

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1171/2018

CATCHWORDS

Domestic Building Contracts Act 1995 – s.8 – implied warranties – whether work defective – evidence – cost of rectification

APPLICANT	Simon Quang Vu Dinh
RESPONDENT	Westgate Joinery & Cabinet Making Pty Ltd (ACN: 060 588 436)
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	2 September 2019
DATE OF ORDER	30 October 2019
CITATION	Dinh v Westgate Joinery & Cabinet Making Pty Ltd (Building and Property) [2019] VCAT 1709

ORDER

1. Order the Respondent to pay to the Applicant \$93,500.00.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant	In person
For Respondent	Mr S Ristevski, Director

REASONS

Background

- 1 The Applicant (“the Owner”) is the owner of a house in Maribyrnong (“the House”) which was constructed for him by the Respondent (“the Builder”) between early October 2010 and June 2014, pursuant to a major domestic building contract.
- 2 The House has a very contemporary design and was constructed in three levels on a block of land sloping very steeply from the front to the rear boundary. Construction was supervised by the Builder’s director, Mr Ristevski.
- 3 Two forms of contract were signed by the parties. The first was a fixed term contract that was prepared for the purpose of obtaining finance from the bank. According to the Owner, the finance was not required and this form of contract was not used. The other form of contract was a cost-plus contract.
- 4 The contract was to construct only, the plans having been provided by the Owner.
- 5 The Owner obtained the joinery and windows from another source and supplied them to the Builder. He obtained quotes from various tradesmen which he passed on to Mr Ristevski. He also undertook the external landscaping which was not within the contractual scope of works.
- 6 There was no construction period fixed by the contract. It is unnecessary to determine why construction took so long but there was no complaint about that and the nature of the site and the design would suggest that it would not have been an easy build.
- 7 The Owner now complains of a number of defects in the House and seeks damages for the cost of rectification.

The hearing

- 8 The matter came before me for hearing on 30 September 2019 with seven days allocated. The Owner appeared in person and the Builder was represented by its director, Mr Ristevski.
- 9 I heard evidence from the Owner, his wife Ms Nguyen and from Mr Ristevski.
- 10 Expert evidence was given on behalf of the Owner by Mr Derek Le, the director of Adda Group Australia Pty Ltd (“Adda Group”), which was the rectifying builder. In addition, experts’ reports were tendered and relied upon from the following experts but none of those experts was called:

Expert	Expertise	Party	Inspection Date
Romeo Georgiev	Building Surveyor	Builder	12/7/16
Andrew Neilsen	Assessor	Owner	8/9/16

Mr Salvatore Mamone	Architect	Owner	23/1/17
Richard Drew	Engineer	Owner	1/2/17
Jeff Beck	Building Expert	Owner	1/4/17
Eric Scott	Building Expert	Owner	18/4/18

- 11 I heard evidence at the Tribunal's premises for the first two days and then visited the site where the parties pointed out to me various matters that had been referred to during the course of the evidence. At the conclusion of the inspection I informed them that I would provide a written decision.

The alleged defects

- 12 The defects alleged are set out in two reports by the Owner's principal expert, Mr Mamone. They are also commented on by a number of other experts.

The damage to the rumpus room

- 13 The main defect complained of is water penetration into the rumpus room causing damage to internal linings and the growth of mould. The Owner claims that the damage was caused by an alleged leak through the vertical wall where the concrete slab steps down from the hallway to the rumpus room. The Builder contends that the water entered the rumpus room between the rebate of the slab and external paving which was laid by another contractor engaged by the Owner. The issue is, where did the water come from?
- 14 The Owner said that he first noticed a leak in the wall on 24 March 2013 during construction, when water was ponding under the stairs and spreading as far as the inside face of the external wall to the south. He produced a photograph that he took on that day. He notified Mr Ristevski who was unable to ascertain where the water had come from.
- 15 The Owner said that he saw the same leak again the following week and that Mr Ristevski told him that would dry out and not to be concerned.
- 16 Ms Nguyen said that she first noticed the leak in the rumpus room during November 2015. She said that it was in the same area as the leak that was observed in March 2013.
- 17 She said that Mr Ristevski came out to inspect and suggested that they wait to see if it dried up. She said that, when this did not occur, the Builder came out and cut into the plaster on the southern external wall and later told her that he had removed two buckets of soil from inside the House.
- 18 The floorboards began to warp and there was mould appearing on the plaster skirting between the stairway and the external southern wall.
- 19 Mr Ristevski said that the cause of the water entry was outdoor paving that had been laid by a concreter who was engaged directly by the Owner after the Builder had left the site. He said that, upon entering through the wall, the water travelled around the perimeter of the wall in the 10 mm expansion

