

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1514/2017

CATCHWORDS

AUSTRALIAN CONSUMER LAW: Respondent supplied concrete to the applicants; whether concrete supplied corresponded with sample chosen by the applicants; whether contravention of s 57 of the *Australian Consumer Law*; whether applicants entitled to the costs of the rectification works.

FIRST APPLICANT	Matthew Ferraro
SECOND APPLICANT	Stephanie Cagorska
RESPONDENT	Aerolink Property Corporation Pty Ltd (ACN 109 055 754) t/as Midway Mini-Mix Concrete Garden & Building Supplies
WHERE HELD	Melbourne
BEFORE	F. Marks, Member
HEARING TYPE	Hearing
DATE OF HEARING	4 and 16 July 2018
DATE OF ORDER	13 September 2018
CITATION	Ferraro v Aerolink Property Corporation Pty Ltd (Building and Property) [2018] VCAT 1422

ORDERS

- 1 The respondent must pay the applicants \$17,860.
- 2 The respondent must reimburse the applicants, the applicant's filing fee of \$467.80.
- 3 Costs reserved. Any application for costs to be filed by 26 October 2018.

F. Marks
Member

APPEARANCES:

For the Applicants

Ms S Cagorska

For the Respondent

Mr Didone, solicitor

REASONS

THE DISPUTE

- 1 Mr Ferraro and Ms Cagorska (**Customers**), are the owners of a home in Wollert. The respondent (**Midway**) is a supplier of concrete and building materials.
- 2 In 2017 Midway supplied grape coloured concrete for the Customers' front porch and alfresco area. The Customers claim that the concrete supplied does not correspond with the grey and white sample that they chose. They claim Midway has contravened section 57 of the *Australian Consumer Law* by failing to supply concrete which corresponded with their chosen sample¹. The Customers claim \$17,860 for the cost of the rectification works.
- 3 Midway denies liability. It concedes that the Customers initially chose white/light grey coloured concrete. It says the Customers had a change of heart and later chose grape coloured concrete which it supplied.

THE HEARING

- 4 I heard the proceeding on 4 and 16 July 2018. Ms Cagorska appeared for the Customers. Mr Didone, solicitor, appeared for Midway.
- 5 For the Customers I heard evidence from Ms Cagorska, her husband Mr Ferraro, her mother Mrs Jogada Cagorska, her brother Mr Gorance Cagorski. Mr Tony Filipovski, builder, gave expert evidence for the Customers. For Midway I heard evidence from Mr Jeffrey Maloney, manager of the concrete division, Robert de Santo, head batcher. Mr Ian Mudge, engineer, gave expert evidence for Midway.

UNDISPUTED FACTS

- 6 In 2017 the Customers' home was constructed using an endorsed colour scheme which complied with the Eden Garden design guidelines. The colour scheme, specified a light grey aggregate concrete driveway and a light grey render.
- 7 In April 2017 the Customers visited Midway's showroom in Sunshine to choose concrete for their alfresco and front porch area. The showroom displayed unnamed polished samples of concrete on its floor and exposed/washed samples of labelled concrete, on its wall.
- 8 On entering the showroom, the Customers met with a sales assistant called Simone. The Customers initially chose a white/light grey concrete sample

¹ Schedule 2 of the *Australian Competition and Consumer Act 2010*.

located on the showroom floor in the corner (**first sample**)² which was unavailable. Simone showed them a similar sample, called Moonlight³ which she said would give the same effect as the first sample, when “arctic” was added to the mix. Simone gave them a business card on which she wrote “Moonlight – grey cement + arctic colour” (**Moonlight mix**)⁴ and the Customers chose that mix. About six weeks later the Customers’ concreter attempted to order the Moonlight mix from Midway only to be told it was unavailable.

