

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D44/2009

**CATCHWORDS**

Failure by owner-builders to rectify defective works – cost of rectification

<b>APPLICANT</b>	Deidre Mary Finemore
<b>FIRST RESPONDENT</b>	Constantinos Houndalas
<b>SECOND RESPONDENT</b>	Kevin Anthony Moran
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	13 and 15 October 2009
<b>DATE OF ORDER</b>	19 November 2009
<b>CITATION</b>	Finemore v Houndalas & Anor (Domestic Building) [2009] VCAT 2406

**ORDER**

- 1 Order the respondents to pay to the applicant \$39,900 forthwith.
- 2 Costs reserved. Liberty to apply. I direct the Principal Registrar to list any application for costs for hearing before Deputy President Aird for one hour.

**DEPUTY PRESIDENT C AIRD**

**APPEARANCES:**

For Applicant	Ms S Kirton of Counsel
For First Respondent	Mr Houndalas in person
For Second Respondent	Mr Moran, in person

## REASONS

- 1 The applicant, Mrs Finemore, purchased a new home from the respondents and moved in with her family in May 2005. She is claiming \$41,979.30 for rectification works. The respondents built the home as owner-builders. The applicant was represented at the hearing by Ms Kirton of Counsel.
- 2 These proceedings were commenced on 30 January 2009. The application was accompanied by Points of Claim and a copy of a report from the Building Commission. After an unsuccessful mediation the proceeding was referred to a directions hearing on 30 April when a timetable was set including orders for the filing of expert reports by the applicant by 3 July and by the respondent by 24 July. Both parties were legally represented at the directions hearing.
- 3 On 21 July, three days before the date for the filing of the respondents' expert reports their solicitor wrote to the tribunal requesting the matter be listed for a further directions hearing as the respondents were seeking further particulars of the cost of the rectification works as the material relied on by the applicant only included a lump sum price. On 29 July the respondents' solicitors advised the tribunal:

...our client is not in a position to file an expert report until such time as proper particulars of loss and damages have been provided by the Applicant.
- 4 The proceeding was listed for a directions hearing at which time I accepted the submission on behalf of the applicant that the onus was on her to prove her loss and damage. I declined to order the applicant to provide a detailed breakdown of the cost of the rectification works, noting the respondents had been in possession of a copy of the Building Commission report for some months and could have obtained their own expert report as to the scope and cost of the recommended works. I extended the date for the respondents to file and serve their expert report to 2 October.
- 5 Until shortly prior to the hearing the respondents were legally represented. The tribunal received advice from the respondents on the morning of the hearing that their solicitor would not be appearing on their behalf at the hearing. A Notice of Solicitor ceasing to Act has not been filed. Mr Houndalas is self employed and owns a café. Mr Moran is an accountant. Mr Moran presented the case on behalf of the respondents with some additional comments being made by Mr Houndalas. He was very thorough in his cross-examination, if argumentative at times.
- 6 At the commencement of the hearing, on 13 October, the respondents advised that although they had engaged an expert ('the first expert') who had carried out an inspection, they had not yet received his report. After I stood the matter down to allow Mr Moran to ring the respondents' expert, he said he expected to receive the report that evening. When it had still not been received on the second day of the hearing, being mindful of the

tribunal's obligations under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* I gave the respondents leave to file and serve a report by 30 October. I do not know whether they ever received a report from the first expert. However, they complied with the orders and filed an expert report prepared by Tony Croucher of Buildspect on 28 October. His report records that he inspected the works on 21 October.

- 7 I also gave the applicant leave to apply for the hearing to be reconvened for the purposes of cross-examining the expert and for the filing of submissions in response to the expert report. The applicant did not seek to have the hearing reconvened and submissions were filed on her behalf on 6 November.

### **Background**

- 8 The applicant says she first became aware there were some problems with the works in September 2006 when there were difficulties in shutting the door to the ensuite bathroom. She contacted 'Hire a Hubby' who, she says, told her the problem was caused by water damage.
- 9 The applicant says she became aware of further problems in October or November 2006 when:
- i The folding doors to the back courtyard were difficult to open and close
  - ii The front door appeared warped
  - iii The splashback to the kitchen bench did not appear to be adequately sealed.
- 10 On 11 December 2006 her solicitors wrote to each of the respondents setting out her concerns and requesting they contact her directly to make arrangements to rectify the defects.
- 11 Shortly after this letter was sent, the applicant says she found that the door to the main bathroom was also difficult to close, and she noticed a water leak in the window frame in bedroom 2.
- 12 In February 2007 the applicant complained to Consumer Affairs Victoria about the failure of the respondents to rectify the defects. On 17 April 2007 Consumer Affairs wrote to the applicant advising that Mr Houndalas had agreed to contribute towards the cost of rectification upon receipt of two quotations, and that they were still waiting to hear from Mr Moran. Consumer Affairs also wrote to each of the respondents confirming Mr Houndalas' offer and seeking Mr Moran's confirmation that he would also contribute. I do not know whether Mr Moran ever replied. In the letter to Mr Houndalas, Consumer Affairs advised:

I will be forwarding a copy of this letter to the purchaser, asking that they forward the repair quotes directly to you both. As the defects listed have the potential to cause greater damage, please note that if this matter is not resolved within four weeks from the date of this

letter, this Office will consider referring the matter to the Building Commission for a technical report.

And in the letter to Mr Moran:

Failure to address this matter within a reasonable period of time will probably also result in consequential damage. This naturally will increase the cost of rectification works.

- 13 On 19 April 2007 she sent Consumer Affairs a copy of a quotation for rectification works which her husband had obtained from John Kennedy Plumbing & Building Services. That quotation is dated 19 April 2007 and refers to three items:

i. Ensuite bathroom	\$9867
ii Main bathroom	\$7348
iii Kitchen splash back	\$ 319

Although a total price was not included, these total \$17,534.

- 14 The applicant sent a copy of this quotation to Consumer Affairs who forwarded copies to each of the respondents in late May 2007, again reminding them of the need for rectification work to be carried out quickly, and suggesting they might wish to obtain their own quotations.
- 15 The applicant says that Mr Moran attended her home, in August 2007, with two or three others, who she believes were plumbers, to inspect the bathrooms. Mr Moran came back in September 2007 with someone from 'T.A.C. Tiling & Shower Seal' to again inspect the bathrooms.
- 16 In November 2007, when she had not heard from either of the respondents, the applicant once again contacted Consumer Affairs who advised her, in a letter dated 3 January 2008, that they had asked the Building Commission to arrange for an inspector to inspect and prepare a report on the items she alleged were defective. Mr Saul Rozenbes inspected on 23 January 2008. The respondents did not attend the inspection. The applicant received a copy of Mr Rozenbes' report under cover of a letter from the Building Commission dated 29 January 2008.
- 17 Mr Rozenbes identified five items which needed to be rectified (using Mr Rozenbes headings).
1. Ensuite – water damage
  3. Main bathroom – water damage
  4. Main bathroom – tile damage
  6. Bedroom 2 – water entry at window
  9. Rear deck – folding doors
- 18 In relation to items 1,3, and 4, after identifying the damage caused by the water leaks, Mr Rozenbes reported:

4. Performance Requirement P2.4.1 of the BCA<sup>1</sup> states that to protect the structure of the building and to maintain the amenity of the occupants water must be prevented from penetrating (a) behind fittings and linings; or (b) into concealed spaces of sanitary facilities bathrooms laundries and the like.
5. As water had penetrated into concealed spaces behind the wall linings and caused damage to the finishes/the floor to be damp and the tiles and grout to be stained, it is considered that the amenity of the occupants has not been maintained and therefore a defect is noted.

and recommended:

Rectify construction to replace damaged finishes and to prevent further penetration of water to the satisfaction of the Relevant Building Surveyor.

19 In relation to item 6 Mr Rozenbes reported:

3. Performance Requirement P2.2.2 of the BCA states that a roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause (a) unhealthy or dangerous conditions, or loss of amenity for the occupants; and (b) undue dampness or deterioration of building elements.
4. As the wall surface has been damaged, it is considered that there has been a deterioration of building elements and therefore a defect is noted.

and recommended

Rectify construction to repair damaged finishes and to prevent further penetration of water to the satisfaction of the Relevant Building Surveyor.

20 A copy of this report was sent to each of the respondents by the Building Commission. On 15 February 2008 Consumer Affairs wrote to Mr and Mrs Finemore advising that Mr Moran had told them that he would arrange for the works to be rectified, and further that if he failed to do so they should lodge an application in this tribunal.

21 On 28 February 2008 the respondents finally made contact and advised:

I refer to our discussions regarding the above property and the subsequent Building Commission Report.

As previously arranged, I have had an inspection of the property with you in attendance by T.A.C. Tiling and Shower Sealing who gave us a quote to repair the leaking bathrooms.

We left it with you to arrange a time for the repairs to be done and apparently you have not followed up with them to organise the repairs.