gap under the skirting boards that had been left around the perimeter of the timber floor. The floor was floorboards laid upon plywood but its thickness was not stated.

- 20 The external veneer of the south wall is expanded polystyrene foam extending down to the floor slab. The Owner's concreter had laid the concrete path well above the level of the concrete slab and the bottom edge of the foam cladding. It would seem from the photographs produced that the foam cladding was used to retain the soil beneath the concrete path, so that soil was banked up against the junction between the bottom edge of the foam board and the floor slab.
- 21 When the House was inspected by Mr Nielsen on 8 September 2016, he found that sections of the internal linings had been removed. He said that there was decay of the timber in the internal stud wall consistent with long-term saturation, caused, in all probability, by minor to moderate water ingress along the floor level after the House was completed. He detected high moisture content readings from internal linings, discolouration, deformation and localised tenting in the timber floor surfaces throughout the west side of the rumpus room, consistent with the effects of saturation. He said the most severe section of damage was apparently directly under the staircase within its recess but that the extent of the deformation dissipated away from the west side of the room approximately 2.5 m and into the kitchenette area. Damage seemed to be at floor level.
- 22 Mr Nielsen said that the design of the vertical section of the floor slab at the western end of the rumpus room required only a single sheet of polyethylene moisture barrier to seal a construction joint at the foot of the vertical wall that formed the junction between the two slabs. He said that, using a plastic membrane to act as a primary waterproof barrier at the junction between two concrete slabs would probably be inadequate. Nevertheless, that is how it was designed.
- 23 The problem of the water ingress into the rumpus room was next considered by Mr Mamone who inspected the House on 23 January 2017. His findings as to the moisture content of the internal linings and the damage to the floorboards were similar to those of Mr Nielsen.
- 24 As to the cause of the water penetration, although he noted from the photographs that the concrete path that had been laid by the Owner's contractor was higher than the finished floor level and sloped towards the House, he said that the area was highly protected and there was little chance that large amounts of water would fall onto the path. He does not discuss the possibility of water entering the wall cavity under the path through the soil built up against it to support the concrete, yet Mr Ristevski said that he removed bucketloads of soil from the wall cavity and it is apparent from indications on the rendered external wall that the underside of the concrete path was well above the level of the level of the floor slab.

- 25 Further, although he described the area as highly protected, such protection could only be from the adjacent walls since there is no roof or eave above it.
- 26 Notwithstanding these considerations, Mr Mamone concluded that the concrete path should be discounted as being the main cause of the water entry into the south-west corner of the rumpus room. He said that the source of the water ingress was likely to be subterranean water running underneath the concrete floor slab and seeping into the building through the construction joint identified by Mr Nielsen. He acknowledged that the only water proofing of the construction joint shown in the plans was the plastic vapour barrier which the Builder installed. He attributed the water flow to the suspected failure of an agricultural drain system installed along the base of the retaining wall below the front walls of the building.
- 27 The plans for the House provided for a subfloor, comprising three bedrooms, two bathrooms, a light court and a walk in robe, all below the level of the entrance driveway. The garage of the House, which is entered from the driveway to the west, is constructed at the ground floor level, directly above the subfloor bedroom, ensuite and bathroom. The subfloor is therefore below the ground and so a retaining wall was designed by the engineer to be constructed, at the Builder's option of brickwork or block work, with the cavity filled with reinforced concrete. The detail on the engineering drawings provides for an agricultural drain to be laid at the level of the rebate on the external face of this retaining wall.
- 28 Although there is no evidence of any water ingress through this wall into the subfloor rooms, Mr Mamone suggested that water was passing under the footing of the wall and travelling under the slab to the construction joint. He blamed this on a suspected deficiency of the agricultural drain and the waterproofing of the wall.
- 29 He said that the suspected defect should be rectified by demolishing the driveway, the strip drains and the stormwater drains across the front of the building, removing the current agricultural drainage system, cleaning the face of the core filled masonry retaining wall, reapplying a waterproof membrane and reconstructing the drainage system in accordance with the plans. His very extensive scope of works was costed by another expert, Mr Beck, at \$207,858.00.
- 30 That work has not been done. Instead, the Owner had the damaged internal linings in the rumpus room replaced by Adda Group at a cost of \$16,500.00.
- 31 The House was next inspected by an engineer, Mr Drew, on 1 February 2017. He noted in his report the level of the external paving adjacent to the south wall and that the expanded polystyrene cladding of the House was below the paving level without any provision for a damp-proof separation.

