

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

DOMESTIC BUILDING LIST LIST

VCAT REFERENCE NO. D172/9 & 174/9

CATCHWORDS

Domestic Building - applicant engaged the respondent to install flooring - claim by the applicant of poor workmanship - applicant terminated the work undertaken by the respondent before it was completed - claim by the applicant for the cost of rectification of defects in the floor - cross claim by the respondent for the value of work undertaken - assessment of the cost of rectification and damages

APPLICANT	Imagination Developments Pty Ltd
RESPONDENT	Pink Painter Pty Ltd (trading as "Floor Group")
WHERE HELD	Melbourne
BEFORE	Vice President, Judge Misso
HEARING TYPE	Hearing
DATE OF HEARING	9 & 10 August 2010
DATE OF ORDER	12 August 2010
CITATION	Imagination Developments Pty Ltd v Pink Painter Pty Ltd trading as Floor Group (Domestic Building) [2010] VCAT 1325

ORDER

- 1 The respondent pay the applicant the sum of \$13,870 together with an order that costs limited to the following:
 - The VCAT filing fee of \$584.50.
 - The cost of the Buildspect report fixed at \$1,036.20 and a supplementary report fixed at \$412.20 and the cost of Mr Mitchell's attendance to give evidence which I fix at \$300.
 - The cost of AFTA report fixed at \$1,715 and the cost of Mr Scarpella's attendance to give evidence which I fix at \$494.
- 2 The respondent's claim is dismissed.

Judge P Misso
Vice President

APPEARANCES:

For Applicant

Mr D Burrows

For Respondents

Mr S Hum

REASONS

Introduction

- 3 The subject matter of this proceeding arises out of a contractual arrangement entered into by the applicant and the respondent in 2007.
- 4 The applicant is a company engaged in the construction of domestic dwellings ("Imagination"). The respondent is a company engaged in the installation of flooring ("Pink").
- 5 The applicant filed an application dated 15 February 2008. The respondent filed an application dated 4 September 2008.
- 6 Initially Floor Group (Aust) Pty Ltd was the respondent to the proceeding brought by the applicant ("Floor Group"). By an order made 29 July 2010 the respondent was added as a second respondent. However, for the reasons set out below it will become plain that Pink was the only party to the contractual arrangement, and not Floor Group.
- 7 Mr Burrows is a director and shareholder in Imagination. He appeared on its behalf. Mr Hum is a director and shareholder of Pink. He appeared on its behalf.

The Background Facts

- 8 Imagination was engaged in the development at 37 Brazillia Drive, Glen Waverley ("Brazillia Drive"). It entered into a contract with Pink to sand and polish flooring at Brazillia Drive for \$1,200. The contract was oral in conversation between Mr Burrows and Mr Hum.
- 9 Mr Burrows said that the workmanship was very poor. The sub-contractor engaged by Pink damaged plaster walls; damaged paintwork on kitchen cupboards; allowed pooling of the floor coating to occur, and failed to use an edging sander around the edges of the floor resulting in a difference in quality between the edging and the rest of the floor.
- 10 Before the poor workmanship became apparent to Mr Burrows, Imagination had entered into a contract in writing with Pink dated 15 February 2007.¹ the contract required Pink to install, sand and polish timber flooring in units 6, 7 and 8 of a development being built by Imagination at 199-201 Lincoln Road, Mooroolbark ("Lincoln Road").
- 11 When Mr Burrows discovered the poor workmanship at Brazillia Drive he refused to allow Pink to undertake any further work at Lincoln Road. By that stage the work which Pink had undertaken at Lincoln Road was limited to laying floorboards preparatory to sanding and polishing.
- 12 Imagination had paid a total of \$11,413 of the total contract price of \$17,413 to Pink by that stage.

¹ Exhibit A.

- 13 Imagination refused to pay Pink the \$1,200 for the work which Pink undertook at Brazillia Drive. Imagination gave the home owners of Brazillia Drive a \$2,000 rebate on the contract price of the renovations to their home as representing the cost of re-sanding and re-polishing the floors.
- 14 Subsequently, Imagination obtained an alternative contractor to sand and polish the floors at Lincoln Road.
- 15 Mr Hum denied the allegation made by Mr Burrows. He said that the work undertaken at Brazillia Drive was of good-quality as was the work at Lincoln Road. Furthermore, that if there were any defects in the floor at Lincoln Road they were not causally connected to the work which Pink undertook in installing the floorboards.

