

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP790/2016

### CATCHWORDS

DOMESTIC BUILDING; allegation of defective plasterwork; allegation that front door handle was fixed at incorrect height; consideration of warranties implied by s 8 of the *Domestic Building Contracts Act 1995*; assessment of damages.

<b>APPLICANT</b>	Mr Glenn Richards Jackson
<b>RESPONDENT</b>	HENLEY ARCH PTY LTD (ACN 007 316 930)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member C Edquist
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	30 November 2016 and 16 December 2016
<b>DATE OF REASONS</b>	1 February 2017
<b>DATE OF ORDER</b>	1 February 2017
<b>CITATION</b>	Jackson v HENLEY ARCH PTY LTD (Building and Property) [2017] VCAT 18

### ORDERS

- 1 The respondent must pay to the applicant damages in the sum of \$4,066.
- 2 Costs reserved, with liberty to apply. Any application for costs is to be referred to Member Edquist who will make orders as to how the application is to be dealt with.
- 3 Any application by the applicant for reimbursement of the filing fee paid made under s 115B if the *Victorian Civil and Administrative Tribunal Act 1998* is reserved. Any such application is also to be referred to Member Edquist.

**MEMBER C EDQUIST**

**APPEARANCES:**

For Applicant:

In person, on both days

For Respondent:

Ms B Findlay, in-house Counsel, on both days

## **REASONS**

### **Introduction**

- 1 Mr Jackson has come to the Tribunal seeking damages for breach of contract from the respondent builder HENLEY ARCH PTY LTD (ACN 007 316 930) ('Henley'). The company trades as Henley Properties. The dispute centres principally on the quality of plasterwork performed by Henley during the construction of a home in Carribie Road, Doreen, for Mr Jackson under a contract signed in 2015. The works were finished in or about February 2016. Mr Jackson alleges that he can see every join and nail in the ceiling in every room of his new house, and also that the front door handle is 100mm lower than every other handle in the house.

### **The first day of the hearing**

- 2 The proceeding came on for hearing on 30 November 2016. Mr Jackson appeared for himself and gave evidence. He called two expert witnesses, Mr Alan Green and Mr Douglas Vaux. Ms Findlay, in-house counsel with Henley, appeared on behalf of that company. Mr Mark Glenn of Henley was also present. Ms Findlay called as an expert witness, Mr Werner Engel.
- 3 The proceeding did not conclude on 30 November 2016 and was listed again for hearing on 16 December 2016.

### **The inspection on 14 December 2016**

- 4 Henley sent an email to the Tribunal following the first day of the hearing making the point that Mr Jackson's expert had given evidence in the witness box additional to that contained in his written report, which related to the positioning of screw fasteners in the ceiling. Henley sought the opportunity to have an employee of USG Boral attend the site to inspect the method of fixing. The Tribunal made an order in chambers on 8 December 2016 giving Henley access for an inspection prior to 14 December 2016. That inspection duly took place, without the Tribunal being present.

### **The inspection on 16 December 2016**

- 5 Prior to the commencement of the further hearing on 16 December 2016, an inspection took place at Mr Jackson's house. Mr Vaux attended on behalf of Mr Jackson. Henley was represented again by Ms Findlay. She was accompanied by Mr Mark Glenn of Henley. Mr Tom Brown of USG Boral was also present. The inspection lasted just over an hour. It centred on the living room/kitchen area, but 2 other rooms were looked at.

### **Mr Jackson's evidence**

- 6 Mr Jackson's evidence on the opening day of the hearing was to the effect that, because of commitments already made, he had to settle before the house was completed. He deposed that he notified Henley that there were issues with the plasterwork at the time he took possession. His evidence is that Henley initially took responsibility for the plasterwork, and agreed to rectify it. However, Henley changed its position. It arranged to have the ceiling in his living room painted, but did not attend to having the plasterwork fixed beforehand.