- 9 On 20 May 2017 Ms Cagorska returned to Midway’s showroom with her mother, to choose a third sample of concrete. They met Wendy and went over to the corner of the showroom floor, to where Moonlight had been previously displayed on the wall. Ms Cagorska found herself standing on the first sample she had originally chosen when she first visited Midway’s showroom in April.
- 10 Ms Cagorska explained to Wendy that originally, she had wanted to order the first sample but was told it was unavailable. Wendy then told her the first sample was available and she asked Wendy to have its availability confirmed. Wendy then asked Mr Maloney, Midway’s manager, whether the first sample was available. Mr Maloney confirmed its availability.
- 11 Mr Maloney said that Midway had changed the rock it used to manufacture the first sample. Following further discussions, Ms Cagorska ordered a concrete sample called Robinvale. Robinvale is grape coloured concrete.
- 12 On 23 May 2017 the concrete was poured at the Customers’ property. The colour of the concrete as poured, was a red/grape colour. The Customers immediately notified Midway. The Customers took photos of the Robinvale concrete on the day it was poured⁵ and the next day when the Customers and Midway’s staff visited the Customers’ home to inspect the concrete.⁶ The Customers also took photos some days after the pour.⁷

DISPUTED FACTS

- 13 The central dispute concerns what was said by the parties before Ms Cagorska ordered the grape coloured concrete called Robinvale. There is also a dispute as to whether Midway staff made admissions about Mr Maloney making a mistake about the name of the concrete that Ms Cagorska claims she intended to order.

² Appendix 1 to Ms Cagorska’s witness statement.

³ Appendix 2 to Ms Cagorska’s witness statement.

⁴ Appendix 3 to Ms Cagorska witness statement.

⁵ Additional photos produced by the Customers at the hearing and attached to Appendices 5 and 6 to Ms Cagorska’s witness statement.

⁶ Appendix 10 to Ms Cagorska’s witness statement.

⁷ Appendix 20 p 3 to Ms Cagorska’s witness statement.

THE ISSUES

- 14 The issues for determination are:
- (a) Which concrete sample did Ms Cagorska choose on 20 May 2017?
 - (b) Did Midway staff make admissions?
 - (c) Did the Customers have a change of heart?
 - (d) Did the concrete as supplied, correspond to the sample chosen by Ms Cagorska?
 - (e) Are the Customers entitled to damages of \$17,860?

Which concrete sample did Ms Cagorska choose on 20 May 2017?

Ms Cagorska's evidence

- 15 Ms Cagorska gave the following evidence. When she visited Midway's showroom on 20 May 2017, she asked Wendy to find out the name of the first sample of concrete on which she was standing. She had never been told its name and the floor samples were not named.
- 16 Mr Maloney told Wendy and Ms Cagorska that the composition of the first sample had changed as quartz had been replaced with a white rock and she looked at the rock. She was not shown a grape coloured sample of concrete. Mr Maloney told them the first sample was called Robinvale.
- 17 Ms Cagorska did not go over to look at the polished sample of Robinvale. She ordered Robinvale because Mr Maloney told her that the first sample, was called Robinvale. The wall samples of the first sample and the Robinvale sample were close together. The floor samples of the first sample and Robinvale were some metres apart.
- 18 In cross examination Ms Cagorska said because she was interested in the first sample on the floor, she did not check its name on the wall prior to placing the order. She said she only became aware of the name of the first sample, when she met with Midway staff at the showroom the day after the concrete was poured. They told her the first sample was called Lisa and not Robinvale.
- 19 At no stage did she consider choosing either another colour or grape coloured concrete. She always intended to order a white/light grey concrete coloured concrete which complied with the endorsed colour scheme. She said she did not have a change of heart. She never intended to order grape coloured concrete. I found Ms Cagorska to be a truthful witness and I accept her evidence.

- 20 Mrs Cagorska confirmed Ms Cagorska's evidence. In addition, she said she did not see Mr Maloney speak to anyone at a desk, nor hear anyone discuss grape coloured concrete. I found Mrs Cagorska to be a truthful witness and I accept her evidence.

Mr Maloney's evidence

- 21 Mr Maloney is the manager of the concrete division at Midway. He gave the following evidence which was not in dispute:

- (a) He was not aware that on the Customers' first visit to the showroom, Simone had given them a business card with the composition of the Moonlight mix, which was a grey and white colour.
- (b) Ms Cagorska was in the corner at the end of the showroom when he came into the showroom, on 20 May 2017.
- (c) He discussed with Ms Cagorska the change in the rock which Midway used to manufacture its concrete and explained that quartz had been replaced with White Ice.
- (d) In cross examination he conceded that Ms Cagorska did not give him any reasons for changing from the light grey whitish sample to a red/grape coloured concrete.