The Claim and Cross-Claim

- 16 Mr Burrows essentially summarised the claim made by Imagination as follows:
 - The claim was limited to Unit 6.
 - The liability to which Imagination was exposed as the builder for either the cost of removal and replacement of the floor, or remedial work on the floor.
- 17 Mr Mitchell, building consultant was of the opinion that the defect warranted the removal and replacement of all the flooring at a cost of \$37,971.
- 18 Mr Scarpella, building consultant was of the opinion that if remedial work was undertaken the floor would function in the vicinity of 85-90 per cent of what would have been expected had the work been conducted in a proper and workmanlike manner.
- 19 Mr Scarpella estimated that the remedial work would require two men at \$100 per day for each man occupied for one day in re-sanding the floor, and three days in re-polishing the floor. An eight-hour day would mean \$1,600 per day, and four days would total \$6,400. He said he would make an allowance for other costs, such as, moving the occupants from Unit 6; removing rubbish, and house cleaning consistent with the estimates given by Mr Mitchell.
- 20 Mr Hum submitted that Mr Burrows refused to allow him to inspect Brazillia Drive and Unit 6. He said that if he had been allowed to do that, and he was satisfied that there were defects in the workmanship then he would have taken steps to remedy the defects which could have been done at little cost.
- 21 Mr Hum submitted that this was the primary issue on which he based his defence to the claim made by Imagination.

- 22 Mr Burrows gave a very different complexion on the breakdown of the relationship between Imagination and Pink.
- 23 Mr Burrows said that he spoke to Mr Hum by telephone regarding the state of the workmanship at Brazillia Drive. During that telephone conversation he arranged for Mr Hum to make a site inspection at Brazillia Drive. Mr Burrows said that he waited all day for Mr Hum to turn up. He did not.
- 24 Mr Burrows said that he spoke to Mr Hum by telephone on 24 August 2007. He arranged to meet Mr Hum at Lincoln Road on 11 September 2007. The exchange between them on that occasion was far from harmonious or conciliatory. Mr Burrows described the conversation as involving his concerns expressed to Mr Hum about the poor workmanship at Brazillia Drive, and that he would not permit Pink to do undertake any further work at Lincoln Road.
- 25 Mr Burrows said that Mr Hum demanded the \$1,200 owing to Pink for the work undertaken by it at Brazillia Drive. He said that Mr Hum became angry and accused Mr Burrows of dishonesty. He said that Mr Hum stormed off and drove away in his car.
- 26 Mr Hum denied all the allegations made by Mr Burrows, and indeed, their respective versions of events were very black-and-white.
- 27 Mr Hum said that at no time was he permitted to inspect either Brazillia Drive or Lincoln Road. He denied that any arrangement was made for him to undertake a site inspection at Brazillia Drive or that there was a meeting between he and Mr Burrows at Lincoln Road on 11 September 2007.
- 28 Mr Hum added that it was his opinion that after the timber floorboards were laid on the floor in Unit 6 that little or no care was taken by Imagination to preserve the integrity of the work that been undertaken. He referred to the possibility that tradesmen had used the floor as a workspace and that there was a possibility that spillages of water had occurred, and at least the introduction of moisture which would have raised the moisture content of the floorboards, with the consequence that the reduction in the moisture content was then the reason why some defects became apparent in some of the floorboards.
- 29 Furthermore, Mr Hum said it was also his belief that the reason why Imagination had not paid for the work undertaken at Brazillia Drive was because Mr Burrows was dishonest, and the reason why he was not permitted to complete the work at Unit 6 was because Mr Burrows was cheating him by getting someone else to do the rest of the work at a cheaper rate.
- 30 After Mr Burrows gave his evidence he was cross-examined by Mr Hum. After Mr Hum gave his evidence he was likewise cross-examined by Mr Burrows.
- 31 Mr Burrows called Mr Mitchell and Mr Scarpella who adopted the contents of their reports. They were both cross-examined by Mr Hum.