### **Mr Green's evidence**

- 7 Mr Green, from Archicentre, inspected the house on 1 July 2016. He produced a report bearing that date. In the report he recited that his report had been 'carried out in accordance with the Building Commission's Guide to Standards & Tolerances 2015'. Clearly, he was intending to refer to the Victorian Building Authority's Guide to Standards and Tolerances ('the Guide to Standards and Tolerances'). He identified two sections of that Guide which he said had been breached, namely, ss 9.18 and 9.19.
- 8 As to s 9.18, Mr Green said that there was:
- Peaking or jointing in plasterboard - Plaster peaking or jointing is defective if it is visible from a normal viewing position.
- 9 As to s 9.19, Mr Green's report stated:
- Nail popping in surfaces - Nail popping in sheeting is defective if it exists at handover or occurs within the first 24 months of completion and can be seen from a normal viewing position.
- 10 Mr Green, at the hearing, elaborated upon the evidence contained in his report. Specifically, he confirmed that the lights were off when he carried out his inspection. In cross-examination he confirmed that he understood the relevant test as set out in the Guide to Standards and Tolerances.

### **Mr Vaux's evidence**

- 11 Mr Vaux gave evidence for Mr Jackson when Mr Green had finished. He identified a report he had written dated 20 September 2016, following an inspection on 17 September 2016. His overall view, as expressed at page 16 of his report, is that there are:
- ... building defects which do not reach an acceptable level of finish, in a proper and workmanlike manner relative to the relevant Australian Standard AS/NZ is 2589:2007 Gypsum Linings, and manufacturer's recommendations. ...
- 12 In particular Mr Vaux said the joins can be seen in multiple light conditions. In his opinion, there was a possibility of over sanding of join

edges making the paper surface of the plasterboard rougher than the remainder of the paper surface.

- 13 Mr Vaux also expressed the view that there was evidence of screw popping, which he said was the result of screw fixing through or close to adhesive, which was contrary to the manufacturer USG Boral's installation manual.
- 14 At the hearing, Mr Vaux elaborated about the conditions in which he had inspected the plasterwork in the living room/kitchen area. He also gave evidence regarding an issue which had been alluded to in his report, but not fully articulated. The issue arose from a drawing, 'Figure 21', which had been extracted from the USG Boral manual. Figure 21 illustrates a conventional method of fixing plasterboard to a ceiling involving a combination of adhesive and screw fixings. Mr Vaux, at the hearing, said that the location of the screws, as evidenced by the photographs set out in his report, demonstrated that the combined fixing method outlined in Figure 21 had not been followed. As the contract required the builder to affix plasterboard in accordance with the manufacturer's manual, there had been a breach of the contract. There had also been a breach of s 9.11 of the Guide to Standards and Tolerances, which provides:

The installation and jointing of plasterboard sheeting systems is defective if it does not conform to AS/NZS 2589 and the manufacturer's installation instructions.

- 15 Mr Vaux went on to say that the failure to follow the manufacturer's instructions was significant, because it gave rise to the potential for the plaster ceiling to collapse at some point in the future. Mr Vaux endeavoured to demonstrate that this risk was not merely theoretical by referring to a photo showing a collapsed plasterboard ceiling in another house which he had been asked to inspect. He said the collapse of the ceiling in that house had been due to the failure of the builder to follow the manufacturer's recommended method of fixing the plaster using a combination of adhesive and screws.

### **Henley's defence**

- 16 Henley's defence to the allegations about the plasterwork contained three elements. First, it was said that the plaster had been installed in accordance with the contract, and in particular in accordance with paragraph 14.1 of the specifications, being to a Level 4 finish. Second, Henley relied on the report of Mr Werner Engel dated 16 November 2016 which stated that the plaster had been installed in accordance with:
- (a) a Level 4 finish being the industry standard for plaster finish;
  - (b) the relevant standard being S/NZS 2589:2007; and
  - (c) the Guide to Standards and Tolerances.

