VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D555/2008

CATCHWORDS

Domestic building, concurrent causes of damage to a timber strip floor, both causes doom the floor to fail, slip rule under s119 of the *Victorian Civil and Administrative Tribunal Act 1998*, insurance payout to the Applicant-owners also relating to the floor, supervening cause

APPLICANTS	Daniel Patrick Dowling, Alana Joy Acton
RESPONDENT	Stuart Laurie
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	24 September 2009
DATE OF ORDER	9 April 2010
CITATION	Dowling v Laurie (Domestic Building) [2010] VCAT 412

ORDER

1 In addition to the sum of $7,368.00 ordered to be paid on 24 June 2009, the Respondent must pay the Applicants a further $95,674.16 forthwith.

2 I reserve interest and costs. There is liberty to apply. Should either party apply for interest and/or costs, they must support their application with a brief outline of the orders sought and the basis for those orders. I direct the Principal Registrar to list the proceeding for me for a half day hearing as soon as possible after any such application is received.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	Mr K. Oliver of Counsel
Witnesses:	Mr D. Dowling Mr R. Lees, Building Consultant
For Respondent	Mr S. Laurie in person
Witness:	Mr B. O'Meara, Building Consultant

REASONS

1 On 24 June 2009 I made interim orders concerning the claim by Mr Dowling and Ms Acton, the Owners, against Mr Laurie, the Builder. Briefly, the Owners bought their home in Williamstown from Ms Cutriss-Beech, who had undertaken certain building renovations. Some of the work had been undertaken by "Professional Restumping", which is not a party to this proceeding. Other work was undertaken by the respondent-Builder, Mr Laurie.

2 It was necessary to make interim orders because I found that the Builder is liable for two items for which I had ordered the Builder pay $7,368.00 and:

> 1(c) The deficiencies of the pad footings constructed by the [Builder] which has not yet been quantified.

3 I also made order 3:

> I find that the [Builder] is not liable for the lack of agricultural drains and deficiencies of and arising out of the restumping and/or reblocking undertaken by the firm Professional Restumping about which more is said in the reasons that follow.

4 At paragraph 60 of the reasons of 24 June 2009 ("June reasons") I said:

> Because of the way evidence of cost has been given by Mr Lees, Longbow Constructions [both for the Owners] and Mr Atchison [for the Builder], I am not able to determine the amount that should be allowed for rectification arising out of the pad footings as distinct from the stumps installed by Professional Restumping. I need further evidence regarding the cost of rectifying the level of the first floor, ceilings, walls, windows and doors and regarding what allowances should be made for access to apply Uretek and to make good the access points. I also need evidence about the time that will be necessary to do this work, whether it will be necessary for the Owners to move out of the home while it is done, and whether this work can be done concurrently with the work arising out of rectification of the stumps, for which I have found the Builder is not responsible. I also reserved [sic] costs and interest.

5 Neither party's experts had satisfactorily distinguished between the physical and financial consequences of the defective pad footings on one hand and the deficiencies arising out of the restumping and the lack of agricultural drains on the other.

6 On 6 August 2009 I conducted a directions hearing, set the proceeding down for a further one day hearing on 24 September and ordered the parties to file and serve any further expert reports upon which they would rely at the hearing. The Owners filed a further report of Mr Lees dated 4 September 2009 and the Builder filed a report of Mr O'Meara of 27 August 2009. The Owners also filed a further witness statement of Mr Dowling of

22 September 2009 and Mr Oliver of Counsel for the Owners handed up an outline of closing submissions.

7 Mr Oliver's submissions were in part:

> 1. On 24 June 2009 the Tribunal found that the Respondent (builder) failed to construct the pad footings in accordance with the engineering design and good building practice [para 48]
>
> 2. The rule of the common law is that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

8 Mr Oliver went on to say that the whole cost of removal and replacement of the strip flooring – an item of considerable cost – should be borne by the Builder because cutting into the floor is necessary to obtain access to the pad footings. His argument continued that patching the floor would provide an unacceptable result and:

> That the owners may choose to rectify the stumps when the flooring is lifted in the course of rectifying the pad footings does not operate to absolve the builder from being liable for all of the costs of rectifying the defective work for which he [was] found to be liable.

