

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1329/2017

CATCHWORDS

Australian Consumer Law and Fair Trading Act 2012; alleged defective painting; no expert evidence called by the applicants; damages; set off.

FIRST APPLICANT	Sasha Harris
SECOND APPLICANT	Paul Harris
RESPONDENT	P.S.A Painting Pty Ltd (ACN 106 502 309)
WHERE HELD	Melbourne
BEFORE	Member F. Marks
HEARING TYPE	Hearing
DATE OF HEARING	21 December 2018 and 8 April 2019
DATE OF ORDER	17 June 2019
CITATION	Harris v P.S.A Painting Pty Ltd (Building and Property) [2019] VCAT 905

ORDER

The proceeding is dismissed.

MEMBER F. MARKS

APPEARANCES:

For the First Applicant	Sasha Harris, in person.
For the Second Applicant	Paul Harris, in person,
For the Respondent	Peter Saba, director.

REASONS

INTRODUCTION

- 1 In 2014 the parties entered into a contract in which the respondent (Painter) agreed to paint the exterior of the applicants' Brighton home for \$12,295 (Contract). The applicants claimed the paintwork was defective and incomplete and refused to pay the balance of \$2,460.
- 2 In 2017 the applicants issued proceedings claiming damages of \$18,018. At that time the applicants lived at their property. In about June 2018 the Painter returned to rectify work which it agreed was defective and incomplete. Mrs Harris lives at the property. Mr Harris does not. Mrs Harris now says some, but not all, of the paintwork has been rectified.

THE HEARING

- 3 Mr Harris and Mrs Harris represented themselves and Mr Saba, director, represented the Painter. At the first hearing, Mrs Harris appeared by telephone from Sydney. The hearing was adjourned because of the loss of connection with Mrs Harris' mobile telephone.
- 4 At the adjourned hearing Mrs Harris appeared by video link from the remote hearing room to ensure compliance with intervention orders that the applicants had taken out against each other. Mr Harris and Mr Saba, director for the Painter appeared in person.

THE EVIDENCE

- 5 I found the evidence of Mr Harris and Mrs Harris to be inconsistent, confusing, and at times implausible. Mrs Harris said Mr Harris prepared the applicants' claim and she challenged Mr Harris' claim for damages. During the hearing Mrs Harris claimed that Mr Harris' evidence was untruthful and that he had altered various quotations for the costs of the rectification work. Mr Harris denied the claims and attempted to explain the inconsistencies. I was not persuaded by Mr Harris' explanations.

CORRESPONDENCE RECEIVED AFTER THE HEARING

- 6 On 8 April 2019, at the end of the hearing, I reserved my decision. On 2 May 2019 Mrs Harris sent the Tribunal an email which raised issues about the truthfulness of some of the evidence presented by Mr Harris at the hearing.
- 7 As it was possible that Mrs Harris' email may have a bearing on the outcome of the decision, the Tribunal sent Mrs Harris' email and attachments to the parties. It requested short written submissions about whether the hearing should be reopened, any further evidence should be called and if so, from whom. The Tribunal suggested to the parties that they get legal advice in the light of the seriousness of the matters raised.

- 8 The parties filed short submissions and requested the Tribunal not to reopen the hearing. Mrs Harris sought leave to withdraw the applicants' claim because she said she wanted to commence a new application against the Painter. She also requested the Tribunal to investigate Mr Harris' conduct.
- 9 Mrs Harris has had the opportunity to make a formal application to the Tribunal. She has not done so. The hearing has finished, I have heard the evidence and I have reserved my decision. During the hearing no application was made to the Tribunal about Mr Harris' conduct. It is not for the Tribunal to investigate now the claims made by Mrs Harris against Mr Harris. Having reserved my decision I will now give my reasons.

WHAT HAPPENED?

- 10 The relevant timing of events in 2018 was that:
- (a) In February 2018 Mrs Harris notified the Tribunal that Mr Harris no longer lived at their home and that she had taken out an intervention order against Mr Harris;
 - (b) In May 2018 Mrs Harris and Mr Saba agreed on the work to be completed by the Painter;
 - (c) In June 2018 the Painter carried out the agreed work;
 - (d) In late June 2018 after the further paintwork was done, Mrs Harris agreed that items had been rectified but said other items were defective or incomplete;
 - (e) In September 2018 the parties agreed to appoint an independent assessor to assess the paintwork at the applicants' property;
 - (f) The parties did not appoint an assessor and did not call independent experts to give evidence at the hearing; and
 - (g) Mr Harris has taken out an intervention order against Mrs Harris.

THE ISSUES

- 11 The principal issues are:
- (a) Whether the paintwork carried out in June 2018 is defective and/or incomplete;
 - (b) If yes, whether the applicants are entitled to damages.