The third defence raised was that Mr Jackson and his expert witnesses had failed to view the walls from a 'normal viewing position' as defined in the

Guide to Standards and Tolerances. It also said that the nail popping evident in the wall of the living room was not as a result of any conduct on the part of Henley.

### **Mr Engel's evidence**

- 17 Henley called Mr Engel who identified his report of 16 November 2016. With respect to the alleged breach of s 9.18 of the Guide to Standards and Tolerances, Mr Engel said at page 2 of his report:

Diffused light test showed no peaking or other irregularities for a standard Level 4 finish which is the industry standard for plaster finished in project homes as set out in Section 3 Design Requirements of AS/NZS 2589:2007.

- 18 Mr Engel went on to note that s 3.1.4 stated that 'Level 4 shall be the default level for gypsum lining'.
- 19 With respect to the alleged breach of s 9.19 of the Guide to Standards and Tolerances, Mr Engel's report stated:

The only nails/screws pop that was evidenced under diffused light conditions, was on the outside east side wall of the living room. However, this pop could have been caused by an accident such as someone falling against the wall, or something hitting the wall.

- 20 In any event, Mr Engel went on to say:

The nail/screw pop in the living room wall was noticed without glancing light. The cost to rectify this defect would be minimal, as the small raised plaster section would simply be trimmed out, then the plaster patched, and then paint patched.

- 21 Mr Engel also said:

Very minor irregularities mentioned in the Owners reports were not visible in normal diffused light, being the non-critical light test, and could only be seen when using artificial light parallel with the surface, which is not a valid test.

- 22 Mr Engel concluded:

Although the reports prepared by Mr Vaux and Mr Green were probably prepared in good faith, they are expecting a level of finish which is well above a Level 4 finish ...

The 'Guide to Standards & Tolerances' does not support a higher level finish, and it should not be expected that the builder finish to a level above this standard.

- 23 Mr Vaux's evidence about the faulty fixing of the plasterwork apparently took Henley by surprise on the first day of the hearing. Certainly, Mr Engel was not in a position to rebut it as he had made no effort to investigate Mr Vaux's allegations when he visited the site.

- 24 Relevantly, Mr Engel said that he was at the Jackson's residence for approximately half an hour, Mr Jackson gave evidence that his wife had

sent him a text at 7.34am advising that three men were outside the residence, and that she sent another text at 7.50am indicating that the inspection had been completed. He said that this meant that Mr Engel and two other representatives of Henley were present for 16 minutes during which time they inspected the house.

### **Mr Brown's evidence**

- 25 When the hearing got underway in the afternoon of 16 December 2016, Mr Brown was sworn in and repeated on oath some of the observations he had made in the morning at the site inspection. The key points in his evidence were:
- (a) The light in the living room was non-critical immediately inside the doorway;
  - (b) The light in the living room other than immediately inside the doorway was critical light, and this explained why imperfections in the plasterwork had become visible further into the room;
  - (c) He agreed with Mr Vaux's observation that some of the placing of the globs of adhesive was not in accordance with USG Boral's mandated method of installation;
  - (d) In particular, he agreed that the method of installation employed was the orthodox method, which involved the use of both fasteners (screws) and adhesive (glue);
  - (e) However, the USG Boral method of installation was merely a guide, and the recommendations for placing adhesive were 'nominal' rather than obligatory;
  - (f) He had had engineers at USG Boral undertake modelling in regard to the actual placing of adhesive in the Jackson's plasterwork, and the engineers had calculated that the fixing was 3.8 times greater than required. The engineers had advised that it was very unlikely that the ceiling would collapse. On this basis, Mr Brown said the ceiling was safe;
  - (g) He said that his responsibilities at USG Boral included investigating ceilings. He said that he investigated about 50% of the collapses. In answer to a question from the Tribunal, he said that last year there were 23 collapses. When questioned about their causes, he said that many of them were caused by overloading, because homeowners had affixed lighting, air-conditioning units or speakers directly onto plasterwork;
  - (h) Mr Brown also said he was familiar with the collapse of the house which have been referred to by Mr Vaux, which was in Caroline Springs. He said that he had inspected the house and had found that the cause of the collapse of the ceiling in the rumpus room was that it

had become saturated. He referred to a letter he had written in 2010 to the builder of the house confirming his opinion.