9 There is also an issue concerning an insurance payment to the owners for water damage to the part of the floor near the kitchen. Mr Oliver submitted, contrary to his earlier submission, that the sum for the insurance payment should not be taken into account because:

> If the sum is for the same loss, the owners are obliged to refund the money received from the builder to the insurer.
>
> The builder cannot take the benefit of the insurance claim by the owners in respect of the same loss.

THE STRIP FLOORING

10 The characterisation of damage to the strip flooring determines, to a substantial degree, the damages to which the Owners are entitled. If they are entitled to be compensated by the Builder for replacement of the strip flooring, other losses flow which are consequential upon the replacement of the floor.

11 I accept Mr Oliver's submission that access to the pad footings cannot be gained except by taking up at least part of the strip flooring. However the strip flooring has also been rendered defective because the stumps upon which it sits are defective. With the exception of the stumps, the sub-floor and floor, including laying the strip floor, were built by the Builder.

12 Both causes are sufficient to necessitate removal and replacement of the strip flooring - the defective stumps and the defective pad footings. I cannot say that one is first in time, because although the floor is now defective because of the poor re-stumping and is yet to have holes cut in it

for access to the pad footings, the ultimate need to rectify the pad footings doomed it to fail, just as the poor re-stumping doomed it to fail.

13 In the course of concurrent evidence with Mr O'Meara, Mr Lees said that the timber floors of the ground floor are so out of level that they would need to be lifted regardless of whether there were any other faults in the home. He added that because the home is largely open plan, work on floors in one area means that a large area of floors need to be worked upon or replaced. I am also satisfied that if the floor were in perfect condition and the contemplated access were the only cause of damage to it, the degree of damage would also be sufficient to justify replacement. In other words, each cause is sufficient to justify replacement of the whole downstairs floor, with the exception of the floors in bedroom 1 and 3, which is not justified by works to the pad footings.

14 I note the amount allowed for replacement of the strip flooring by Mr Lees does not include bedrooms 1 and 3, although he has provided an alternative costing that does include these rooms. Bedrooms 1 and 3 are not part of the open plan - they are joined to the remainder of the ground floor by standard sized doorways therefore there could be breaks in the strip flooring at those points which are not aesthetically displeasing.

15 This is not a proceeding where apportionment under part IVAA of the *Wrongs Act* 1958 is considered, because apart from any other reason, neither party sought to join Professional Restumping to the proceeding for that purpose.

Concurrent causes

16 Mr Oliver submits that the causes of damage are concurrent. He handed up an extract from Cheshire & Fifoot's Law of Contract 9th Aust Ed containing paragraphs 23.37 and 23.38 which are respectively "Concurrent causes" and "Intervening and supervening causes". In both headings, the words necessary to imply are "of breach of contract". The liability of the Builder is not based on a breach of contract, but a breach of the statutory warranties implied by s 8 of the *Domestic Building Contracts Act* 1995 which run with the land under s 9. Nevertheless, as the warranties apply because of the original contract between the Builder and the previous owner, I find the extract is relevant.

17 As the learned authors Seddon and Ellinghaus say[1]:

> The law accepts that events are determined by multiple causes. A breach which is only one cause among others may nevertheless attract legal liability. It is not necessary for the breach in question to be the exclusive or dominant cause of the loss complained of. The question is whether the breach 'materially caused or contributed to the harm suffered'.

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[1] Seddon, NC and Ellinghaus, MP, *Cheshire & Fifoot's Law of Contract, Ninth Australian Edition* 23.37

Are the causes concurrent?