I have contacted them again and they are still prepared to do the work. You can call them on ...to arrange a suitable time. Once the leaks are

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<sup>1</sup> Building Code of Australia

repaired and the areas have dried out, we will arrange for the carpentry work to be undertaken.

I am disappointed that you did not arrange for this work to have been completed sooner as it may have resulted in further water damage and therefore more costs.

Please call me on ...if you have any queries.

This letter appears to have been written by Mr Moran on behalf of both respondents.

- 22 The applicant says she had a number of concerns with this letter. First she had not seen the T.A.C. quotation, secondly the letter did not confirm that the respondents would pay for the work. Further, it was unclear whether the proposed works included rectification of the window leak and the rear folding doors, or whether the works would be carried out by a suitably licensed person or registered building practitioner. Finally she said that she believed it was the responsibility of the respondents to make the necessary arrangements for the works to be carried out.
- 23 She had her solicitors write a further letter to each of the respondents dated 4 March 2008:

We act on behalf of Mrs Finemore and refer to your letter dated 20 February to Mr John Finemore hand delivered on Thursday 28 February 2008.

With all due respect it is your responsibility to contract with the builders to undertake the required rectification works not our client's responsibility. There has been significant time for you to do so since the report of 29 January 2008.

We ask that within seven (7) days you provide this office with a formal letter detailing when and what works will be carried out. If you fail to arrange rectification of the defects VCAT proceedings will be issued against you without further notice.

- 24 On 11 March 2008 the respondents once again wrote to the applicant directly, rather than responding to her solicitors (once again the letter appears to have been written by Mr Moran):

I refer to the letter received from your solicitors dated 4<sup>th</sup> March 2008 regarding repairs to the above property.

As previously stated I thought that the easiest and most efficient way to get the repairs started was for you to arrange a time directly with the contractor T.A.C. Tiling & Shower Sealing that suited you.

As this is not to your liking, please provide me with three dates which are suitable and I will then book in a time with T.A.C. Tiling & Shower Sealing to get the repairs underway.

I am disappointed that you did not arrange for this work to be completed sooner as it may have resulted in further water damage and therefore more costs.

Please call me on ...if you have any queries.

- 25 When she had not heard anything further from the respondents by the end of May 2008 she and her husband contacted a number of builders to obtain quotations to rectify the defects identified by Mr Rozenbes. They obtained three written quotations:
- (a) John Kennedy Plumbing & Building Services dated 24 June 2008 - \$38,940.
  - (b) Alan Ames dated 10 July 2008 for \$54,310; and
  - (c) David Coates trading as 'Solid Developments' dated 1 August 2008 for \$39,900.
- 26 The applicant did not contact the respondents to advise them she had obtained further quotations and intended to have the works carried out. Rather, as John Kennedy was not immediately available, the applicant contracted with Mr Coates who, with his tradesmen carried out the works between October 2008 and February 2009. Whilst he was carrying out the works Mr Coates advised the applicant that he had found that more extensive rectification of the sub-floor timbers was required at an additional cost of \$2,079.30. She has paid Mr Coates a total of \$41,979.30.

## Discussion

- 27 As noted above, the applicant relies on the Building Commission report prepared by one of its inspectors, Saul Rozenbes and a 'Condition Report' prepared by Mr Coates dated 13 February 2009. Mr Coates makes a number of comments and observations about what he discovered during the works, and sets out the works he carried out. This report is accompanied by a number of undated coloured photographs.
- 28 In his report, Mr Croucher agrees that '*...the repair methodology outlined in the Solid Developments report appears to be satisfactory...*' and then raises some issues, and makes a number of observations about the way in which the works have been performed. These are not relevant to the issues in this proceeding and I have not taken them into account.
- 29 Mr Croucher goes on to say:

Unfortunately, as the Owners continued to use the bathrooms for more than 12 months after the Builders viewed the bathrooms, considerable more damage had occurred as a consequence.

It is reasonable to assume the required rectification works would not have been as significant if attended to early.<sup>2</sup>

and

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<sup>2</sup> Buildspect report 28 October 2009, p3

## Conclusion

9. It would appear the charge to the Owners by the rectifying builder are excessive with potentially, some of the work being unnecessary if the original Builder has been permitted to carry out proposed rectification works.

However, nowhere does he indicate what further damage he considers has occurred by the delay in the rectification works being carried out, or what works were 'potentially ...excessive'.