- 32 He said that the external area adjacent to that where the external wall returns on the south side shows evidence of the accumulation of water and residual soil dampness. He said that in and after higher rainfall events, water was likely infiltrating from adjacent properties through the gap between adjacent buildings on the boundary or through the sand bedding layer specified in the design documentation, to underlie the basement slabs. He said that there was no clear provision for surface drainage in that area.
- 33 He noted that the only provision for waterproofing of the construction joint referred to by the other experts was the plastic damp proof membrane. In a diagram in his report he indicated directions of possible water flows, including under the slab through the sand, as suggested by Mr Nielsen and down the southern side of the House. He said that the effectiveness of the agricultural drain behind the retaining wall was unclear but his criticisms related mainly to the design documentation rather than the work the Builder has done. The poor construction practice that he referred to related to the paving adjacent to the southern wall, which was not done by the Builder.
- 34 He said that the presence and adequacy of the agricultural drain could not be determined by visual inspection as such drains are buried deeply in the ground. He noted that there were no signs of differential settlement in the House.
- 35 He also said that it was not possible to comment on the extent and adequacy of any vapour barrier or the waterproofing tanking without extensive destructive testing but he said that the inadequacy of tanking and damp-proofing was “clearly evident”.
- 36 His observations as to the damage to internal linings in the rumpus room were similar to the other experts.
- 37 On 18 April 2014, Mr Scott inspected the property and prepared report for Domestic Building Dispute Resolution Victoria. He considered 16 alleged defects, most of which he did not attribute to defective workmanship of the Builder. Most of the matters that he considered related to the rumpus room. The moisture readings that he took were considerably less than the readings taken by earlier experts, which would suggest a lessening of the dampness in the room after the external paving had been removed. He said that the evidence in the form of staining to the concrete render and a photograph of the paving supplied to him by the Builder before it was removed, showed that the finished height of the removed concrete was approximately 100 mm higher than remaining concrete paving.
- 38 He said that the thermal images that he took showed a reduction in the dampness as one moved away from the southern wall. He concluded that, as moisture damage was in the same area as the paving that was removed, and due to the height of the concrete being about the floor height, it was reasonable to believe that the moisture damage was caused by defective installation of the concrete.

- 39 His observations of the damage to the internal surfaces of the rumpus room were similar to the other experts but he considered it to be caused by moisture from outside and not attributable to work by the Builder.
- 40 The Builder relied upon a short report prepared by the relevant building surveyor for the construction of the House, Mr Georgiev. He said that he was called to inspect the work on 12 July 2016 and found that the concrete paving by the Owner was 100 to 150 mm higher than the internal finished floor level instead of being 50 mm below the finished floor level as required by the National Construction Code. He said that he also noted that the concrete paving had been poured above the sliding door sub sills, allowing water ingress into the building. He said that considerable amount of sawdust from construction on the adjoining site had accumulated in the sliding door track, not allowing water to escape through the weepholes. He advised that the paving outside the rumpus room should be removed and reinstated in accordance with the National Construction Code.

What to make of the evidence?