18 It is by no means easy to characterise the point of occurrence of the causes. Reblocking occurred before the Builder's work commenced, but the floor, built on defective stumps, and doomed to fail by defective pad footings, was the last to be built. Both the stumps and the pad footings were in place before the Builder built the sub-floor and laid the strip flooring. I find that the floor was doubly doomed before it was built and that the causes are, therefore, concurrent.

'Materially caused or contributed'

19 In *Chappel v Hart*[2] Gaudron J said:

> Before the defendant will be held responsible for the plaintiff's injury, the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury. In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person. If a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff. That being so, whether the claim is in contract or tort, the fact that the risk eventuated at a particular time or place by reason of the conduct of the defendant does not itself materially contribute to the plaintiff's injury unless the fact of that particular time or place increased the risk of the injury occurring. [Emphasis added]

20 I find that the Builder's failure to construct the pad footings properly did result in increased risk of injury to the Owners and that he has therefore materially caused or contributed to their loss concerning the floor.

21 The facts of the floor failure also bring to mind the factual matrix in *Caltex Oil (Australia) Pty Ltd v The Dredge Willestad* (1976) 11 ALR 227, a claim in tort rather than in contract, where the High Court found the negligence of two respondents were "concurrent causes leading to a common result" rather than the act of the second negligent respondent amounting to a break in the chain of causation between the owner of the damaged item and the first negligent respondent.

The 'but for' test

22 In contract, as in tort, the question of whether damage is caused by a breach can often be answered by application of the 'but for'[3] test. Would the loss

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2 [1998] HCA 55 at 27

3 *Chappel v Hart* (1998) 195 CLR 232 at 268 and 282

not have arisen 'but for' the breach upon which the claimant relies? If it would, the respondent is not liable.

23 In this proceeding, the answer is a resounding no – regardless of the Builder's breach, the floor would still have been defective. However had the floor not already failed or been doomed to fail, the Builder's breach would have passed the 'but for' test.

24 This limit to the usefulness of the 'but for' test was raised in *March v Stramare (E&MH) Pty Ltd*[4] where at paragraph 22 Gibbs CJ said:

> The 'but for' test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. The application of the test "gives the result, contrary to common sense, that neither is a cause".[5]

25 I am satisfied that the defective stumps and defective pad footings are concurrent causes of the necessity to remove and replace the strip flooring in all the ground floor rooms except bedrooms 1 and 3, where I find that the only cause is the defective stumps.

26 The Builder must compensate the Owners for the whole cost of the replacement of the strip flooring and for the losses consequent upon that replacement.

THE EXPERT EVIDENCE

27 As stated in the June reasons, Mr Lees had assessed damages at $192,559.00. His assessment of 4 September 2009 is $125,524.00. It includes the two items I have already allowed – rectification of the strip flooring to the upper level and rectification of the roof leak, respectively $8,739.00 and $362.00 in the report of 4 September, therefore the amount he attributes to the pad footing failure is therefore $125,524.00 less $9,101.00; a total of $116,423.00.

28 Although Mr Atchison gave expert evidence for the Builder at the hearing in April (resulting in the June reasons), Mr O'Meara provided a report and gave evidence for him at the hearing of 24 September 2009. Mr O'Meara's written report was of limited assistance because, as he admitted under cross-examination, he had not read the reasons except for the last page. He said he read the orders of 6 August, which referred to the orders of 24 June "and the supporting reasons". At paragraph 32 he said:

> I have concluded from the explanations above that there is no evidence of sinking/sagging or tilting of the PF pad footings to cause any of the floor sinking, plaster wall cracking or joinery installation movement which I further conclude is caused from the re-stumping exercise that is flooded with evidence to show the unstable state they present. [sic]

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4 [1991] HCA 12

5 Quoting Winfield and Jolowicz on tort, 13th Edition (1989) at 1311.

29 Mr O'Meara's report attributed liability for $1,578.00 to the Builder; $710.00 for plaster repairs to the south end of the "UC" beam which runs north-south through the family room, parallel to the kitchen and $285.00 for the roof leak addressed in interim order 1(b) of 24 June 2009. Mr O'Meara's concurrent evidence with Mr Lees was nevertheless helpful.