The Issues

- 32 It occurred to me during the hearing that a significant portion of the evidence given by both Mr Burrows and Mr Hum was either irrelevant or of marginal relevance to the central issues of the dispute between Imagination and Pink.
- 33 It seems to me that the real issues boiled down to the following:
- whether the workmanship undertaken by Pink at Brazillia Drive was of poor quality;
 - whether Pink was prevented by Imagination from undertaking remedial work on the floor at Brazillia Drive;
 - whether the poor workmanship at Brazillia Drive was the real reason why Imagination would not permit Pink to undertake any further work at Unit 6;
 - whether there was a refusal by Imagination to permit Pink to inspect Brazillia Drive and Unit 6, and to undertake remedial work, and if so, was that refusal reasonable;
 - whether the defects in Unit 6 were caused by poor workmanship on the part of pink;
 - whether there was any interference with the floorboards installed by Pink in between the time of installation and the commencement of the sanding and polishing by the alternative contractor which was the cause of the defects found in the floor.

Brazillia Drive

- 34 I consider that Mr Burrows gave his evidence in a straightforward and convincing manner. He struck me as being a builder of considerable experience and expertise who went about the work at Brazillia Drive and Unit 6 in a businesslike and systematic manner.
- 35 On the other hand I do not consider that Mr Hum gave his evidence in a straightforward or convincing manner. His evidence was largely characterised by simply making wholesale denials of all of the allegations made by Mr Burrows, and seeking to speculate on things that might have happened to the floor in Unit 6 which might have been the cause of the ultimate defects found in the floor.
- 36 I accept the evidence of Mr Burrows that the workmanship at Brazillia Drive was as poor as he described.
- 37 I do not accept Mr Hum's evidence that he was not given an opportunity to inspect the floor at Brazillia Drive. I accept that Mr Burrows organised for a site inspection which Mr Hum did not attend.

- 38 In any event it seems odd that Mr Hum did not himself become more proactive and make serious attempts to organise such a site inspection to satisfy himself that the allegations made by Mr Burrows of poor workmanship were true. Mr Burrows was keen to have such an inspection take place.
- 39 The defects described by Mr Burrows evident at Brazillia Drive were substantial. I accept his evidence that they were so substantial that he gave a rebate on the contract price to the owners of Brazillia Drive of \$2,000 which is significantly in excess of the contract price quoted by Mr Hum for that job.
- 40 I should add at this point that neither Mr Burrows nor Mr Hum were represented. They had not pleaded their cases in a conventional way by identifying the issues with any precision. It fell to me to interpret their evidence and re-formulate it into a pleading.
- 41 I will firstly deal with the case brought by Pink to recover the sum of \$1,200 for the work it undertook at Brazillia Drive.
- 42 The claim is based upon work and labour done. The defence to it is that the materials were defective; that the workmanship was poor, and that there was a total failure of consideration.
- 43 On the basis of the findings I have made I accept the evidence of Mr Burrows regarding the defects in the floor at Brazillia Drive. It amounts to a total failure of consideration.
- 44 A floor with so many defects is a far cry from what Imagination bargained for. The incidence of damage to plaster, paintwork on cupboards together with pooling of material laid on the floor, and a failure to undertake the edging work strikes me as being very poor workmanship indeed.
- 45 I am fortified in reaching that conclusion because of the rebate of \$2,000 given by Imagination to the home owners which I accept was given as an estimate of the cost of remedial work necessary to repair the damage caused by Pink's contractor to remedy the defects in the floor.
- 46 It is for these reasons that I will dismiss the claim made by Pink for the sum of \$1,200 claimed by it for the work it performed at Brazillia Drive.

Termination of the Contract

- 47 I accept the evidence of Mr Burrows that the poor workmanship and the disinterest shown by Mr Hum in undertaking a site inspection pointed to the likelihood that the same level of poor workmanship would occur if Pink was allowed to sand and polish the floor in Unit 6.
- 48 It occurs to me that there was a reasonable basis for Imagination terminating the contract relevant to Unit 6 on 11 September 2007.
- 49 By the time the termination of the contract occurred Imagination had paid Pink the sum of \$11,413 of the total contract price of \$17,413.

