.
- 121 Neither the Cataldos' nor Mr Tardio made any submissions regarding an award of interest at the hearing. However, because the Cataldos specifically sought interest in their points of claim they should be given an opportunity to make submissions about interest. The relevant issues are:

⁶ (1854) 9 Ex 341.

- (a) Does the Tribunal have jurisdiction to award interest in a case of this nature?
- (b) If so, should interest be awarded?
- (c) If so, between what dates, and at what rate or rates?

122 Mr Tardio must, of course, be given the opportunity to respond to any such submissions.

The Cataldos' claim for costs

123 In their points of claim the Cataldos, in addition to damages and interest, sought an order for costs. As they have been successful, they should be given an opportunity to make submissions as to why costs should be awarded to them having regard to s 109 of the VCAT Act. Mr Tardio must of course be given the opportunity to respond to any such submissions.

ORDER FOR REIMBURSEMENT OF FILING FEE

124 When the Cataldos filed their application, they paid a fee of \$575.30. There is an issue as to whether the Tribunal should exercise its discretion under s 115B of the VCAT to order Mr Tardio to reimburse to them that filing fee.

FURTHER SUBMISSIONS OR FURTHER HEARING

125 In the circumstances, I consider the appropriate order is that the Cataldos be given leave to send to the Tribunal and to Mr Tardio submissions regarding interest, costs and reimbursement of the filing fee. Alternatively, they may apply to the Tribunal for a further hearing in respect of those matters. As it is important that the proceeding be brought to finality, this leave will not be open ended, and must be exercised within 60 days of the date of the orders made.

126 If the Cataldos send submissions to Mr Tardio regarding interest, costs or reimbursement of the filing fee paid, he may respond within 30 days of receipt. If he does not do so, the Tribunal may make orders regarding interest and costs in any event.

MEMBER C EDQUIST