THE ALLEGED DEFECTS

- 12 Of the defects which the applicants originally identified in 2017, some have been rectified by the Painter in 2018 and some have been abandoned by the applicants.
- 13 The applicants rely on an independent quotation from David Shepherd obtained in April 2017 which predates the rectification work carried out by the Painter in 2018. At the start of the hearing Mrs Harris claimed that some

of the items, which in June 2018 she agreed been addressed satisfactorily, were no longer agreed. She also disputed the damages claimed by Mr Harris on behalf of the applicants. At the hearing the applicants claimed the following items were defective or incomplete.

Item no	Alleged outstanding work	Damages claimed
2	Defective paintwork (house, fence line and window treatments)	\$9,900
3	Window treatments (fly wire screens)	Nil
4	Windows painted shut	(damages included in item 2 above)
5	Paint damage: radiators and blind cords	Nil
6	Paint damage: driveway	Nil
8	Roof damage: arising from falling cherry picker	\$2,500
9	Roof damage	Nil
10	3 broken windows	\$460
12	Broken Pavers	\$280
13	Damaged lawn	\$2,750
15	Paint and materials left	Nil
	TOTAL	\$15,890

Items 2 and 4: Defective Paintwork

- 14 Mr Harris relied on a quotation no. 798 from David Shepherd Painting and Decorating dated 30 April 2017 for \$9,900 (David Shepherd's Quotation). The applicants did not call Mr Shepherd to give evidence.
- 15 Mrs Harris disputed the authenticity of the quotation and claimed it had been altered by Mr Harris. She relied on another quotation from David Shepherd, of the same date and same quotation number, but which quoted the costs of repair and repainting as \$8,800.
- 16 Mr Harris was asked to explain the reason for the 2 quotations. Mr Harris said he received an initial quotation from David Shepherd for \$8,800. He noticed that 2 items were not included in the quotation: the first was the unpainted chimney and the other was water damage to the interior of the upper floor annex caused by the Painter's cherry picker collapsing on the roof. He said Mr Shepherd gave him a second quotation as requested which included these items.

- 17 Although Mr Saba had not seen the quotation for \$8,800, he said neither of the quotations were relevant because they predated the rectification work done in June 2018.
- 18 I find that David Shepherd's Quotation and his assessment of the defective and/or outstanding work which he prepared in April 2017, not to be of assistance to the Tribunal because it predated the Painter's rectification works done in June 2018.

Is the Painter's work defective?

- 19 The applicants' claim is based on Mrs Harris' assessment of the paintwork. On 21 June 2018 Mrs Harris sent emails to Mr Saba. She did not accept the paint on the windows which she said were not shutting completely. She said the broken windows had not been fixed, the roof leaked because of damage caused by the Painter to the roof and areas of paint had been missed on the exterior of the house. Mrs Harris relied on photos attached to her emails as evidence of the defective and/or incomplete work.
- 20 Mr Saba examined Mrs Harris' photos. He agreed that the paint work on some of the windows had chipped and needed further sanding and repainting. He agreed that a couple of shingles had bubbled and also needed to be sanded and repainted. He otherwise disputed Mrs Harris' claims that the rectification work carried out in 2018 was not satisfactory. He said the applicants' home was built in about 1917 and that a number of the windows had been painted shut by previous painters. He said the Contract required the Painter to paint the exterior and not the interior of the applicants' home.
- 21 Mr Saba said some of the windows were warped and bowed and rubbed against the frame of the window. He said these issues had not been caused by the Painter. He said some of the windows had been "nailed in" and the painters had removed some of the nails to allow the windows to be opened. Mr Saba said that his painters did not open windows which were painted shut from the inside because this work did not form part of the scope of works.
- 22 Mr Athas, who worked for the Painter and supervised the painting at the applicants' home, said when he came to quote on the works he discussed the windows with Mrs Harris. He said a number of the windows had been painted shut by previous painters.
- 23 Mr Saba and Mrs Harris did not agree on the number of windows that were closed shut and/or required further repair. Having heard the evidence of Mrs Harris and Mr Saba and having reviewed their photos, I find that at least 16 windows, comprising in most cases 2 panes of glass, require repair following the Painters' repair work carried out in June 2018.
- 24 Mr Saba initially estimated the cost to repair the chipped windows to be about \$528 comprising the following: scraping chips off the edges of the windows, sanding, applying 2 coats of paint to the sides of the windows and allowing half an hour per section. He said there were about 16 windows that

required some repair work. He allowed 8 hours of labour at \$50 per hour, \$20 for sandpaper and \$60 for 4 litres of paint.