### **The issues to be determined**

- 26 The issues regarding liability to be determined in this case, as Ms Findlay highlighted in her submissions, are threefold. The first is whether the plasterwork has been performed to the Level 4 standard, as required by the contract. The second is whether the ceiling is unsafe. The third is whether Henley is obliged to fix the front door handle which has been installed at a height of 920mm from the ground.
- 27 If breach on any issue is found to exist, then damages will have to be assessed.

### **Normal viewing position and non-critical light**

- 28 The repeated references in the evidence to the criticality of viewing the plasterboard from ‘a normal viewing position’ reflects the requirement of the Guide to Standards and Tolerances, the relevant parts of which were put into evidence.<sup>1</sup> The Guide to Standards and Tolerances provides as follows:

Generally, variations in the surface colour, texture and finish of walls, ceilings, floors and roofs, and variations in glass and similar transparent materials are to be viewed where possible from a normal viewing position. A normal viewing position is looking at a distance of 1.5 m or greater (600 for appliances and fixtures) with the surface or material being illuminated by “non-critical light”. Non-critical light means the light that strikes the service is diffused and is not glancing or parallel to that surface.<sup>2</sup>

### **The USG Boral letter of 9 March 2016**

- 29 The importance of inspecting plasterwork from a normal viewing position is explained in a letter from the manufacturer USG Boral addressed to Henley dated 9 March 2016, which was tendered by Mr Jackson. The letter came to be written because Henley had suggested to Mr Jackson that USG Boral should be given the opportunity to inspect its plaster which had been installed in his house, and he agreed. In the letter, USG Boral said:

When architects, specifiers, builders or homeowners are considering the type of finish they require from plasterboard walls and/or ceilings it is important to understand how the overall appearance is likely to be affected by glancing light.

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<sup>1</sup> Exhibit R2.

<sup>2</sup> Guide to Standards and Tolerances, page 14. This section of the Guide contains a footnote to the effect that non-critical light is defined in appendix B3 and D7 Australian Standard AS/NZS 2589.



Critical glancing light is the light that shines directly or almost directly across the surface of a wall or ceiling.

No building material, including plasterboard can provide a perfectly flat or defect free ceiling or wall finish. The common requirement is a completely flat surface, however, despite our best intentions, this is not always possible to achieve and imperfections can and will be highlighted by light falling almost parallel to the surface. This lighting effect is termed “Critical glancing light”.

Glancing light tends to magnify imperfections and/or blemishes and can ruin any perceived flat finish that has been created.

### **Henley’s contentions regarding the Level 4 issue**

- 30 In connection with the first point, Ms Findlay tendered the contract made between Mr Jackson and Henley, which had been signed on 4 May 2015. She pointed to the specification incorporated into the contract, and drew the attention of the Tribunal to s 14 ‘Internal Wall and Ceiling Linings’. Here, at paragraph 14.1(d)(i), it was specified that:

Internal areas of the home (Class 1 building) except the inside of cupboards, wardrobes and the like [would be finished to]-A Level 4 finish.