50 Mr Hum gave evidence that Pink was entitled to a further sum of \$3,000 for work that it had completed by the date of termination as a fair representation of the value of that work.

Defects at Unit 6

51 Imagination and Pink tendered the following expert reports:

- Buildspect dated 14 October 2008 prepared by Mr Mitchell who made an inspection of Unit 6 on Thursday October 2008.²
- ATFA (Australian Timber Flooring Association) prepared by Mr Scarpella who made an inspection of Unit 6 on 12 July 2010.³
- RESI-CHECK dated 11 August 2009 prepared by Mr Cheong, Building Consultant who made an inspection of Lincoln Road, including Unit 6, on 24 July 2009.⁴
- Houspect dated 28 July 2009 prepared by Mr Kennedy, builder who made an inspection of Lincoln Road, including Unit 6, on 24 July 2009.⁵

52 Mr Mitchell and Mr Scarpella gave evidence and were cross-examined by Mr Hum. I was impressed by their evidence, although, I prefer the evidence of Mr Scarpella relevant to the cost of remedial work to rectify the defects in the floor at Unit 6.

53 A summary of Mr Mitchell's opinion is as follows:

- The particle board under flooring had a wax coating over it. After a floor board was removed there was evidence that the wax coating had not been removed.
- There was evidence, where the board had been removed, of plaster dust still evident in between the areas where glue had been applied.
- It was necessary to remove the wax and the dust to ensure that the glue would adhere to the particle board. The absence of a clean surface would prevent such adhesion.
- He noted a number of other serious defects:
 - the joint boards had opened (photographs 1 and 2);
 - butt joints at the ends of the floorboards were loose and floating;
 - a number of floorboards were loose and floating (photographs 3 and 4);
 - a number of floorboards were not fully glued (photograph 7).

² Exhibit B.

³ Exhibit C.

⁴ Exhibit 5.

⁵ Exhibit 4.

- not all floorboards had been nailed (photographs 6 and 7).
- 54 Mr Hum cross-examined Mr Mitchell essentially putting to him that the conclusions he had reached were wrong on every issue.
- 55 Mr Mitchell was of the opinion that the floor should be removed and replaced.
- 56 Mr Scarpella spoke to the owner of Unit 6. He was told the following:
- Two floorboards had become delaminated.
 - There was a gapping between floorboards and isolated splitting of some floorboards.
 - There was deflection and audible squeaking from numerous butt joints.⁶
 - Concern was expressed about the quality of some floorboards.
 - Filler and putty used was significantly lighter than the colour of the floorboards.
- 57 Mr Scarpella took photographs of each of the areas referred to by the owner and adjacent to the photograph inserted a commentary:
- He noted that parts of the subfloor (the particle board) was unprepared, however, he noted that there was evidence of adhesion between the services of the subfloor in the floorboards (page 7).
 - A floorboard had delaminated. It was rising upwards (page 8).
 - There was gapping between some floorboards. The average gap was between 0.5 mm to 0.75 mm with some larger gaps of up to 2.3 mm (page 9).
 - There was some splitting of edge bonding between floorboards consistent with edge bond failure (page 10).
 - There was deflection and squeaking from numerous butt joints (page 13).
 - There was evidence of borer or woodworm in a small number of floorboards (page 14).
 - There were a number of areas where gap filler had been used which was very light in colour compared to the surrounding colour of the floorboards (page 14).
- 58 Mr Scarpella was of the opinion that the likely reason why the foregoing problems had occurred in the floor were higher moisture content at the time of installation resulting in reduction in the width of the floorboards producing gapping; a nonstandard method of fixing had contributed to the delamination of some of the floorboards, and the deflection and squeaking of others.

⁶ A video shown by Mr Burrows demonstrated the deflection squeaking at a butt joint.

