

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1146/2013

CATCHWORDS

Alleged defects, drummy floor tiles, percentage of drumminess per tile, percentage of drummy tiles, compensation for rent forgone, claim for reimbursement of application fee.

APPLICANTS	Mr Craig Anthony Ferdinands, Mrs Karen Frances Ferdinands
RESPONDENT	3D Homes Pty Ltd (ACN: 116 599 912)
WHERE HELD	Melbourne and on site in Tarneit
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	18 July 2014 and 19 August 2014
DATE OF ORDER	10 October 2014
CITATION	Ferdinands v 3D Homes Pty Ltd (Building and Property) [2014] VCAT 1274

ORDER

The Respondent must pay the Applicants \$2,298 forthwith.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants on 18 July 2014	Mr Ferdinands in person
On 19 August 2014	Mr and Mrs Ferdinands in person
For Respondent	Mr Capodiferro, director

REASONS

- 1 The Applicant-Owners own a house in Tarneit that was built for them by the Respondent-Builder. The house was handed over to them on 30 July 2010 and is now a rental property. The parties agree that the whole sum due to the Builder under the contract was paid.
- 2 I heard this matter on 18 July 2014 at 55 King Street, Melbourne. Mr Ferdinands attended for the Owners. Mr Capodiferro and Mr Barbaro were present for the Builder.
- 3 Both parties produced expert reports concerning the floor tiles, but neither expert was present on 18 July 2014. For this reason, I permitted the experts to attend the adjourned hearing on site. The Owners' expert is Mr Robert Paul of Just Inspections. The Builder's expert is Mr David Graham of Ceramic Tile Systems Pty Ltd.
- 4 The hearing on site was on 19 August 2014. As well as those present on 18 July 2014, Mrs Ferdinands and Mr Paul attended for the Owners, as did Mr and Mrs Lockwood of Kernow Tiling and Mr Graham, for the Builder.
- 5 I accept the evidence of Mr Ferdinands that a number of defects lists were sent to the Builder, the first of which was sent on 1 September 2010. The parties also agree that there have been a number of occasions on which the Builder sent tradespeople to site to rectify, or attempt to rectify, alleged defects. They disagree about the efficacy of attempts to rectify.

ALLEGED DEFECTS

Hole under carpet in theatre room

- 6 The Owners claim that there is a hole in the concrete floor theatre room and the cost to rectify is \$605. The Owners rely on a quotation from p&d builders [sic], which states that the work to be undertaken is remove and relay the carpet and patch the hole in the slab.
- 7 Mr Stephen Capodiferro said that after mediation of the proceeding it was arranged that the Owners would mark the low places in the floor with Post-it notes. Mr Capodiferro said this was done and the areas marked were injected with silicon without the necessity to roll back the carpet. Mr Ferdinands showed me the area in the master bedroom that had been repaired as the described. As he remarked, the result was not smooth, although the Owners did not claim for this area.
- 8 Mr Ferdinands said he believes the area in the theatre room was not filled. At the site inspection my impression was that the hole had not been filled and I find the area is defective. Mr Capodiferro said that this area could also be injected with silicon, through the carpet.
- 9 I am not satisfied that the technique suggested by Mr Capodiferro is adequate to rectify the hole. I allow \$605 for this item.

Uneven tile splash back

- 10 The Owners' quotation for this item is \$880 to "rectify splashback defects above cooktop". The Owners' Points of Claim state that there are nine tiles on the splashback that are uneven or out of level. The parties agree that the Builders' tiler repaired the splashback in February 2013 but the Owners claim that the tiles are not fully level. They say that the tiler told them he could not make the tiles fully level as the wall supporting the tiles is out of level. Mr Lockwood repeated this at the hearing on site.
- 11 Mr Paul said that the tiles must be flush, with no allowance for tolerances, but I am not satisfied that this is an accurate representation of reasonable workmanship.
- 12 Mr Capodiferro said that the Guide to Standards and Tolerances provides that all tiles can have a lippage of 2 to 3 mm without being defective. Mr Graham's evidence on site was to the same effect.
- 13 Mr Capodiferro also said that if the tiles must be replaced, the allowance for tiles should be \$27.50 per square metre for the tiles themselves and \$30 per square metre to lay them. He estimated that the total splashback area is approximately 2m².
- 14 On site I noted that there appears to be slight peaking of the tiles between the second and third rows from the top. While it is not immediately obvious, it looks rather odd, and unworkmanlike. I accept Mr Capodiferro's evidence that the total area of the splash back is approximately 2m².
- 15 There is no indication of how b&d builders have calculated \$880 for this area, and it seems excessive. I allow \$330 inclusive of GST being \$110/m² for the tiles and substrate and a further \$110 to straighten the wall.