- 22 Contrary to Ms Cagorska's evidence, Mr Maloney said that:

- (a) Wendy did not ask him to name the first sample because she already knew its name.
- (b) After he told Wendy and Ms Cagorska that the first sample was available, Ms Cagorska walked over to the other side of the showroom where he showed her the White Ice in the polished section of the Robinvale sample.
- (c) Ms Cagorska asked him the name of the sample and he said Robinvale.
- (d) He went over to Mr De Santo's desk and asked him the colour of Robinvale and Mr DeSanto told him it was grape.
- (e) Simone and Ms Cagorska heard Mr DeSanto tell him that the colour was grape.

- 23 In cross examination, when asked why he went to ask Mr DeSanto the name of the concrete, Mr Maloney said he was not unsure of the colour of Robinvale but wanted to be sure. In further cross examination, Mr Maloney said he could not remember why he asked Robbie for the colour. Later, his evidence was that he had been asked the colour. Mr Maloney was also asked why Ms Cagorska would ask him for the colour when she could see it. Again, Mr Maloney responded by saying that she asked for it. Mr

Maloney was unable to recall whether Ms Cagorska said she would like to order the sample off the floor.

Mr DeSanto's evidence

- 24 Mr DeSanto gave the following evidence of his discussions with Mr Maloney on 20 May 2017:
- (a) Mr Maloney came over to his desk and asked him what colour was in Robinvale or what colour was in the mix. He told Mr Maloney the colour was grape.
 - (b) He did not walk over to the Robinvale concrete sample but stayed at his desk because he knew the sample by name.
 - (c) He did not call out across the room in answering Mr Maloney.
 - (d) From his desk, he could see the entry at the opposite end of the showroom. He was unable to see Ms Cagorska on the day she visited the showroom because, when seated at his desk, he had his back to the showroom area.
 - (e) In cross examination he said he did not hear Ms Cagorska say words to the effect "I want a grape colour" or "I want light grey".

Conclusions

- 25 I prefer Ms Cagorska's evidence of her discussions with Wendy and Mr Maloney in the Midway showroom on 20 May 2017, to Mr Maloney's evidence. I did not find Mr Maloney's evidence to be credible. I have difficulty with Mr Maloney's evidence for the following reasons.
- 26 First, the three samples which Ms Cagorska had chosen, were very similar: the first sample⁸, the Moonlight sample⁹ and the Moonlight mix were all white/light grey concrete. Ms Cagorska chose a grey and white sample each time she was told her chosen grey and white sample was unavailable.
- 27 In my opinion it is inherently unlikely that Ms Cagorska would chose grape coloured concrete having just been told that the first grey and white sample, which she had chosen previously, was now available.
- 28 Second, Ms Cagorska's evidence of the events leading up to her visit to the Midway showroom on 20 May 2017, was not contradicted. Mr Maloney was unaware that Simone had given Ms Cagorska a business card with details of the white/light grey Moonlight mix. He was unaware, at the time, that each of the samples which Ms Cagorska had previously chosen, were grey and white.

⁸ Appendix 1 of Ms Cagorska's witness statement.

⁹ Appendix 2 of Ms Cagorska's witness statement.

