

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D107/2009

CATCHWORDS

Domestic Building – Responsibility for defect – Shared responsibility – Quantification of loss.

APPLICANT	Gary Domaille
FIRST RESPONDENT	Gazza and Jazzie Home Handy Fixers Pty Ltd
SECOND RESPONDENT	Wayne Kolbl
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	20 May 2009 and on site at 66 Millbank Drive, Deer Park on 1 June 2009
DATE OF ORDER	3 June 2009
CITATION	Domaille v Gazza and Jazzie Home Handy Fixers Pty Ltd & Anor (Domestic Building) [2009] VCAT 983

ORDER

- 1 The Principal Registrar is directed to note that the Second Respondent's family name is spelled "Kolbl".
- 2 The First and Second Respondents must each pay the Applicant \$1,321.50. Payment must be made forthwith.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	In person
For First Respondent	Mr G. Sciberras
For the Second Respondent	In person on 20 May 2009. No appearance on 1 June 2009.

REASONS

- 1 The Applicant owns the home the subject of this dispute. He claims \$7,135.00 from the First Respondent to rectify problems with the balcony, which leaked into the eave lining beneath the balcony, necessitating waterproofing work and replacement of the lining sheets. The claim is for \$4,200.00 which the Applicant says the First Respondent undertook to pay direct to Mr Tim Baxter, the plumber who undertook certain works at the Applicant's home and also undertook repair works after the balcony leaked, and \$3,043.00 paid by the Applicant to Mr Marcus Day, carpenter, in accordance with the list accompanying his letter of 10 February 2009. Mr Day gave evidence for the Applicant. I note that the sum of these amounts does not equal \$7,135.00.
- 2 The First Respondent was engaged by the Applicant to do certain work at his home on a "do and charge" basis. Mr Scibberas, director of the First Respondent who appeared on its behalf, said that he was paid for "wages" for himself and the Second Respondent and for materials purchased by each of them. I accept the evidence of the Applicant that the whole renovation cost paid to the First Respondent exceeded \$82,000.00 and note with concern that the First Respondent's invoices state that no GST is payable.
- 3 On the application of the First Respondent, I joined the Second Respondent to this proceeding on 16 April 2009. The Second Respondent worked with the First Respondent.

CAUSE OF THE LEAK

- 4 I accept the evidence of the Applicant and of his partner, Ms Pamela Wood, that the first time there was heavy rain after the Respondents completed their work, there were serious leaks from the balcony down the exterior wall of the house and through the eaves. I accept their evidence that there was water dripping from the down-lights and that stain from the balcony decking was leaking through the eave lining and marking it.
- 5 The Applicant has attributed the leaking to a lack of fall from the wall edge of the balcony to the outer edge, poor construction of the balcony substrate and poor flashing. The First Respondent attributed it to Mr Baxter's failure to connect a down-pipe that discharged the water from approximately 23.5m² of roof directly onto the balcony.

Alleged lack of fall

- 6 Mr Baxter said in evidence that there was no fall to the balcony substrate. The First Respondent alleged there was and said that it could be determined whether there was fall by using a spirit level on the eve immediately below the beams supporting the balcony. The on-site investigation carried out on 1 June 2009 demonstrated that there is no fall. I accept that the lack of fall contributed to the balcony leaking.

Alleged poor construction of the balcony substrate

- 7 I accept the evidence of the Applicant that the Respondents built the substrate of the balcony using Colourbond sheeting placed upside down so that there were narrow channels approximately 200mm apart and that the Colourbond was coated in tar as tanking, to which the decking was directly attached with nails. I accept the evidence of Mr Day that when he removed the decking, the channels, which the Respondents had apparently hoped would allow water to be carried away, contained significant amounts of saw dust and other material that would prevent the flow of water.
- 8 I accept that poor design and construction of the balcony substrate by one or more of the Respondents contributed to the balcony leaking.