Gap between tile splash back and stove

- 16 The Owners claimed \$121 to repair the gap between splashback and range hood. There is an uneven gap, but as Mr Ferdinands said, if the amount sought to replace the tile splashback were granted, this amount would not also be claimed. As I have allowed an amount for replacement of the tiles, I do not allow an amount for this item.

Repaint porch ceiling

- 17 The Owners claim \$220 to repaint the porch ceiling. Mr Ferdinands said that the Builder has repaired the flashing to prevent water ingress but when the porch ceiling was repainted it was not adequately sealed and the marks caused by dirty water passing through bled into the new paint.
- 18 On site I noted that there is a very faint line where water has probably entered. I allow \$100 towards the cost of repainting on the next occasion that such work is undertaken.

Front door and "T" mould

- 19 The Owners claim \$715 for this item. They say that there are cracks around the "T" mould (which is also known as a mushroom stop) in the double doors and that in rectification there are differences in shades of paint used and there is bleeding between different colours of paint.
- 20 Mr Capodiferro said that the Builder used the original paint that had been left on site. Mr Ferdinands said that if the paint on the doors had been rectified promptly, the doors as originally painted would not have changed with age to produce the differences in paint colour.
- 21 On site I saw that the job is not completely perfect. There are some flecks of paint on some of the door furniture on the striker side of the northern door, and the northern door also has a slightly different paint colour (bright white as distinct from slightly ivory) and texture (brushed on gloss as distinct from sprayed with a duller finish). I saw the inconsistent paint when it was drawn to my attention; not before.
- 22 I allow \$100 towards the cost of repainting on the next occasion that such work is undertaken.

Floor tiles

- 23 The overall appearance of the floor tiles is competent and workmanlike with no sign that any of the tiles or grout are broken, cracked or loose, in circumstances where the floor has been in place for over 4 years. Both expert reports concerned tiling. Somewhat surprisingly, Mr Graham's report for the Builder was dated 19 February 2014 and Mr Paul's was later – 11 March 2014. Neither report refers to the other and Mr Graham was not given a copy of Mr Paul's report before the hearing on site.
- 24 The Owners claim \$25,052.50 to remove and replace the tiles, which they say are drummy, uneven, grout stained and lacking flexible movement joints. They claim a further \$715 to remove and store the household items of the tenant and accommodation cost for the tenant (a family with four children) at The Quest Apartments Werribee for 30 days at \$350 a day being \$10,500.
- 25 Mr Barbaro said that at handover of the house there was an extensive list of alleged defects and the only concern regarding the tiling was with respect to an expansion joint. He said a few tiles were replaced and a chipped tile was also replaced.

Drummy

- 26 The expert reports would have been more helpful if they had referred to clause 5.4.7 of *AS 3958.1- 2007 Ceramic Tiles, Part 1: Guide to installation of ceramic tiles* which provides:

5.4.7 Bonding In some installations small hollow-sounding areas may be found. Although they do indicate incomplete bond they are not

necessarily indicative of imminent failure. However, cases where more than 20 percent of the tile sounds hollow when tapped ('drummy') would have to be considered suspect over the long term. Needless to say this ratio would need to be varied depending on-

- (a) whether the tile is fixed to the floor or wall; and
- (b) the anticipated form and amount of traffic.