- 41 If the source of the water is a failure of the retaining wall and agricultural drain and the entry point is the construction joint identified on the plans, then water penetration should have been experienced along the whole length of the construction joint. Indeed, Mr Mamone said that his moisture readings indicated that the damage was away from the south-west corner of the wall of the room "...revealing the main source of water penetration into this room is not the result of the exterior concrete paving but rather direct moisture/water penetration through the concrete floor slab step up at the west end of the rumpus room.". That statement would suggest that there was no damage further to the south and yet the photographs in his report suggest that the wetness was continuous from the kitchenette to the southern wall. Also, the damage to the timber is greater as one moves towards the south wall.
- 42 Mr Mamone also suggested that there was moisture penetration along the base of the west wall of the room behind the kitchenette joinery. The basis for this suggestion is not stated. It does not appear that he could have taken moisture measurements behind the joinery and there are none mentioned in his report. When the joinery was removed for the purpose of the rectification works that were done, it was not found to be necessary to replace any of the joinery, nor was it suggested that there was any need to repair the wall behind it. Consequently, his assumption that the wall behind the kitchenette joinery was water affected turned out to be wrong.
- 43 After removing the external concrete path, the Owner has since repaired the internal linings of the west wall and the south wall and, although he has not carried out the extensive rectification work that Mr Mamone said was required to the retaining wall and the agricultural drain, no further water penetration into the rumpus room has been experienced.

- 44 There is no evidence that there is anything wrong with the stormwater drain at the foot of the retaining wall. There has been no camera inserted into the drain to check its condition nor any excavation to observe the manner in which the Builder constructed it.
- 45 Further, most of the site between the House and the roadway to the west is paved and there is very little in the way of permeable surface through which water might enter the soil and pass under the slab, even if there were deficiencies in the retaining wall and agricultural drain.
- 46 It has not been established on the balance of probabilities that, either the retaining wall below the garage and entry to the House, or the agricultural drain adjacent to it, has been defectively constructed. Mr Ristevski gave evidence that both the wall and the drain were constructed in accordance with the plans and there is no evidence to the contrary. The only reason for suggesting that there might be a defect is the presumed absence of any other source for the water in the rumpus room, yet there is firm evidence of an alternate source, being the build-up of the soil against the southern wall and the construction by the Owner of a pathway above the rumpus room floor which sloped towards the House. When that alternate source was removed, it does not appear that there has been any further water penetration.
- 47 The claim with respect to the damage to the rumpus room is therefore not established.

The upper balcony

\$82,500.00

- 48 Ms Nguyen said that, in January 2016, she observed leaking in the ceiling at the entrance to the main bedroom, which is directly above the upper balcony. She reported the leak to Mr Ristevski who came out and cut two holes in the ceiling and said that he was unable to identify where the water was coming from.
- 49 Mr Mamone said that there was water staining and damage to the plasterboard ceiling within the centre of the room resulting from the leaking of the first floor terrace. He said that there were areas of floor tile grout displaying signs of degradation and a gap along the underside of the sliding door that has not been caulked, through which water might enter.
- 50 He said that the water leaks indicated incorrectly installed or faulty membrane installation on the underside of the floor tiles. He recommended that all of the floor tiles and skirting tiles be removed, the existing membrane scraped off and the balcony be reconstructed. He incorporated a costing for this amongst a costing for a wider scope of work involving other items which I have not allowed.
- 51 Ms Nguyen said that, by July 2019, the leak was spreading and they engaged Mr Le of Adda Group to attend and identify what needed to be done. She informed Mr Ristevski that Mr Le had been engaged to address the problem and there were a number of communications passing between

the Owner and Ms Nguyen on the one hand and Mr Ristevski on the other as to how Mr Le should go about that task.