Alleged poor flashing

- 9 I accept the evidence of Mr Day that the balcony substrate was not adequately flashed into the wall and that this contributed to the leaking and I note that this work was initially undertaken by Mr Baxter.
- 10 Although Mr Baxter was correct in the evidence that he gave about the lack of fall, some of his evidence did not appear to me to be very reliable. He said under oath that he told Mr Sciberras that the balcony would leak because the substrate did not have sufficient fall. In answer to my question he said that he did not tell the Applicant because Mr Sciberras “should have known”, but that he did tell his then apprentice, who is the Applicant’s grandson. He said he did not think the grandson would speak to the Applicant about this issue.

Alleged failure by the Applicant’s plumber to connect a down pipe

- 11 At the on-site inspection, Mr Sciberras showed me the position of the down-pipe that he said discharged directly onto the balcony. It has since been piped to a point where it discharges to another spouting. His evidence was not contradicted by the Applicant, although Mr Baxter said that a properly constructed balcony should not have leaked, even if the down-pipe was not connected. I do not accept that it was reasonable to discharge such a volume of water onto the balcony and find, in all probability, that the failure to connect the down-pipe contributed to the balcony leaking.

RESPONSIBILITY OF THE RESPONDENTS

- 12 The Second Respondent’s rhetorical question was “Why should I be responsible?” The First Respondent’s rhetorical reply was “Why should you not be?”
- 13 Both agree that the Second Respondent was not the employee of the First Respondent although the Second Respondent said in evidence that he was working under the direction of the First Respondent. The First Respondent disagreed. They agreed that they framed the balcony together.
- 14 Neither are qualified carpenters, although the First Respondent said that he is “working on” obtaining a qualification. The First Respondent is a tool

maker and the Second Respondent is a plasterer and painter. The First Respondent invoiced the Applicant for work done by both Respondents. A typical invoice is Number 29 of 15 September 2008 where Mr Sciberras invoiced in the name of the First Respondent for his own labour and materials and included a separate item for the Second Respondent's labour and materials. Mr Sciberras gave evidence, which was supported by the Second Respondent, that there has been at least one job where the Second Respondent has invoiced and passed payment to the First Respondent.

- 15 On balance I find that the Respondents undertook the work for the Applicant as a joint venture, that both were responsible for the construction of the balcony and that they should share responsibility equally. I note that the Applicant and First Respondent agree the design of the balcony was provided by Mr Calleja, a building designer and engineer. Mr Calleja was not a party to the proceedings and his design did not provide a detail for the balcony showing fall and did not specify materials.

QUANTIFICATION OF THE APPLICANT'S LOSS

- 16 Both the Applicant and Mr Baxter gave evidence that the First Respondent was directly liable to Mr Baxter, and that the Applicant was not liable to Mr Baxter, for the work he undertook to rectify the balcony. I find that in those circumstances the Respondents are not liable to the Applicant for the claimed sum of \$4,200.00 and it is not necessary for me to consider whether I prefer the Applicant's assertion that the First Respondent agreed to pay Mr Baxter, or the First Respondent's denial. Mr Baxter is not a party to this proceeding, therefore it is also unnecessary for me to consider whether he is partly responsible for the Applicant's loss.
- 17 I accept Mr Sciberras' evidence that after the leak he and the Second Respondent each spent two days working on rectification and provided materials to the value of \$326.00 for which they did not charge.
- 18 I accept that the amount of \$3,043.00 charged by Mr Day is reasonable, but note that he has charged twice for the installation of the eave sheets. I assume that this was to install them before and again after the water leak. I therefore reduce the amount the Applicant may receive by \$300.00 for labour to install the eave sheets on only one occasion. I also note that Mr Day has charged \$693.00 for 10 sheets of ply and some battens. I assume that half the sheets of ply were for installation on the first occasion, and in the absence of evidence about the cost of sheets of ply, reduce the amount the Applicant can recover by a further \$100.00.
- 19 The total the Applicant may recover is therefore \$2,643.00 and the Respondents must pay half each.

SENIOR MEMBER M. LOTHIAN