- 31 Ms Findlay reminded the Tribunal that the light in which the plasterwork had to be inspected from a normal viewing position was non-critical light. She said that neither Mr Green nor Mr Vaux in their reports had addressed this key issue. She said that it was convenient for them to have addressed the issue in their oral evidence at the hearing when the importance of light had been identified. On the other hand she said that Mr Engel, who is an experienced builder and architect, had squarely addressed the light conditions in his report, and had formed the view that no defects were evident. In particular, Ms Findlay referred to s 9.18 of the Guide to Standards and Tolerances which states that plaster ‘peaking or jointing is defective if it is visible from a normal viewing position’. As peaking or jointing was not visible when tested in the relevant light, there was no defect. She said that Mr Jackson was seeking a Level 5 finish, which was much higher [than Level 4], and much more expensive.
- 32 Ms Findlay also placed reliance on the first report prepared by Archicentre which was prepared in February at Henley’s request in an endeavour to satisfy Mr Jackson’s concerns about the plasterwork. She reminded the Tribunal that in that report the plasterwork had not be identified as a defect, although a number of other defects in the house were identified.
- 33 Ms Findlay also attacked the competence of both Mr Green and Mr Vaux as expert witnesses, and highlighted that Mr Vaux had not even referred to the relevant VCAT Practice Note in his report.

### **The attack on Mr Green as an expert witness**

34 It is convenient to deal at the outset with Ms Findlay's attack on Mr Green as an expert witnesses. The first observation to be made is that no attack on the expertise of Mr Green was made before or at the time he gave evidence. Accordingly, Henley's attack, made as it was in final submissions, comes too late, as Mr Green's evidence has been accepted. Furthermore, as no criticism of his expertise or qualifications was put to Mr Green in cross-examination, I consider that it is unfair to him, and accordingly to Mr Jackson, for an attack to be made on this basis in final submissions, as Mr Green was not given an opportunity to address any concerns about his expertise. In any event, I regard any criticism of Mr Green's qualification as an expert witness to be unfounded. Mr Green records in his report that he has been a registered architect since 1970, that he is a certified building inspector, and that he has 45 years' experience including 40 years' in private architectural practice and construction management. I find that Mr Green is adequately qualified to be an expert witness, and I am prepared to place weight on his opinions.

### **The attack on Mr Vaux as an expert witness**

35 Turning to Mr Vaux, I note similarly that no express attack on his expertise was put to him in cross-examination. He was asked about his experience in cross-examination by Ms Findlay, and he answered that he had 35 years' in the industry, both on the tools and as a lecturer. No attack was made on his expertise at this point.

36 It is true, as Ms Findlay contends, that Mr Vaux failed to refer to the relevant VCAT Practice Note relating to expert witnesses in his report. The significance of this was not fleshed out, but I consider it is relevant to the issue of whether Mr Jackson complied with clause 7 of the Tribunal's practice note relating to expert witnesses, PNVCAT2, which provides:

Parties to a proceeding must ensure that any expert retained by them to provide a report for use in the proceeding is made aware of the contents of this practice note at the time of such retainer.

37 Having made this point, I note that no objection to the admission of the report was made on the first day of the hearing, and the report was admitted into evidence. For this reason, Henley's attack on Mr Vaux's standing as an expert came too late. In any event, the Tribunal is not bound by the rules of evidence,<sup>3</sup> and I consider Mr Vaux's failure to acknowledge PNVCAT2 goes to the weight to be attributed to his evidence rather than its admissibility.

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<sup>3</sup> Section 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*.

- 38 Having heard Mr Vaux give evidence, and having observed him under cross-examination, I find that he is appropriately qualified to give evidence as an expert.

### **Discussion of the expert evidence**

- 39 The situation accordingly is that Mr Jackson called two experts who I have found have relevant expertise. Mr Green clarified in his oral evidence that he carried out the inspection referred in his report in accordance with the Guide to Standards and Tolerances. When questioned by me, he confirmed the inspection was carried out in natural light. Mr Vaux also gave oral evidence that he could see the defects in the ceiling when the curtains were drawn. When he was cross-examined by Ms Findlay, and it was put to him that he did not say in his report that he viewed the defects in non-critical light, he responded that he had viewed the defects in ‘multiple lighting conditions’. He then expressly confirmed that no lights were on when he looked at the ceiling during his inspection in September.