- 30 Attached to his report is a 'Pricing Calculation' in which he has estimated the cost of the works which have been carried out by Mr Coates at \$27,340. However, noting that Mr Coates' quotation was \$960 more than the second quotation provided by John Kennedy and \$14,410 less than Alan Ames' quotation I am satisfied the price paid was fair and reasonable. In any event, as I said in *Donaldson Homes v Vero Insurance* [2006] VCAT 179 at [24]

It is apparent that an appropriate basis for assessment of damages is the actual cost of carrying out works in circumstances where works have already been carried out ... such sum can only be the actual amount paid to the owners. In *Hyder Consulting (Australia) Pty Ltd v Wilhemsen Agency Pty Ltd* [2001] NSW CA 313 Giles J A said:

That if the rectification work has been carried out and the actual cost is known, that provides sound evidence of the reasonable cost and should ordinarily provide the basis for damages.

- 31 The major difficulty is that the respondents do not seem to have any understanding of what constitutes reasonable and necessary works to rectify the defects which have been identified. I accept that neither the applicant nor her solicitors were provided with a copy of the T.A.C. quotations until after the commencement of these proceedings. They were included in the respondents' list of documents, and copies obtained by her solicitors in July of this year. There are two quotations dated 17 September 2007, one for each of the main and en-suite bathrooms which set out an identical scope of works. The quoted price for each bathroom is \$1,100:

Main shower: remove loose grout from internal corners where wall tiles meet base tiles. Repair cracked grout on wall and floor tiles, repair grout on outside of shower area, replace silicone around shower screen where required. Apply 2 part epoxy to internal corners, apply a penetrating sealer to walls and base. NOTE: Do not use shower 2 days before work and 1 day after.

It is not clear whether T.A.C. were provided with a copy of John Kennedy's first quotation which sets out an extensive scope of works for both bathrooms. It seems that the respondents did not seek any quotations after they received Mr Rozenbes' report, and that they have not understood the scope and extent of the works required to rectify the defects he identified.

- 32 Although in their letter of 28 February 2008 the respondents indicate that once the T.A.C. works have been carried out and the areas dried out they would arrange for the carpentry works to be undertaken, details of the scope of proposed rectification works were not provided. However, Mr Moran said that the total cost to the respondents of all works would have been approximately \$5,000. There is no evidence to support this, nor about the proposed scope and extent of those works.
- 33 Both respondents said they did not receive the letter from the applicant's solicitors dated 11 December 2006 setting out details of the defective works. Whilst correspondence addressed to one of them might have gone astray in the post, it seems unlikely they neither of them received it.
- 34 Mr Moran seemed focussed on passing the responsibility for the respondents' failure to rectify the works onto the applicant. He maintained that the respondents were always prepared to rectify the works at their cost but had not done so because the applicant had failed to advise them of three times, which were convenient for her, as they had requested in their letter of 11 March 2008. This is despite her solicitors advising that access was generally available. He then persisted in questioning about what was meant by 'generally available'. For instance, he enquired, what if had arranged for the contractor to attend and she had been out shopping? Presumably he could have arranged for the works to be carried out and advised her of the time, and if that was inconvenient, reminded her that she said access was generally available.
- 35 Any suggestion that it was incumbent upon the applicant to seek out Mr Houndalas at his café or Mr Moran at his home (he said at the time he lived across the road) is misconceived. Not only was it the respondents' responsibility to make the necessary arrangements for the carrying out of these works, the applicant was entitled to engage legal representation and to communicate with the respondents through her lawyers.
- 36 The photographs attached to Mr Coates 'condition report' prepared whilst he was carrying out the works confirm there has been serious water damage to the structural timbers suggestive of a compromised waterproof membrane. I note T.A.C. Tiling were not called to give evidence, and Mr Croucher has not made any comment about the adequacy of T.A.C.'s proposed works. However, it seems unlikely that simply sealing the leaks would have been sufficient. In his report Mr Rozenbes has identified that the water has penetrated into the '*concealed spaces behind the wall linings*' so of course it was necessary to remove the tiles, investigate and repair the cause of the water penetration and rectify any consequential damage.
- 37 Despite the best endeavours by Consumer Affairs and the applicant's solicitors, the respondents failed to take responsibility for, and arrange for the necessary rectification works. In such circumstances, the applicant had no alternative other than to make her own arrangements for the works to be rectified. The works set out in each of the quotations is consistent with Mr

Rozenbes' report. However, she had a duty to mitigate her loss and if she had arranged for the works to be carried out sooner the damage to the sub-floor timbers might not have occurred, and accordingly the additional costs are not allowed.

- 38 I will therefore order the respondents to pay to the applicant the sum of \$39,900. I will reserve the question of costs with liberty to apply.

**DEPUTY PRESIDENT C. AIRD**