- 29 Third, I reject Mr Maloney's evidence that Ms Cagorska went to the other side of the showroom floor, some metres away from the first sample, to look at the polished sample of Robinvale. His evidence was inconsistent with both Ms Cagorska's and her mother's evidence, whose evidence I have accepted.
- 30 In my opinion, it is inherently unlikely that Ms Cagorska would go to the other side of the showroom floor to look at a sample of grape coloured concrete and then request the name of that sample when she wanted to order grey and white coloured concrete.
- 31 Fourth, Mr Maloney's evidence was inconsistent with Ms Cagorska's email to Midway dated 3 June 2017¹⁰ in which Ms Cagorska gave an account of the events leading up to her ordering concrete called Robinvale. Her email corrected errors in the email dated 2 June 2017, from David Boxshall, Midway's owner.¹¹ Ms Cagorska's email stated that after Mr Maloney checked the availability of the first sample and explained the change in stone, he then told Ms Cagorska that the name of the display was Robinvale.
- 32 I accept Ms Cagorska's email as being an accurate contemporaneous note of her discussions with Mr Maloney, at Midway's showroom on 20 May 2017. I also accept the content of Ms Cagorska's email dated 8 June 2017¹² and Mr Ferraro's emails dated 29 May 2017¹³ and 1 June 2017¹⁴ which are also contemporaneous notes of the relevant events. The oral evidence of Ms Cagorska and Mr Ferraro was consistent with the content of their emails.
- 33 Fifth, Mr Maloney's and Mr DeSanto's evidence of their discussions about the Robinvale sample did not make sense. They both said that they were asked to determine the colour of Robinvale. They both said it was a grape colour. Mr Maloney said he was asked to name the Robinvale sample and told Ms Cagorska it was Robinvale. Later he said he was asked to name the colour of the Robinvale sample and said it was grape.
- 34 I find it implausible that Mr Maloney would tell Ms Cagorska that the colour of the concrete was grape, when Ms Cagorska's evidence, which I have accepted, was that she asked for the name of the first sample. Further, there was no dispute that the colour of Robinvale was reddish/grape and that the concrete as poured was a reddish grape colour.¹⁵
- 35 Further, it is inherently unlikely that Mr Maloney and Mr DeSanto would have discussed the colour of Robinvale, or what was in the mix, when Ms

¹⁰Appendix 19 to Ms Cagorska's witness statement.

¹¹ Appendix 19 to Ms Cagorska's witness statement.

¹² Appendix 22 to Ms Cagorska's witness statement.

¹³ Appendix 13 to Ms Cagorska's witness statement.

¹⁴ Appendix 18 to Ms Cagorska's witness statement.

¹⁵ The photographs in Appendices 5, 6, 10 and 20 (p 3) of Ms Cagorska's witness statement.

Cagorska requested the name and not the colour of the grey and white first sample.

- 36 Sixth, Mr Maloney's evidence that Ms Cagorska and Simone heard Mr DeSanto tell him that the colour was grape, was inconsistent with the evidence of Mr DeSanto. Mr DeSanto said that he was nowhere near Ms Cagorska when he spoke to Mr Maloney. Mr DeSanto was unable to shed any light on Mr Maloney's discussions with Ms Cagorska as he did not see or hear her. Wendy and Simone were not called to corroborate Mr Maloney's evidence and did not make themselves available for cross examination.
- 37 Finally, Midway did not dispute, contradict or challenge Ms Cagorska's and Mr Filipovski's evidence that the builder was required to use colours which complied with the Eden garden Design Guidelines and the endorsed colour scheme which was predominantly grey.
- 38 The colour scheme provided for an external render of light grey. The concrete driveway was a light grey aggregate. The bricks, roof tiles, fascia and gutter, downpipes and doors were dark grey, and the pier render on the porch was grey. Grape was not an endorsed colour and did not feature in the endorsed colour scheme.

Findings

- 39 For the reasons set out above, I find that on 20 May 2017, when Ms Cagorska visited Midway's showroom with her mother, and asked for the name of the first sample and Mr Maloney told them that the name of the first sample was called Robinvale when in fact it was called Lisa.

Did Midway staff make an admission?

- 40 Mr Ferraro gave evidence that at 8:16 am on 24 May 2017, the morning after the concrete was poured, Wendy telephoned him and said Mr Maloney made a mistake in telling Ms Cagorska that the name of the first sample was Robinvale. Mr Ferraro did not change his evidence when robustly cross examined by Mr Didone. I found Mr Ferraro to be a truthful witness and I accept his evidence.
- 41 Ms Cagorska gave the following evidence. She took her mother Mrs Cagorska, and her brother Mr Cagorski, to the Midway showroom the morning after the pour. She was greeted by Wendy and Simone who admitted to them that Mr Maloney had incorrectly told her on 20 May 2017, that the concrete she had chosen, was called Robinvale, when in fact it was called Lisa.
- 42 A short time later, Mr Maloney arrived at the showroom and apologised for calling the sample the wrong name. He said he called the sample Robinvale

when it was Lisa. Only on returning to the showroom that morning, did she discover that Robinvale floor sample was located on the other side of the showroom. I accept Ms Cagorska's evidence.