- 27 Floor tiles must withstand more wear and tear than most wall tiles, but I note the standard treats “residential” as the least demanding environment, after “industrial” and “commercial”. I am satisfied that in accordance with the standard, floor tiles in a residence which are no more than 20% drummy are acceptable.
- 28 It was also unhelpful that neither expert referred to this provision on site, or had a copy of the standard with them. Mr Paul referred to page 57 of the standard, which in the 1999 edition shows satisfactory and unsatisfactory patterns of adhesive coverage. I am not willing to draw conclusions about the patterns of coverage for these tiles on the basis of drumminess alone.
- 29 I accept the evidence of Mr Ferdinands that there are 208 tiles in the floor.
- 30 Mr Paul reported that there are approximately 40 drummy floor tiles in the building. On site he said 50 were drummy. He did not report that any of the tiles were broken or cracked, and I note that none is, but he quoted clause 11.05 of the *Guide to Standards and Tolerances* to the effect that if such tiles occupy more than 5% of the tiled area within 24 months of completion of the building, there is a defect.
- 31 Mr Graham did not report on whether any of the tiles are drummy and said at the on site hearing that this had not been brought to his attention.
- 32 Mr Graham thought that drumminess of up to 10% of the tile surface would be acceptable and Mr Paul did not correct him. On site we looked at all the tiles in the kitchen/family room area that the Owners had identified as drummy, and tapped them at approximately 50mm intervals with a large marble to determine which tiles appeared to be more than 10% drummy. Having regard to the Owners’ diagram at page 5 of Mr Paul’s report, about two thirds of the tiles reported by the Owners to be drummy are in the area considered.
- 33 My estimate of tiles which are more than 10% drummy in the area inspected was 11 tiles. If the tiles may be drummy for 20% of their surface, I find that no more than 6 of these tiles would be unacceptably drummy, or a likely 9 tiles over the whole floor. This is less than 4.5% of the total floor surface.
- 34 Mr Ferdinands said that he does not know the proportion of the tiles that are drummy and in September 2010 the Builder told him that the tiles were "within tolerances".

- 35 Drumminess is a matter of concern because it can lead to failure of the relevant tiles. However I am not satisfied that the floor is rendered defective by the few drummy tiles which have not yet failed. I am not satisfied that they are doomed to fail, and make no allowance for this aspect of the tiling.

Uneven

- 36 Mr Paul reported that in the kitchen there are approximately 10 floor tiles which are not flush, discrepancies between adjacent tiles ranging between .5 of a millimetre to 1.5 millimetres. Mr Graham said at paragraph 19 of his report that there was no sign of tile lippage which was out of tolerances. He said that there could be lippage of up to 2 mm for tiles of this nature.
- 37 On site I noted that the tiles were not visibly uneven from a normal viewing position of approximately 1.5 meters (see diagram F, page 12 of the *Guide to Standards and Tolerances 2007*). I ran my hand over areas pointed out to me by the Owners and Mr Paul as uneven. I concluded there were no areas that might be unpleasant to walk on in bare feet.
- 38 I am not satisfied that the tiling is defective by virtue of slight unevenness and I make no allowance for this aspect of the tiling.

Stained

- 39 Mr Paul reported that there is a smoky haze discolouration of floor tiles approximately 50 mm each side of grout lines. He noted this in the entry and the family room. He recommended replacement of the discoloured floor tiles.
- 40 Mr Graham reported that the floor was approximately three and a half years old at the date of his report and it has a varied surface texture which "showed as quite patchy type of surface finish and especially when viewed with a glancing light on the various tiled areas".
- 41 Mr Ferdinands said that on handover he and his wife walked into the home to find Mr Capodiferro mopping floors. I accept the evidence of Mr and Mrs Ferdinands that there was excessive grout on the tiles when they took possession of the house. I note in particular an area on the north side of the entrance hallway, close to the wall, pointed out by Mrs Ferdinands, showing unworkmanlike marking.
- 42 Mr Ferdinands said the Owners asked Mr Capodiferro about excessive grout on the floors and he suggested the owners attempt removal using eucalyptus oil. Mr Ferdinands said this was unsuccessful. He said he spoke to the tile supplier who suggested the use of a de-scaler. Mr Ferdinands said this was also unsuccessful and then another tile supplier suggested trying a weak acid solution. He said he experimented on a small patch of tiles using hydrochloric acid at a 1: 20 solution.
- 43 Mr Ferdinands said that the area he experimented on in the en suite bathroom produced a satisfactory result but that there is a continuing mark

on the tiles. He said he used a small scrubbing brush and was assisted in the work he did by a man called Eddie from the Builder.