- 59 Mr Scarpella was of the opinion that gluing, top nailing and pinning at the butt joints in the affected areas would restrict future movement of the areas of the floor where there were defects.
- 60 In his oral evidence Mr Scarpella said that if the remedial work he advised is undertaken that it would return the floor to a degree of functionality of up to 85-90 percent. He did not believe that the other areas of the floor which were unaffected by the foregoing problems would evidence defects of a similar kind later in the life of the floor.
- 61 The opinions of Mr Mitchell and Mr Scarpella are very similar save in two specific respects - firstly, Mr Scarpella did not accept that if there were problems in one area of the floor that it was likely that there would be problems emerging in other areas, and secondly, he did not accept that removal and replacement was required, although, he noted that the homeowners were most unhappy about the prospect of top nailing which would interfere with the aesthetic quality of the floor.
- 62 I was very impressed with the evidence of Mr Scarpella and to a similar, but lesser extent with the evidence of Mr Mitchell.
- 63 The inspection report of Mr Kennedy and Mr Cheong were by no means as extensive and comprehensive as that of Mr Scarpella and Mr Mitchell. Mr Cheong's thesis is that there is very little in the floor in Unit 6 which constitute any defects, and to the extent that there are defects they are not the responsibility of Pink (described by him as "Floor Group").
- 64 Mr Cheong appears to attribute the responsibility for the defects to the alternative contractor engaged by Imagination who he believes should have attended to any defects which were evident before the sanding and polishing occurred.
- 65 Mr Kennedy's report is very short on detail. However, he noted similar defects as were noted by Mr Mitchell and Mr Scarpella. He was of the opinion that re-sanding, filling gaps and re-polishing at a cost of up to \$3,000 would be adequate to solve the problems with the floor.
- 66 What distinguishes the opinions of Mr Mitchell, Mr Scarpella and Mr Kennedy from Mr Cheong is that Mr Cheong seemed to have gone on a mission to find an answer to the allegations made against Pink, whereas the others appear to have accepted (at least by inference in any event) that the defects present in the floor were due to the method of installation of the floor.
- 67 The interesting distinction between Mr Mitchell, Mr Scarpella and Mr Kennedy is the range of their opinions regarding the steps necessary to remedy the defects in the floor, ranging from removal and replacement to a cheaper alternative of rectification proposed by Mr Scarpella and simple filling in the gaps, re-sanding and re-polishing by Mr Kennedy.

- 68 I found the evidence of Mr Scarpella compelling and I am persuaded by his evidence that the defects in the floor are to be attributed to the installation performed by Pink.
- 69 I reject the submissions made by Mr Hum that there was possibly interference with the floor after it was installed which has resulted in the defects. I accept the evidence of Mr Burrows that care was taken to cover the floor with MDF boarding so that it was well protected, and that there was no evidence interference of any kind before the floor was sanded and polished.
- 70 Mr Hum had the opportunity to cross-examine Mr Burrows, Mr Mitchell and Mr Scarpella on the thesis that he developed during his submissions that the defects were produced by such interference. Mr Burrows denied the allegations put to him, but Mr Hum did not cross-examine Mr Mitchell and Mr Scarpella to any significant extent at all regarding any observations they had made consistent with such interference.
- 71 It occurs to me that the thesis developed by Mr Hum has no substance whatsoever, and was not based upon any evidence which he could point to. In the face of Mr Burrows denials, and his evidence of the care taken before the floor of the thesis was no more than just that, a bare thesis.

The Claim for Compensation

- 72 Mr Scarpella put the cost of undertaking remedial work at \$6,400. He accepted the opinion of Mr Mitchell that the homeowners of Unit 6 would need to vacate the unit with their furniture and belongings, and be accommodated elsewhere while the work was undertaken. He accepted that a sum of \$4,000 would be fair.
- 73 Mr Burrows submitted that in addition to the remedial work there would need to be an amount allowed for the removal of rubbish and final house cleaning before the homeowners could return to the unit. Mr Mitchell put the cost of rubbish removal at \$570 and house cleaning at \$400.
- 74 The total of those figures amounts to \$11,370. I consider that sum to be fair and reasonable.
- 75 Mr Burrows accepted that it would be an unnecessary and unreasonable course to require the removal and replacement of the floor even though the remedial work referred to by Mr Scarpella would nonetheless leave the floor with a diminished aesthetic appearance, and one which the homeowners told Mr Scarpella they would consider to be unacceptable.⁷
- 76 In summarising what damages can be awarded to compensate the homeowners for a breach of contract consisting of defective building work it is open to the Tribunal to award a sum which compensates for the lesser