- 43 Mrs Cagorska and Mr Cagorski corroborated Ms Cagorska's evidence. Neither Ms Cagorska, Mrs Cagorska and Mr Cagorski changed nor contradicted their evidence when challenged by Mr Didone. I found them to be witnesses of truth and I accept their evidence.
- 44 Mr Maloney said he did not apologise or make any admissions, when he met with Ms Cagorska and her family at the Midway showroom on the morning after the concrete was poured.
- 45 I do not accept his evidence. I find Mr Maloney's evidence to be inconsistent with the evidence of Ms Cagorska, Mrs Cagorska and Mr Cagorski which I have accepted. I also find Mr Maloney's evidence to be inconsistent with what Ms Cagorska, Mrs Cagorska, Mr Cagorski and Mr Ferraro said they were told by Wendy and/or Simone on the day after the concrete was poured.
- 46 Of significance is the fact that Midway did not call key witnesses - the sales assistants Wendy and Simone - who could have supported Mr Maloney's claims that he did not make any admissions to Ms Cagorska and her family. The witnesses were in Midway's camp. No explanation was given for their absence. I draw the inference that their evidence would not have assisted Midway.¹⁶
- 47 At the end of the first day of the hearing, the parties' evidence was not complete. Mr Didone said he intended to call Mr Robbie DeSanto and Mr Maloney. He said he did not intend to call any further Midway employees. I explained to him that an inference may be drawn if Midway did not make Wendy available for cross examination at the adjourned hearing on 16 July 2018.

Findings

- 48 I find that on the morning after the concrete was poured, Wendy, Simone and Mr Maloney each admitted that Mr Maloney had made a mistake in incorrectly calling the first sample Robinvale.

¹⁶ *Jones v Dunkel* (1959) 101 CLR 298.

Did the Customers have a change of heart?

- 49 In April 2018 Mr Maloney took photos of the Customers' front porch (**Mr Maloney's photos**) showing the concrete porch which where the concrete had been removed and repoured as part of the rectification works (**Second Pour**). On the first day of the hearing Mr Didone spent a lengthy period cross examining Ms Cagorska, her husband Mr Ferraro, her brother Mr Cagorski and their builder, Mr Filipovski, about the colour of the concrete which comprised the Second Pour.
- 50 Mr Didone argued that the colour of the Second Pour was far darker than the grey and white first sample that the customer said they had chosen. Mr Didone suggested to each witness that the colour of the concrete on the front porch which formed the Second Pour, was a medium to dark grey colour, was charcoal, was darker than the driveway or was substantially or markedly darker than the driveway and the path.
- 51 Mr Didone submitted that this supported Midway's claim that the Customers had had a change of heart in choosing grape coloured concrete. Mr Didone showed each witness Mr Maloney's photos, and photos of the front porch taken by Ms Cagorska after the Second Pour.¹⁷ I found Mr Didone's cross examination of the witnesses about Mr Maloney's photos, to be of little assistance.
- 52 In cross examination, the gist of each witness' evidence was that a shadow could be seen in Mr Maloney's photos. The shadow resulted in part of the porch, and driveway appearing to look much darker in the photos than they were in reality. In each case the witnesses disagreed and disputed Mr Didone's propositions.
- 53 In cross examination, Ms Cagorska said that she had used her best efforts to match the concrete to the colour that she had firstly chosen. She said that the colour of the concrete in the Second Pour, was medium to light grey.
- 54 In cross examination Mr Ferraro denied having a change of heart and choosing grape coloured concrete. He said he had been alerted to the grape coloured concrete when his father sent him a photo of the concrete shortly after it was poured.¹⁸ Mr Didone argued that Mr Ferraro's responses supported Midway's claim that Mr Ferraro was not a witness of credit. I reject Mr Didone's argument as I found Mr Ferraro to be truthful witness and I have accepted his evidence.
- 55 In cross examination, Mr Filipovski reiterated his evidence in chief, that the builder was required to follow the endorsed materials and colour schedule and that the colour schedule did not include grape coloured concrete. He

¹⁷ Appendix 24 to Ms Cagorska's witness statement.