- 52 Mr Le said that, when he inspected the House on 31 July 2019, there were clear signs of damage to the ceiling plaster at the entrance of the main bedroom and ensuite. He said that he then inspected the top balcony as a potential source of water ingress. He saw signs of calcium build-up along the tile grout lines which he said indicated that there was water penetration underneath the tiles. He concluded that the balcony did not have sufficient fall to direct water promptly to the box gutter that had been constructed on the right-hand side of the balcony to drain it. He said that water pooled on the balcony, particularly in the middle section.
- 53 He said that, in the course of replacing the balcony, he made the following observations:
- (a) There were two downpipes contained in the wall next to the sliding door that received water from the roof above. At the bottom of each downpipe there was a plastic outlet intended to direct the water from the downpipe onto the balcony so that it could drain across the balcony and into the box gutter. When he removed the two plastic outlets, he found that they were heavily distorted and that water would bypass them and enter the wall cavity. Moreover, he said there were no signs of any plumbing adhesive joining the sections of the pipe together and the individual sections were easily removed by hand.
 - (b) Upon removing the tiles of the balcony, there were no signs of waterproofing around the corners and joints and the newly exposed screeding was soaked with water. He found the screeding to be up to 75 mm thick which he said was unusual. He said that, although its apparent purpose was to provide a fall to the box gutter, it is better practice to obtain a fall on a balcony by falling the substrate rather than using a thick screed.
 - (c) When the screed was removed, a significant water entry point was found next to the base of the sliding door into which Mr Le was able to insert a full finger past the silicon and there were obvious signs of water penetration and damage to that corner.
- 54 He subsequently reconstructed the balcony, providing a new substrate with an appropriate fall. The cost of the balcony replacement was \$82,500.00. This is substantially more than Mr Mamone's costing would suggest was warranted. However, Mr Mamone had not contemplated replacing all of the substrate as well as the tiles and Mr Le said that the charge was fair and reasonable.
- 55 Mr Ristevski said that both the tiler and the waterproofer who had tiled and waterproofed the balcony were engaged directly by the Applicant but that he considered that their work was done adequately. Although it appears that the Applicant requested the Builder to use these tradesmen, the tiling and

waterproofing work were within the Builder's scope of works under the contract and the Builder is responsible, as Mr Ristevski acknowledged in cross-examination.

The master bedroom balcony

\$11,000.00

- 56 Mr Mamone said in his report that there was water staining across the surface of the left hand side of the rendered wall below the first balcony in the bedroom, resulting from water leaking from the back edge of the balcony floor.
- 57 He said that the top of the skirting tiles were not properly caulked and sealed and that the tiles should have been caulked with UV stabilised silicon sealant. In some areas the caulking and sealant had fallen out of the top of the tiles and they had become loose. He said that the floor waste in the left-hand side end of the balcony floor was incorrectly graded and the fall was back towards the base of the walls of the building
- 58 He said that all of the balcony floor tiles and skirting tiles should be removed, along with the existing membrane, and the floor waste lifted to allow regrading of the screed to properly fall the balcony floor towards the waste.
- 59 The Owner engaged Mr Le to replace the balcony at a cost of \$11,000.00. Mr Le said that he found that it had been constructed in the same manner as the other balcony and had the same defects. Again, he said that his charge was fair and reasonable.

Water stain on garage ceiling / leak under sink

- 60 There was a slight water stain on the garage ceiling pointed out by Mr Mamone that the Owner and Ms Nguyen had not noticed. It was not shown to me on site. It is related to a water leak under the sink which Mr Mamone described as being faulty and/or damaged but the nature of the fault or damage is not stated in his report.
- 61 The photograph of the cupboard under the sink shows the bottoms of two deep sink basins, one of which has P-trap connected and one appears to have an insinkerator with a P-trap and hoses connected. It is said that there has been a leak from one or other of these sources but when the leak first appeared and what the cause was is not established. Mr Scott said in his report that it was a maintenance item and not proven to be a defect and without any better evidence I accept that opinion.

Conclusion

- 62 The cost of rectification of the two defects that I find are established is \$83,500.00. There will be an order that the respondent pay that sum to the Applicant.
- 63 Costs will be reserved because I have heard no argument about costs.
However:

- (a) by s.109 of the *Victorian Civil and Administrative Tribunal Act 1998*, parties are to pay their own costs unless the Tribunal finds that it would be fair to make an order for costs;
- (b) there has been success on both sides since the main monetary claim made by the Owner was unsuccessful and the Builder has been ordered to pay a substantial sum; and
- (c) the parties were not legally represented.

SENIOR MEMBER R. WALKER