- 25 At the adjourned hearing Mr Saba agreed that there were additional items that required further painting, repair and/or completion. Mr Saba agreed that the paint on 3 or 4 of the shingles had bubbled and needed to be sanded back and repainted. However, he said it was not the Painter's responsibility to open gaps between the shingles where they had been overpainted by previous painters. He agreed that there were a couple of areas around the exterior of the house where the paintwork had been missed and which needed to be completed.
- 26 Mr Saba said 2 days of labour was needed to rectify and complete the paintwork. He estimated repair costs to be \$1,000 based on labour costs of \$50 per hour and \$40 of material costs. Mr Saba is a director of the Painter and is not independent. It is reasonable to assume that his estimate may be less than an independent painter's quotation, so I will allow \$2,000.

Item 3: Window treatments (fly wire screens)

- 27 The applicants claim that the Painter failed to re-install fly wire screens after painting. Mr Saba said the Painter re-installed the flywire screens in 2018. I accept that a flywire shown in Mrs Harris' photo is placed against the exterior wall of the house. The applicants did not provide evidence of the cost of reinstalling the flywire and so I am not satisfied as to this item.

Item 5: Paint damage: radiators and blind cords

- 28 The applicants claim that in 2014, the Painter left paint on radiators located outside their home and on blind cords. Mr Saba gave evidence that the Painter had taken paint off the radiator but was unable to locate the paint as claimed by Mrs Harris. Mrs Harris said there was still paint on one of the radiators. As the applicants did not provide evidence of the cost of removing the paint from one radiator, I am not satisfied as to this item.

Item 6: Paint: driveway

- 29 The applicants claim that the Painter left paint stains on their driveway in 2014. Mr Saba gave evidence that the Painter removed the paint in June 2018. No evidence was given by Mrs Harris about this item. Nor were any costs of rectification provided. I am not satisfied as to this item.

Item 8: Roof damage: arising from falling cherry picker

- 30 The applicants claim that the Painter damaged the roof tiles and insulation when its cherry picker collapsed onto their roof in 2014. They claim damages of \$2,500 to repair the roof tiling and insulation. Although previously agreed, Mrs Harris now says the item is defective because the applicants' roof leaks.
- 31 Mr Harris initially relied on a quotation from "WILL FIX IT ROOFING" dated 8 October 2013 for \$2,500. The quotation was for the removal and

replacement of the second story terracotta tile roof where damaged, and the replacement of insulation as necessary.

- 32 Mrs Harris disputed the accuracy of the “WILL FIX IT ROOFING” quotation because it pre dated the cherry picker collapsing. Mr Harris said a mistake must have been made by the supplier in typing the date, because the quotation should have been dated 8 October 2015 and not 2013. I am not persuaded by Mr Harris’ explanation.
- 33 Mr Saba said that the Painter carried out the repair to the roof in 2018. He relied on photos which he said showed damage to the tiles on the roof caused by the Painter’s cherry picker collapsing in 2014 and the subsequent repairs to the roof.
- 34 Mrs Harris disputed Mr Saba’s evidence as to the size and location of the damage to the roof. She relied on photos which she claimed showed roof damage. I prefer Mr Saba’s evidence to the evidence of Mrs Harris and Mr Harris. Mr Saba’s evidence was clear and consistent. I accept his explanation of the photos which showed that the roof tiles had been replaced and repaired. I found Mr and Mrs Harris evidence to be inconsistent. Mrs Harris did not provide any expert evidence to support her claim that the roof leaked in 2018, and that the leak was caused by the Painter.
- 35 I found Mr Harris’ explanation of the quotation from “WILL FIX IT ROOFING” dated 8 October 2013, which he said was meant to be dated 8 October 2015, to be implausible. I find that the “WILL FIX IT ROOFING” quotation dated 8 October 2013 predated the original engagement of the Painter in 2014 and the date on which the cherry picker collapsed. I am not satisfied as to this item.

Item 9: damage to annex caused by Painter damaging roof

- 36 Mrs Harris said that the annex was damaged when the Painter damaged their roof. Mrs Harris agreed that work had been done but said the window frame was damaged. She did not have a quotation for the costs of the repair work. Mr Saba said that the Painter repaired and repainted the damaged ceiling. Mr Saba said that he was only shown the ceiling and not the window and that the Painter did not damage the window.
- 37 The applicants did not provide expert evidence to support their claim. Nor did they provide any costing for repair. I am not satisfied as to this item.

Item 10: 3 broken windows

- 38 The applicants claim that the Painter broke 3 windows while working at the applicants’ property. They claim damages of \$460 for the cost of repair. Mr Saba denied that the Painter had broken any windows. He also denied being told that the Painter had broken any windows.
- 39 Mrs Harris gave evidence that she noticed broken windows. She was unable to say when she noticed the broken windows. She said they were not broken

at the time an inventory was taken of the applicants' property in January 2013, when tenants vacated the property. She said the applicants moved into the property in about February or March 2014. She submitted that the windows must have been broken by the Painter.