### **Observations at the site inspection**

- 40 At the site inspection that took place on the morning of the second day of the hearing, I noted that when the curtains to the room were open, but the lights were off, it was possible to identify where the plasterboard in the ceiling had been joined in four out of five cases. The fifth case was directly inside a glass door to the living room. Here, abundant natural light illuminated the ceiling, and no unevenness in the plasterwork was visible. However, in other parts of the room, the light from the door and from a window was diffused, and on a careful inspection it was quite possible to see where the plaster joints were located. A popped screw was also visible.
- 41 I accordingly have no difficulty accepting that Mr Green and Mr Vaux observed defects in the plasterboard in the ceilings under similar conditions. It is not clear to me why those defects would not have been apparent to Mr Engel in natural light conditions.

### **Discussion regarding light**

- 42 With respect to the specific issue of whether the daylight in the living room /kitchen when the curtains were open was critical or non-critical, there is divided evidence. On the one hand, Mr Green and Mr Vaux say the daylight in the room is non-critical. On the other hand, Mr Brown opined that the light near the glass door was non-critical, but the light became critical further into the room.
- 43 I think a relevant observation is made by Mr Engel, who in his report at page 2 says this:

As per all the relevant codes, the visual inspection was carried out in natural diffused light conditions, through windows and external doorways, however artificial “glancing light” was used to determine

other minor defects claimed by the owner, not seen with natural diffused light and without the light being glancing ...

The areas covered in this report are areas claimed by the owner as having defects, and include the entry and hallway, kitchen/family room, bedrooms, and bathrooms. All these areas were examined with natural non diffused light.

Photos taken on the day did not show any defects when using natural light under accepted conditions, so it must be assumed that photos taken by Mr Vaux were taken with glancing light.

- 44 I consider these passages are important, because they confirm that Mr Engel thought it was satisfactory to view the plasterboard throughout the house using natural light. He did not make any suggestion that the light in the living room coming in through the glass door and window, when the curtains were open, was of such quality in any area of the room that it could not be regarded as non-critical.
- 45 This section of Mr Engel's report, is consistent with the note that I made of his evidence at the hearing on 30 November 2016 to the effect that when the curtains were open the lighting requirements 'under the codes' were satisfied.
- 46 I turn to the Archicentre report of February 2016 which was referred to by Ms Findlay. She noted that it did not refer to problems with the plasterwork. However, Henley did not call the author of that report, and indeed could not actually identify the individual who wrote it. The author was not available for cross-examination. In circumstances where Mr Jackson's experts were available for cross-examination, and indeed were cross-examined, there is no basis to place more credence on the Archicentre report of February 2016 than on Mr Green's evidence and Mr Vaux's evidence.

#### **Finding as to Level 4 finish**

- 47 I observed at the inspection that when viewed in normal daylight with the curtains open, the plasterboard in the living room/kitchen area displayed defects. I accept that Mr Green and Mr Vaux each made similar observations. As these defects were visible in non-critical light, I find that the plasterboard on the ceiling was **not** finished to a Level 4 standard, and there accordingly has been a breach of the contract.
- 48 I note further that in Henley's own specification at s 14.1(d)(i), it is mandated that plasterwork will generally achieve the following standard of finish:

Internal areas of the home (Class 1 building) except the inside of cupboards, wardrobes and the like-a Level 4 finish in that all jointing compound will be sanded to a smooth finish. *No tool marks or ridges will be visible in un-deflected normal daylight conditions.* (Emphasis added).

- 49 The existence of ridges indicates that Henley's own interpretation of a Level 4 finish has not been achieved. This reinforces my finding that there has been a breach with respect to the living room/kitchen.
- 50 I accept Henley's contention that defects in the plasterboard were visible only in the living room/kitchen. There was no defect visible in the first bedroom which was shown by Mr Jackson, when the curtains were opened, nor in the second bedroom at the end of the house, which was flooded with natural daylight when the curtains were opened.