¹⁸ Appendix 5 to Ms Cagorska's witness statement.

gave evidence that the colour of the Second Pour was much lighter than it appeared in Mr Maloney's photos.

- 56 Ms Cagorska, Mr Ferraro and Mr Filipovski gave detailed evidence of various meetings with Mr Maloney on site following the concrete being poured. A good deal of the evidence was not in dispute however, most of the evidence was not relevant for my determination.

Findings

- 57 I find that the documents on which Ms Cagorska relied, evidence her intention to order grey and white coloured concrete and not grape coloured concrete called Robinvale.
- 58 I find that Ms Cagorska, Mr Ferraro, Mr Cagorski and Mr Filipovski's evidence did not change when cross examined. I find their evidence was supported by their emails sent in late May and early June 2017. I find that the Customers immediately notified Midway of their concerns when the grape coloured concrete was poured and took immediate action to arrange quotations to rectify the work. I find Midway's request for the engineering plans, further supports the Customers' evidence that Mr Maloney agreed to fix his mistake.
- 59 So I reject Midway's allegation that the Customers had a change of heart and ordered grape coloured concrete. I find that Ms Cagorska ordered concrete called Robinvale after Mr Maloney told her that the first sample was called Robinvale.

Did the concrete as supplied, correspond to the chosen sample?

Findings

- 60 In the light of the findings I have made, I further find that the Robinvale concrete supplied by Midway did not correspond with the sample chosen by Ms Cagorska at the Midway showroom on 20 May 2017.
- 61 I find the concrete to be defective as it was not of acceptable quality. I find that the concrete as poured was a red grape colour and not a whitish grey concrete. I find that the Robinvale concrete was not acceptable in appearance to the Customers who always intended to order the first sample which was grey and white concrete called Lisa. I therefore find that Midway has contravened section 57 of the *Australian Consumer Law*.

Are the Customers entitled to damages of \$17,860?

- 62 The Customers claim damages of \$17,860. The damages comprise the following costs of the rectification works which have been carried out, invoiced and paid for by the Customers:

- (a) \$2,750 for grinding down the concrete in the alfresco area;¹⁹
- (b) \$9,900 for installing and polishing Pangaea PCV to the alfresco area;²⁰
- (c) \$3,960 for the removal and replacement of the concrete porch;²¹
- (d) \$1,250 for the hire of a generator and trailer.²²

63 Midway claims that the rectification works could have been carried out for approximately \$13,500.²³

Mr Mudge's report

64 Midway relied on Mr Mudge's report dated 26 June 2018. Mr Mudge is an engineer and consultant specialising in the properties of concrete and related products. Mr Mudge did not inspect the concrete supplied by Midway which was poured at the Customers' property. Mr Mudge based his opinion on photographs provided to him. He dealt separately with the rectification costs to the alfresco area and the porch.

65 Mr Mudge considered the rectification works in the alfresco area to be inappropriate. He considered that the recommended grinding of concrete would damage the structural integrity of the concrete slab. Mr Filipovski, the Customers' builder disagreed with Mr Mudge. Mr Filipovski gave evidence that he increased the depth of the concrete pour to allow for grinding. For my purposes it is unnecessary to determine this issue. The issue for determination is whether Midway is liable for the rectification costs of the alfresco area and porch.

66 As to alfresco area, Mr Mudge considered the quotations from Alliance Specialised Flooring Pty Ltd (**Alliance**) dated 25 May 2017 and 5 June 2017, to be fair and reasonable. Alliance's first quotation was for \$11,000, to remove the surface of the slab and install and polish Pangaea PCV. Alliance's second quotation for \$2,750 was to remove 15 mm from the surface of the concrete only.