⁷ See *Bellgrove v Eldridge* (1954) 90 CLR 613; *Tabcorp Holdings v Bowen* [2009] 253 ALR 1, in the very helpful and useful analysis of the foregoing authorities in *Clarendon Homes Vic Pty Ltd v Zalega* [2010] VCAT 1202 per Senior Member, R Walker at paragraph 148-165.

appearance, loss of functionality, and loss of amenity produced by the defects.⁸

- 77 Compensation of that kind is difficult to assess. It does not require expert evidence so much as an understanding of the defects and what the defects have produced. Having viewed photographs contained in the reports of the experts it is clear to me that the floor was intended to be a feature. The defects significantly detract from the aesthetic appearance of the floor and in that respect the functionality and loss of amenity to the homeowners.
- 78 I assess a further sum of \$2,500 to compensate the homeowners for the loss of functionality and loss of amenity.
- 79 I am not prepared to award Pink the compensation which it seeks which amounts to \$3,000 for the work which it says it completed before the contract was terminated, loss of interest on that sum between March 2007 and 2009 (a curious period claimed by Mr Hum which he did not seek to explain despite my persistent enquiry of him) of \$1,100. There were other sums which Mr Hum referred to as part of Pink's claim which I consider to be a doubling up and included in the \$3,000 which it seeks.
- 80 No effort was made by Mr Hum to demonstrate that the installation of the floor, and indeed, the work performed by Pink before the contract was terminated is valued at \$3,000. It was simply a figure which Mr Hum considered was fair.
- 81 Imagination has challenged the claim made by Pink for any moneys owing relevant to the work which is under talk up until the time when the contract was terminated. That challenge must put Pink to its proof that the work it did undertake was of the value submitted by Mr Hum.
- 82 Mr Hum attempted to give evidence of the value of the work without pointing to what work had been undertaken and the value which should reasonably be attributed to it. Furthermore, the actual contractor who undertook the work was not called to give evidence to establish actually what was done so that some measurement could be made of the work done relevant to the contract price, and whether the work actually completed at the time of the termination of contract had a value in excess of what had already been paid by Imagination.
- 83 I have some other serious and grave misgivings about the claim. It occurs to me that the conduct of Pink was in many ways misleading, and did not provide Imagination with what it had bargained for - the timber flooring was imported Indonesian timber and not Australian as was represented; there were no specifications provided by the manufacturer of the timber flooring regarding its method of installation any characteristics of the timber which required special attention; the flooring was not stored adequately to avoid the introduction of excessive moisture, and the

⁸ *Clarendon Homes Vic Pty Ltd v Zalega (supra)* at paragraph 165 (e).

contractor engaged by Pink was not capable of undertaking the work in a proper and workmanlike manner.

- 84 It is for the foregoing reasons that it occurs to me that the bargain which Imagination thought it had achieved was far short of the mark. For Mr Hum to submit that there is some basis upon which I should assess that Pink is entitled to \$3,000 in the abstract and without there being specific evidence on the subject in the light of the conduct of Pink in misleading Imagination and undertaking the work in the way it did does not provide a sound basis upon which I can determine that there is any merit in the claim for \$3,000.
- 85 As a result, and logically, the claim for interest must also fail because it relies on success with the primary claim for \$3,000. That claim is based upon the claim to compensation and the interests could have been earned on that sum of money. Furthermore, Mr Hum did not provide evidence of the interest rate applied in arriving at the sum of interest. Altogether, the claim for interest was put a most unsatisfactory and unconvincing way.
- 86 It is for these reasons that I dismiss the claim made by Pink based upon the contract or otherwise.

Conclusion

- 87 I will order that Pink pay Imagination the sum of \$13,870 together with an order for costs limited to the following:
- The VCAT filing fee of \$584.50.
 - The cost of the Buildspect report fixed at \$1,036.20 and a supplementary report fixed at \$412.20 and the cost of Mr Mitchell's attendance to give evidence which I fix at \$300.
 - The cost of AFTA report fixed at \$1,715 and the cost of Mr Scarpella's attendance to give evidence which I fix at \$494.
- 88 I will order that the claim by Pink be dismissed.

Name Judge P Misso
Vice President