### **Is the plasterboard safe?**

- 51 Mr Jackson's case regarding the lack of safety of the plasterboard rests on Mr Vaux's view that the adhesive used in fixing the ceiling in the kitchen/living room has not been placed in accordance with the manufacturer's recommended 'orthodox' method. Mr Vaux opined there is a risk the ceiling might collapse, and that the risk is not theoretical because he had experience of a ceiling which collapsed in a house in Caroline Springs.
- 52 Ms Findlay contended that the incident in Caroline Springs could to be put to one side as it is irrelevant. I accept this. The evidence of Mr Brown was that the plasterboard ceiling in the rumpus room in the Caroline Springs house had collapsed because it had become wet. That was not the case here.
- 53 More relevant is the fact that Mr Brown went into the ceiling at the Jackson's house and investigated the placing of adhesive, and then had engineers at USG Boral conduct tests. The engineers' report was not put in evidence. However, Mr Brown said that the engineers considered that the roof was safe, and under oath he said it was safe. He also said that his company would guarantee the ceiling.
- 54 Importantly, Mr Brown also said that if a ceiling was going to fail, it would ordinarily not fail instantaneously, unless it was overloaded or soaked with water. Typically, a plaster ceiling would sag before it collapsed. There would be 'pillowing'. This would evidence itself within months of the plasterboard being fixed. Here, the plasterboard had been in place since October or November 2015, and no issue with pillowing had been identified. This suggested that this particular ceiling was safe.
- 55 I accept Mr Brown's evidence on this point and find that the ceiling is safe. I accordingly find that Mr Jackson is not entitled to an award of damages assessed on the basis that the ceiling needs to be replaced. Even if there is a technical nonconformity with USG Boral's standard method of installation, as contended by Mr Vaux, replacement of the ceiling in circumstances where the roof is in no danger of collapsing, would, I consider, be unreasonable.

### **Assessment of damages regarding the breach of contract regarding lack of Level 4 finish**

- 56 I note that Mr Jackson was put on notice during the first day of the hearing that he had no evidence relevant to his claim for damages. Despite this, he came to the second day of the hearing having obtained no quotations for plastering work or painting work, let alone for accommodation or furniture moving.
- 57 Mr Vaux agreed the ceiling did not have to come down but considered that the peaking had to be addressed. This would involve skimming the ceiling with a fine coat of plaster and a second skin of heavier plaster, and repainting. He said it would also be possible to affix further fasteners, and that they should be put in. He estimated the cost for the whole house at \$10,000. He estimated that the work would take 10 days if no-one was in the house.
- 58 Ms Findlay contended that as defects had only been demonstrated in the living room/kitchen area, the rectification work should be confined to that area. I accept this contention, with the qualification that the hallway will have to be rectified at the same time, as its ceiling and that of the living room/kitchen are a continuum.
- 59 Ms Findlay referred to calculations to the effect that the cost of replastering and repainting the entire house would be \$4,300. Henley invited the Tribunal to accept that the cost of rectifying the living room/kitchen area would be half the cost of doing the whole house. Mr Jackson asked no questions about this costing. I regard it as reasonable, noting that according to an invoice from Otto Painting Services Pty Ltd dated 10 May 2016 two painters had cut and rolled the ceiling in the living room/kitchen area and the hallway, and also attended to painting a door frame and staining the front door and frame for \$630 plus GST. I am accordingly prepared to accept the thrust of Henley's proposition.
- 60 The relevant cost to be assessed is the cost of carrying out the requisite two plaster treatments and then repainting the ceiling of the living room/kitchen *and* the hallway. Bearing in mind Henley's assessment of \$4,300 for rectifying the whole house, and noting that the hallway ceiling is to be done as well as that of the ceiling to the living room/kitchen, I find that Mr Jackson is entitled to an award of damages in respect of the defective plasterwork of \$2,500.

