

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D765/2010

**CATCHWORDS**

Domestic building – sale of tiles - goods sold and delivered

<b>APPLICANT</b>	Clearview Constructions Pty Ltd (ACN 104 900 647)
<b>RESPONDENT</b>	CDK Stone Pty Ltd (ABN 52 104 900 647)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING AND ORDER</b>	17 December 2010
<b>DATE OF REASONS</b>	19 January 2011
<b>CITATION</b>	Clearview Constructions Pty Ltd (ACN 104 900 647) v CDK Stone Pty Ltd (ABN 52 104 900 647) (Domestic Building) [2011] VCAT 69

**WRITTEN REASONS**

The following written reasons for the order made on 17 December 2010 are provided pursuant to the written request of the Respondent's solicitor.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr W. Sampson, Solicitor
For the Respondent	Mr C. O'Sullivan of Counsel

## REASONS

### The application

- 1 The Applicant is a Builder. The Respondent is an importer and supplier of tiles, including marble tiles.
- 2 This application concerns allegedly defective marble tiles laid in one of the bathrooms of a two storey house in Middle Park. The tiles were purchased by the Applicant from the Respondent and laid by the Applicant's tiler as part of a renovation that the Applicant was carrying out pursuant to a domestic building contract for the owners of the house.
- 3 The majority of the tiles were laid in the bathroom on the ground floor and there was no complaint concerning those tiles. A smaller number of tiles were laid in the bathroom of the upper floor. Many of those tiles cracked or came off and ultimately they were all replaced.
- 4 It was not disputed that the tiles ought to have been suitable for the purpose of being laid in the bathrooms. The issue was whether they were suitable for that purpose..

### The complaints

- 5 Shortly after the tiles were laid a complaint was made to the Applicant by the owners of the house in regard to marks that had appeared on the tiles. The Respondent's manager, Mr Victor, went to the house and after an inspection he decided that the marks were due to some chemicals from the washing products used in the bathroom. That was his evidence and there being no evidence to the contrary I accept that that was the case in regard to that particular complaint. He gave some advice to the owners about getting the tiles polished and that was the last that he heard about the marks.
- 6 The next complaint from the owners was that the tiles in the upper bathroom were cracking and coming loose. The director of the Applicant, Mr Sampson, sent an email to Mr Victor complaining about the cracking. Mr Victor said in evidence that he did not reply to the email because he considered that it did not call for a reply. However the communication did allege that the tiles were cracking and it would have been very useful if Mr Victor had gone out and had a look and established whether or not the complaint was justified. Since he did not do so I only have Mr Sampson's evidence, which is that the tiles were cracking and coming loose.
- 7 According to Sampson's evidence, only some of the tiles failed at first and he went back to the Respondent and purchased some more tiles of a similar stone. The replacement tiles that he purchased were thicker, being 15mm instead of 11mm, which is more than a third as much again in thickness.
- 8 Counsel for the Respondent, Mr O'Sullivan asked why, if Mr Sampson thought that the tiles were defective, he would go back and buy more. Mr Sampson said that he was trying to get out of the problem as economically

as he could by replacing only those tiles that had failed. To do that he needed to buy replacement tiles of the same type to match the others. Otherwise he would have had to retile the whole bathroom. That is a plausible explanation and I accept it.

- 9 The replacement of those first tiles that failed did not solve the problem. Tiles continued to come off and crack and delaminate.

**Were the tiles defective?**

- 10 The Applicant claims that the tiles were defective. Mr O’Sullivan has said, correctly, that the onus is on the Applicant to prove that the tiles were defective.
- 11 The allegation that the tiles were faulty in these respects was made by the Applicant quite clearly by both letter and email and was not investigated by the Respondent.
- 12 According to Mr Victor’s evidence, these tiles are marble, cut out of a quarry and shaped into tiles. Some of the tiles that had failed were produced at the hearing. They exhibited cracks which followed the natural pattern in the stone. They also showed extensive crazing or many very fine cracks that I have never seen before in marble tiles or indeed any marble produced at a hearing. I am not an expert in marble tiles but it seems unlikely that marble tiles should be cracked or crazed in this way.
- 13 Any stone formed over millions of years is not going to be homogenous. Mr Victor acknowledged himself that the white veins in the marble are not as strong as the green part of the marble. Examination of the tiles showed cracks in some instances following the line where the white vein met the green part of the stone as well as cracks elsewhere in the tiles.. As to the extensive crazing or tiny cracks, Mr Victor said that did not consider them to be significant. He said that it was a common enough thing to be observed in such tiles. If it is common I have never seen it. Although I accept that he is an importer and dealer in such tiles, Mr Victor was not qualified as an expert in the physical properties of marble or stone.
- 14 Mr O’Sullivan submitted that the fact that there is no complaint about the tiles in the downstairs bathroom indicates that the problem is unlikely to be the tiles but rather, the way in which the tiles in the upstairs bathroom were laid. He suggested that the problem might be to do with the substrate but it appears that in both bathrooms the underlying floor is timber. Further, the Applicant has had to pull up all the tiles in the upstairs bathroom and put ordinary ceramic tiles down in their place and they have not cracked, suggesting that the fault probably does not relate to the substrate.
- 15 As to the laying, according to Mr Burge’s evidence both sets of tiles were laid by the same experienced tiler. It seems unlikely that he would have laid the tiles in one bathroom in a way that would lead to them coming loose and cracking and the tiles in the other bathroom without there being any problems at all.

- 16 It was suggested that perhaps water penetrated the grout between the tiles but although that might explain how tiles could come loose it would not explain how the tiles came to be cracked. In any case, it seems unlikely that the grout in one bathroom would leak and the grout in the other bathroom would not.
- 17 Why then should the tiles in only one of the bathrooms have failed?
- 18 From Mr Victor's description as to the manner in which these tiles are produced it seems that the tiles from the same box and of a matching colour are likely to have been cut from the same part of the quarry and are likely to be have been laid side by side because they would match in both colour and pattern. Hence, any cracks, fissures or weaknesses naturally occurring in one tile are quite likely to also be present in other tiles cut from that same part of the quarry. Accordingly, if there is going to be a failure of the tiles in one bathroom I cannot assume that there will necessarily be a failure in the other.
- 19 Of course I cannot be certain that that is the explanation but cases are decided on the balance of probabilities. It is clear that the tiles in the upstairs bathroom have cracked and come off. The allegedly defective tiles produced at the hearing did show extensive cracking, some of which seemed to follow the natural lines within the stone, and also extensive crazing in the form of many tiny cracks. That and the other matters referred to would suggest that it is more likely than not that the cracking and loosening of the tiles are due to the weaknesses in the tiles themselves rather than to some external cause.
- 20 Tiles intended to be laid on the walls and floor of a bathroom should not be of a nature or quality where they crack or come off.

### **Conclusion**

16. Therefore I find that these tiles were not suitable for the purpose. They have cracked and come off due to their nature and not due to any external cause. I am satisfied on the balance of probabilities the tiles were not of merchantable quality or suitable for the purpose and so I will make a finding for the amount claimed, being \$9,482.82, that being the total of the damages suffered by the Applicant.

**SENIOR MEMBER R. WALKER**