- 40 I do not accept Mrs Harris' submission. The applicants have the onus of proving their claim. They have not done so. In my opinion the windows could have been broken at any time after the tenants moved out of the property in January 2013 when the house was vacant, or after the applicants moved into the property in early 2014 and before the applicants engaged the Painters. I am not satisfied as to this item.

Item 12: Broken Pavers

- 41 The applicants claim damages of \$280 for the cost of repair to pavers said to be damaged by the Painters in 2014. Mr Harris relied on photos of the repair work which he said was done by his brother's company, Prominent Paving Pty Ltd. He also relied on its invoice for \$280 which he said he had not paid.
- 42 Mrs Harris contradicted Mr Harris' evidence. She claimed that Mr Harris was not entitled to claim damages of \$280 for repair work which had been done by the Painter, albeit not to her satisfaction. Mr Saba said the repair work to the pavers had been completed satisfactorily by the Painter in 2018. He relied on an invoice from Storey Maintenance dated 31 May 2018 for this work.
- 43 I prefer the evidence of Mr Saba to Mr Harris and Mrs Harris. The evidence of Mr Saba was clear and was supported by an invoice from Storey Maintenance. Again Mr and Mrs Harris gave conflicting evidence. I find that the Painter has carried out the repair work to the pavers in June 2018. I am not satisfied as to this item.

Item 13: Damaged lawn

- 44 The applicants claim damages of \$2,750 for the repair of their front garden and lawn caused by the Painter's cherry picker being placed on their front lawn for some months. Mr Harris gave evidence that the cherry picker was located on the applicants' front lawn for about three months. He said he obtained a quotation to rejuvenate and repair the lawn. Mrs Harris gave evidence that 75% of the applicants' front lawn was damaged by the Painter.
- 45 Mr Saba said the cherry picker was placed on the applicants' front lawn for about 6 to 8 weeks. He said it moved forwards and backwards along the face and the front of the applicants' house as required. He said the tyre tracks had damaged about 20% of the front lawn. He said the repair work had been done by Storey Maintenance in 2018 and was itemised in its invoice dated 31 May 2018. He relied on photos that he had taken of the lawn in about December 2018 to show that the lawn had grown back.

- 46 It was not disputed that the cherry picker damaged the applicants' front lawn. What was disputed was the amount of damage, whether the repair was satisfactory and the cost of any further repair. I prefer Mr Saba's evidence to Mrs Harris' evidence about the actual damage and the required repair work. I accept that the repair work was carried out by Storey Maintenance in 2018.
- 47 The applicants relied on an undated quotation for \$2,750 from Greens Fine Turf for "A Total Lawn Renovation". The quotation set out the cost of removing the entire lawn and some soil and replacing the front lawn with new soil and premium quality drought tolerant instant turf and adding fertiliser. The quotation included the use of a bobcat and excavation works comprising the removal of existing lawn, fluffing up the soil and levelling and smoothing off. It also included rotary hoeing and levelling an area of 122m², with works on the front lawn covering 105m².
- 48 The applicants did not explain how the Greens Fine Turf quotation related to the localised damage caused to a part of the applicants' front lawn. Mr Harris did not recall when he obtained the quotation which was filed with the applicants' application in September 2017.
- 49 I find that the quotation predates the repair work to the lawn carried out by Storey Maintenance in 2018. I am not satisfied that this quotation is for the repair work to the front lawn arising from localised damage caused by the Painter's equipment. Mr Harris and Mrs Harris did not give evidence about the state of the front lawn and their garden prior to the Painter commencing works in 2014. On the evidence before me I am not satisfied as to this item.

Item 15 Paint and materials left at the property

- 50 The applicants claim that the painter left paint and materials at their property. They did not identify what had been left or the cost of removing the materials. Mr Saba said he left some paint tins for the applicants which was his usual practice. Having heard the evidence I am not satisfied as to this item.

CONCLUSION

- 51 I have found that the Painter is liable to pay the applicants \$2,000 for defective paintwork. It was not disputed that the applicants have not paid the balance of \$2,460 owing under the Contract. I find that the amount of \$2,460 owed by the applicants to the Painter must be set off against the amount of \$2,000 payable by the Painter to the applicants for damages arising from defective painting and/or incomplete work.
- 52 I find that having allowed the set off, a balance of \$460 is payable by the applicants to the respondent and that the respondent is not liable to pay any amount to the applicants. I will therefore make orders dismissing the applicants' claim.

MEMBER F. MARKS