67 He said that his enquiries indicated that up to \$16,000 may have been charged by some contractors for rectification of the alfresco area. He said \$16,000 comprised \$4,000 to remove 15 mm of surface material and \$12,000 to supply and install Pangaea PCV veneer.²⁴

68 As to the rectification of the front porch, he considered the amount of \$3,960 for the removal and replacement of concrete to be excessive. He

¹⁹ Appendix 20. Tax invoice dated 5 June 2017 from Alliance Specialised Flooring Pty Ltd.

²⁰ Appendix 23. Tax invoice dated 5 September 2017 from Alliance Specialised Flooring Pty Ltd.

²¹ Appendix 24. Invoice dated 3 November 2017 from L. S Constructions.

²² Appendix 20. Tax invoice dated 5 June 2017 from Kennards Hire and Appendix 23. Tax invoice dated 14 September 2017 from Kennards Hire.

²³ Expert Report of Ian H Mudge dated 26 June 2018 at [5].

²⁴ Mr Mudge's report at [4.2b].

considered \$2,500 to be a reasonable amount, based on a charge of \$120 per m² with the added cost of breaking and removing the original material. He concluded that the rectification works could be carried out for \$13,500.

Mr Mudge's evidence

- 69 Mr Mudge gave oral evidence in which he confirmed his opinions set out in his report. He was asked to examine the costs of the actual rectification work carried out by Alliance on the alfresco area. He agreed that Alliance's invoice dated 5 June 2017, for \$2,750 for grinding the concrete, was reasonable.
- 70 The original Alliance quotation dated 25 May 2017, for supplying the Pangaea PCV, was \$6,600. He considered Alliance's invoice of \$9,900 for supply, installation and polishing of Pangaea PCV to be excessive. He said that no explanation was given for the increase in Alliance's costs. Mr Mudge said that without any explanation as to the increase in price, he considered Alliance's first quotation of \$11,000 to be fair and reasonable.
- 71 In cross examination Mr Mudge agreed that \$17,860 was a reasonable amount for the rectification of both the alfresco area and the porch because he had received a quotation for \$16,000 to rectify the alfresco area only. He agreed that his costings did not include hiring a generator.
- 72 In his evidence in re-examination, Mr Mudge said that the longer concrete was left after being poured, the more expensive it was to rectify. He said that in this case the grinding off of 15 mm of concrete in the alfresco area, was done on 5 June 2017, not that long after the concrete had been poured.
- 73 I found Mr Mudge to be a truthful witness. However, I found him to be fixated by the original quotation of Alliance dated 25 May 2017. He continued to say that this was the correct quote to work off because no explanation had been given for the increase in price. However, the fact is that the Customers paid \$17,860 to have the rectification works carried out.
- 74 Further, Mr Mudge, while agreeing with the first quotation of Alliance dated 25 May 2017, did not address the fact that Alliance allowed \$4,400 to grind down 8 to 10 mm of 30 m² of existing concrete but only invoiced the Customers \$2,750 for that work.²⁵ Mr Mudge continued to argue that the Alliance invoice dated 5 September 2017 was excessive.
- 75 The Alliance invoice dated 5 September 2017 appears to be a quotation. Under the heading "Description" the invoice reads:

"Please read FAQs on Pangaea website for expectations and limitations of product. By accepting this quotation, you acknowledge

²⁵ Appendix 20. Tax invoice dated 5 June 2017 of Alliance Specialised Flooring Pty Ltd.

the FAQs. Deposit – 50% required to book job. Balance on completion.”