30 In order to avoid the experts giving evidence at cross-purposes, I introduced the notion of a hypothetical carpeted chip-board floor that could be cut into readily to enable non-flooring repairs to be undertaken. The purpose of the hypothetical floor was to isolate deficiencies related to the pad footings, for which the Builder is liable, from deficiencies relating to restumping, for which he is not.

Concurrent evidence of the experts

31 The item names and order used by Mr Lees in his report of 4 September 2009 were adopted during the hearing and are reproduced here. Mr Lees' figures, given in the headings, include a 20% overhead and profit margin plus the amount he attributes to them for preliminaries. Mr O'Meara did not provide a separate sum for preliminaries, but allowed 30% to cover preliminaries as well as overheads and profit.

32 Mr Lees' reports show the calculations he has used to reach his estimates. Mr O'Meara's do not. For most matters I prefer Mr Lees' evidence to that of Mr O'Meara.

Preliminaries – Lees $24,710

33 Preliminaries represent an approximate addition of 24.5% to the items allowed by Mr Lees. No amount is allowed for preliminaries as a separate item as they are taken into account under the relevant items. They are discussed here because Mr Lees and Mr O'Meara disagree about the amount attributable to preliminaries.

34 Mr O'Meara criticised 80 hours of supervision allowed by Mr Lees and said it would be "8 or 16 at most". Mr Lees pointed out that as Mr O'Meara had allowed eight weeks for the work, this would be only an hour or so a week, including travel. Mr O'Meara revised his estimate up to 24 hours. On the basis of the value and difficulty of work to be undertaken, I accept Mr Lees estimate. I find that on this job preliminaries of approximately 24.5% are reasonable.

35 I note Mr Lees attributes preliminaries according to the value of the work to be done, rather than according to the requirements of each items of work. For example, cleaning and rubbish removal is likely to be more attributable to some tasks than others, but I accept Mr Lees' approach, with which Mr O'Meara agrees, as practical.

36 It is helpful that Mr O'Meara has valued most of the items of work discussed by Mr Lees, even though he describes them as "Repairs attributable to the Restumper".

Furniture removal and storage – Lees $8,431

37 This item is sought directly by the Owners and is dealt with below. I see no justification to add a builder's margin to it.

Services – Disconnection – Lees $723, O'Meara $900

38 The experts agree that it is necessary to disconnect services to enable the strip flooring to be undertaken. I prefer Mr Lees' evidence concerning this item to that of Mr O'Meara. The Builder must pay the Owners $723 for disconnection of services.

Dismantle and store kitchen – Lees $2,970

39 This item was not included in Mr Lees' report of 3 April 2009 as a separate item, but was included as part of item 3, at the same rate. Mr O'Meara's response was "As per item 3 of Lees Report save for [overhead and profit percentage]". I accept Mr Lees' evidence that removal and storage of the kitchen will be necessary, given that the floor must be replaced. The Builder must pay the Owners $2,970 for this item.

Removal of internal fittings and fixtures – Lees $3,805, O'Meara $7,921

40 Mr O'Meara adopted Mr Lees' item 3 of 3 April 2009 which includes dismantling and storing the kitchen. Mr Lees original scope is more extensive than in the report of 4 September 2009.

41 In accordance with Mr Lees' September report, the Builder must pay the Owners $3,805 for this item.

Uretek to column bases – Lees $10,149

42 I accept Mr Lees' evidence that this estimate is based on enquiries of Uretek. Mr O'Meara did not provide a costing but commented that:

> Recommendations have been made … to engage Uretek to stabilise the pads when there is no positive evidence that the pads have in fact sunk.

My invitation to the parties to provide further evidence was based on the finding that the pad footings as constructed by the Builder are defective. It was not an invitation to re-agitate matters that had already been decided.