44 Mr Lockwood said on site that he attended site on the Builder's instruction to assist in cleaning and sealing the tiles. He said the sealing produced an acceptable result and that it looks the same now.

45 Mr Graham said at paragraphs 30 of his report:

Frankly acid cleaning of any ceramic tile, let alone a glazed tile, should never be allowed as although this method can result with an excellent and clean surface, more often than not will result with degrees of acid sitting on various tiled surface positions for varying time spans and causing very variable surface etching to occur.

He said at paragraph 43:

I believe that the acid cleaning process was the cause of the surface marking concerns and resulted with the tile to tile surface marks, edge spots and the odd individual tile surface markings.

46 At paragraph 46 of his report, Mr Graham said:

I believe that the only method that would rid the surface of these concerns would be to completely replace all existing tiling – and most expensive and messy operation or tile over the existing tiling (which would require difficult new floor heights concerns). I do not believe that these methods are required as the concerns are well within the 5% Building Commission Guide to Standards and Tolerances 2007.

47 Both the Owners and the Builder brought sample tiles to show me. Both said the tile they produced had not been treated with anything. The tiles laid are not uniformly shiny, and neither are the sample tiles. I am not satisfied that the tiles are so defective as to be obvious to a reasonable person who is unfamiliar with their history. If defective at all in appearance, they are not sufficiently defective to warrant replacement.

48 However I am satisfied that the Owners have been put to time, trouble and expense to remove excess grout from the tiles, and the appearance is not precisely what they bargained for. I do not allow the cost of replacement, but do allow damages in accordance with the rule in *Bellgrove v Eldridge* (1954) 90 CLR 613, of \$1,000.

Movement joints

49 Mr Paul said that there are no flexible movement joints installed to the perimeters of the tiled rooms. He quoted Australian Standard AS3958.1-5.4.2(c):

Perimeter joints ... should be inserted where the tiling abuts restraining surfaces such as perimeter walls ...

50 Mr Graham said at paragraph 19 of his report that:

use of an intermediate movement joint at the North/South tiled joint at the kitchen doorway area would have been advised.

And at paragraph 39:

All perimeter joints are actually defined as movement joints and should be filled using flexible sealant not hard filled type grout material but I do acknowledge that the installation under review did not show movement degradation.

- 51 On site Mr Paul and Mr Graham agreed that there is no sign of damage due to the absence of movement joints. I make no allowance for this item.

Compensation for lost rent

- 52 I am not satisfied that the work to be undertaken in accordance with these orders will take more than a day or two. Neither am I satisfied that it is urgent. It can be undertaken at the end of a tenancy. I allow 3 days rent between tenants, to take into account the work and clean-up at \$380 per week. The Builder must pay the Owners \$163 for rent forgone.

Items allowed

- 53 The Builder must pay the Owners to:

Rectify hole under the carpet	\$605
Replace splash-back	\$330
Painting	200
Compensate for floor tiles	\$1,000
Compensate for rent forgone	<u>\$163</u>
	<u>\$2,298</u>

OTHER CLAIMS

VCAT application fee

- 54 The Owners claimed reimbursement of their application fee of \$428.90 paid by them on 10 December 2013. Under s115C of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) there is a presumption that there will be reimbursement of fees paid concerning domestic building proceedings to a “substantially successful” party. As the amount awarded is less than 6% of the amount claimed, I am not satisfied that the Owners were “substantially successful” and I make no order for the application fee.

Inspector’s report fee

- 55 I am not satisfied that under s109 of the VCAT Act it is fair to make an order that the Builder reimburse the Owners for the cost of their expert report and attendance by their expert at the hearing on site.

ORDER

56 For the reasons given above, the Builder must pay the owners \$2,298 forthwith.

SENIOR MEMBER M. LOTHIAN