- 76 The Customers’ Commonwealth Bank transaction statements²⁶ are evidence of the Customers’ payments of \$4,950 on 5 September 2017 and \$4,950 on 18 September 2017. It is not disputed that the Customers paid Alliance \$9,900 for supplying Pangaea PCV.
- 77 It is not disputed that Alliance’s increased its costs of supplying Pangaea PCV to the alfresco area. Alliance’s first quotation was in May 2017. Its later quotation was given in September 2017.
- 78 Mr Mudge said that it became more expensive to remove concrete, the longer it was left after being poured. It was not disputed that the concrete was poured on 23 May 2017 and removed from the porch on 3 November 2017. In other words, the concrete on the porch was removed five and a half months after it was poured.
- 79 Accepting Mr Mudge’s evidence, I find that the cost of removing the concrete five and a half months after it was poured, would have exceeded the cost of removing the concrete immediately after it was poured. I find that the L.S Constructions’ invoice of \$3,960 for the removal and repouring of the concrete porch, was reasonable.
- 80 Mr Mudge conceded that if the alfresco area had to be repaired, the reasonable cost of repairing it would have been \$16,000 and that other rectification works were required. That concession reinforces my conclusion that \$17,860 was the reasonable cost of all rectification works required.

Findings

- 81 I find that the rectification works for the alfresco area and the porch have been carried out for \$17,860. I find that the rectification costs are fair and reasonable. I find that Midway is liable to pay the Customers \$17,860.

Should a *Jones v Dunkel* inference be drawn?

- 82 The Customers provided evidence of payment of the rectification works, except for a payment of \$3,960 to LS Constructions. Ms Cagorska gave evidence that she and Mr Ferraro were given cash as part of their wedding presents and that they paid L.S Constructions \$3,960 in cash.
- 83 Mr Didone questioned why the Customers did not obtain a receipt for the monies paid to L.S Constructions. The Customers gave evidence that, at the time, they did not think they needed a receipt. The Customers did not call anyone from L.S Constructions to give evidence of the payment of its

²⁶ Appendix 25 to Ms Cagorska's witness statement.

invoice dated 3 November 2017. Mr Didone submitted that in the light of the Customers failing to call anyone from L. S. Constructions, I should draw a *Jones v Dunkel* inference that the evidence of L.S. Constructions would not have assisted the Customers.

- 84 I am not persuaded that this is a case in which a *Jones v Dunkel* inference should be drawn. First, as the Tribunal is not bound by the rules of evidence, the rule is not directly applicable to proceedings in the Tribunal.²⁷ However, the rule may operate where there is an unexplained failure to call a witness. In appropriate circumstances this may lead to an inference that the uncalled evidence would not have assisted the party.
- 85 Three conditions are required before an inference can be drawn. First, where a missing witness would be expected to be called by one party rather than the other. Second, where his or her evidence would elucidate a particular fact or true complexion on the facts. Finally, where there is no explanation, or an unsatisfactory expectation is given for the absence of the witness. Mr Didone did not examine each of these conditions.
- 86 In my opinion, this is not a case where it would be expected or natural, for the Customers to produce an employee from L.S. Constructions. Nor do I consider it to be a case where L.S. Constructions are to be regarded as in the Customers' camp. Ms Cagorska gave evidence that she did not know of L.S. Constructions before engaging them to do the work.
- 87 In my opinion it is inherently unlikely that an independent supplier would issue an invoice for \$3,960 for the removal of an existing concrete porch and the replacement of the concrete porch and allow the invoice to remain unpaid. I accept Ms Cagorska's evidence that she paid L.S Constructions \$3,960 in cash. It is not disputed that the porch has been rectified. The rectification works can be seen in photos which have been produced by the Customers.²⁸
- 88 Finally, Ms Cagorska's evidence was that the rectification works were delayed due to the Customers endeavouring to resolve the issue with Midway. She said they did not carry out the works immediately as they worked with Midway on the understanding that Midway would fix the problem. She said that after it became apparent that Midway would not accept any liability, the Customers had no choice but to arrange for the rectification works to be carried out. I accept Ms Cagorska's evidence.

²⁷ Section 98 (1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*; *Maund v Racing Victoria Ltd* [2016] VSCA 132 at [55].

²⁸ Appendix 24 to Ms Cagorska's witness statement.

ORDERS

- 89 I have found that Midway has contravened section 57 of the *Australian Consumer Law* by supplying concrete to the Customers which did not correspond with the original sample that they chose. I have found that Midway is liable to pay the Customers \$17,860 in damages for the rectification works. I will make orders to that effect, with an order that Midway reimburse the filing fee.

F. Marks
Member