43 The Builder must pay the Owners $10,149 for this item.

Reconstruct the flooring – Lees $4,703, O'Meara $15,962

44 I understand that difference between the estimates of Mr Lees and Mr O'Meara arise because the former does not include anything for rectification of the stumps and the latter does. I prefer the evidence of Mr Lees on this point.

45 The Builder must pay the Owners $4,703 for reconstruction of the particle board flooring onto which the strip flooring will be installed.

Supply and install strip flooring - Lees $25,009, O'Meara $24,453

46 As mentioned above, Mr Lees' costing is for the ground floor only and does not include bedrooms 1 and 3. I allow Mr Lees' costing.

47 The Builder must pay the Owners $25,009 for strip flooring.

Plaster repairs – Lees $7,356, O'Meara $6,401

48 Mr O'Meara and Mr Lees have costed the same work slightly differently. In accordance with Mr Lees' report, the Builder must pay the Owners $7,356 for this item.

Skirtings and internal doors – Lees $5,332, O'Meara $6,140

49 Mr O'Meara costed from Mr Lees' April 2009 report, which Mr Lees revised down in his report of September 2009. I allow Mr Lees' costing.

50 The Builder must pay the Owners $5,332 for this item.

Reinstate the kitchen and reconnect electrics – Lees $12,346, O'Meara $9,431

51 Mr O'Meara agreed with Mr Lees' scope of April 2009, which Mr Lees has increased by 15% ($980) for a contingency allowance. The preliminaries already contain a 5% ($3,819) contingency. As there was no explanation of the additional contingency for the kitchen I do not allow it. The Builder must pay the Owners $10,919 for this item being the sum, without contingency, allowed by Mr Lees in his April 2009 report.

Roof leak

52 This was allowed for in order 1(b) of the interim orders of 24 June and no further order is made in these orders.

Internal painting – Lees $21,054, O'Meara $14,128

53 Although Mr Lees headed this item "internal painting", it includes $2,220 before overhead, profit and GST, for "selected external painting". These items were included in the Lees' Report of April 2009 and I allow them.

54 The Builder must pay the Owners $21,054 for this item.

Sand and reseal the strip flooring – Lees $12,080, O'Meara $7,608

55 Mr Lees costing for sanding and resealing the strip flooring includes up and down stairs and the stairs themselves. Mr O'Meara's costing is for the Lees' work "save and except the first floor".

56 The amount ordered for the upstairs flooring of 24 June 2009 did not include sanding and resealing it. On the other hand there is no evidence of damage to the stairs for which the Builder is responsible, I am not satisfied that the difference in finish between the floors and the stairs would appear to be a defect and I do not allow the sum estimated by Mr Lees for them, $1,956 inclusive of margins and GST.

57 The Builder must pay the Owners $10,124 for this item.

Remove and replace strip flooring – Upper floor

58 I attributed $7,000 to the upstairs flooring in the decision of 24 June 2009 based on the statement in Mr Lees' summary of opinion that:

> The estimated cost of rectifications is $192,559 incl. GST
>
> If it is found the flooring to the master bedroom does not require replacement a cost saving of approximately $7,000 could be achieved.

59 However I note that in both the April and September reports the item "Remove and replace strip flooring" has an item total of $7,019 and a total including preliminaries of $8,889. Under s119 of the *Victorian Civil and Administrative Tribunal Act 1998* I correct my decision of 24 June 2009 to allow $8,889 in place of the order for $7,000, an increase of $1,889 and I do so because I mistakenly failed to take into account amounts for profit and preliminaries in the June orders.

Upper floor en suite – Lees $2,465

60 In his September 2009 report Mr Lees includes a contingency of $1,500, grossed up to $2,456 to "selectively reseal junctions and repair wall tiles in the upper floor en suite as part of the rectification works". At the on site inspection during the hearing it was clear that there was movement and damage that had not previously been reported by the experts. I allow the contingency.

61 The Builder must pay the Owners $2,465 for this item.

Agricultural drains- Lees $3,894

62 As found in order 3 of the June interim orders, the Builder is not liable for the lack of agricultural drains. No amount is allowed for this item.

THE INSURANCE PAYMENT

63 I know little about an insurance payout to the Owners except that $29,332.84 was paid to them by their insurer in May 2007 with respect to water damage to the kitchen floor. There is no suggestion that the water damage was caused by the Builder and I do not know how the loss was assessed.

64 In his closing address of May 2009 Mr Oliver said that in accordance with *Boncristiano v Lohmann* [1998] 4VR 82, "[if] the builder is found liable for the replacement of the floor, the Owners' loss is reduced by $29,332.84".

65 In his closing submissions of 24 September 2009 Mr Oliver said:

> Contrary to my earlier submissions, the payment received by the owners from the insurer in relation to the water damage claim is not to be taken into account when assessing the owners' loss in this case. The claim is not for the same damage, ie water damage to the floor compared to defective pad footings.

66 Mr Oliver said that in accordance with the decision by Byrne J in *Transport Industries Insurance Co Ltd v Masel* [6]:

> It is well established that a payment received from an insurer which has agreed to indemnify a plaintiff against that loss cannot be relied upon by a defendant in diminution of that loss.

67 Mr Oliver is correct that the item damaged is the same – the floor – but I find that the cause of damage is different. I characterise the water damage as a supervening cause which broke the chain of causation between the Builder's failure to properly construct the pad footings and the damage to that section of the doomed-to-fail floor. I therefore deduct $29,332.84 from the amount otherwise payable by the Builder to the Owners

STORAGE AND ACCOMMODATION

68 As stated at paragraph 5 of the June reasons, the Owners sought $5,309.00 for storage costs and $13,200.00 for accommodation during the rectification works. However Mr Dowling provided a further witness statement of 22 September 2009 concerning the difficulty of obtaining accommodation in Williamstown and the cost of doing so. As most of the rectification costs are to be borne by the Builder, it follows that he is also liable for costs incurred because of the Owners' need to move out of the home while rectification is underway.

Storage

69 I find the amount claimed by the Owners reasonable. The Builder must pay the Owners $5,309.00 for furniture removal and storage.

Accommodation

70 Both experts agreed that to undertake all works, including the strip flooring, would take about eight weeks. As the apartment rate for 2009 for Quest in Williamstown North approximates the amount previously claimed and the accommodation is unlikely to be as convenient to the Owners as the house they originally planned to rent, I find that the Builder must pay the Owners $13,200 for accommodation.

AMOUNT DUE TO THE OWNERS

71 In addition to the sum previously ordered, the Builder must pay the Owners $95,674.16 as follows:

Services – Disconnection	$723.00
Dismantle and store kitchen	$2,970.00
Removal of internal fittings and fixtures	$3,805.00
Uretek to column bases	$10,149.00
Reconstruct the flooring	$4,703.00

[6] Unreported, Supreme Court of Victoria 4 October 1996 at page 5

Supply and install strip flooring	$25,009.00
Plaster repairs	$7,356.00
Skirtings and internal doors	$5,332.00
Reinstate the kitchen and reconnect electrics	$10,919.00
Internal painting	$21,054.00
Sand and reseal the strip flooring	$10,124.00
Remove and replace strip flooring – Upper floor, a further	$1,889.00
Upper floor en suite	$2,465.00
Storage	$5,309.00
Accommodation	$13,200.00
	$125,007.00
Less payment by the Owners' insurer	$29,332.84
The Builder must pay the Owners a further	$95,674.16

INTEREST AND COSTS

72 I further reserve the issues of interest and costs. There is liberty to apply. Should either party apply for interest and/or costs, they must support their application with a brief outline of the orders sought and the basis for those orders and I direct the Principal Registrar to list the proceeding for me for a half day hearing as soon as possible.

SENIOR MEMBER M. LOTHIAN