### **The claim for accommodation and furniture moving**

- 61 Mr Jackson had not obtained any evidence regarding the cost of alternative accommodation in a motel, and he had not thought about how long he might need it. At the hearing, he proposed a rate for a motel room of \$110 per night and said he would need two rooms for himself and his wife and baby daughter and his teenage son. At a total cost of \$220 a night, he

sought \$2,200 for alternative accommodation for 10 nights, based on Mr Vaux's assessment of the duration of the works. He also wanted damages in respect of the cost of moving furniture, but had no evidence about what this cost might be.

- 62 I am prepared to allow recovery of alternative accommodation expenses at the rate of \$220 per night, noting that the rate per room of \$110 was not challenged by Henley. However, I limit the recovery to two nights, as I accept Henley's assessment of the duration of the works of 2 to 3 days. I find accordingly that Mr Jackson is entitled to an award of \$440 dollars in respect of alternative accommodation while the rectification works are being carried out.
- 63 I make no allowance in respect of the cost of moving and storing furniture, for the reason that only the living room/kitchen/hallway areas will be affected by the works. I am not satisfied that any furniture will have to be removed from the house, stored and then brought back.

### **The door handle**

- 64 I turn now to the issue of the level of the front door handle. Mr Jackson's contention is that this handle should be at the same level as all the other door handles in the house. He says that he complained about the issue and that Henley agreed to attend to it, as evidenced by the fact that a second door was delivered, and left at the back of his house. This door had no holes for locks and handles drilled in it. However, when the door was installed, the handle was located at exactly the same height as it had been on the first door, as the openings in the doorframe to accommodate the deadlock and the handle had not been altered, because the doorframe had not been changed.
- 65 Ms Findlay pointed out that Mr Jackson had not referred to any provision of the contract which required the door handle on the front door to be at any particular level. She says that the door handle is fit for purpose, and accordingly there has been no breach of contract.
- 66 I do not accept this argument. I accept Mr Jackson's evidence that Henley replaced the original door and sent a carpenter to install the replacement door. These actions are consistent only with Henley accepting that the handle on the first door was at the wrong height. The door handle may have been fit for the purpose of opening the door, but Henley's actions indicate that the company accepted that either the handle had not been installed in a proper and workmanlike manner, or had not been installed with reasonable care and skill.<sup>4</sup>
- 67 Having accepted that a new door needed to be hung, Henley did not carry out the task satisfactorily because it did not replace the door frame. This meant that the inappropriate door handle height in the original door was re-

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<sup>4</sup> These are 2 of the warranties in clause 11 of the contract. See also ss 8(a) and 8(d) of the *Domestic Building Contracts Act 1995*.

created in the replacement door. I find for Mr Jackson against Henley in respect of this particular limb of the case.

- 68 I assess damages at \$1,126, which was Henley's estimate of the cost of replacing the door frame and fixing a new door.

### **Summary of findings as to damages**

- 69 Mr Jackson is entitled to an order for damages of \$2,500 in respect of defective plasterwork, \$440 respect of alternative accommodation while the rectification works are carried out, and \$1,126 in respect of the new door handle, a total of \$4,066.

### **The cost of consultants' reports and other expenses**

- 70 Mr Jackson, at the hearing, said he wanted reimbursement for his expenses. First of all, he wanted reimbursement of the filing fee he had paid of \$174.10. It was pointed out that this would be dealt with separately, as the Tribunal has a discretion to award reimbursement of fees if he is successful.

- 71 Next, Mr Jackson wanted to get back the fees of \$1,125 he had paid Mr Green of Archicentre for his report. In addition, Mr Green had also provided a further account of \$528 in respect of his attendance on the first day of the hearing, 30 November 2016, which had been paid.

- 72 Turning to Mr Vaux's fees, Mr Jackson wanted to recover \$660 for his report. Mr Vaux at the end of the hearing gave evidence that his further costs for attending on the first day of the hearing, and then preparing for and attending on the second day, was a further \$2,300.

- 73 Mr Jackson also wanted reimbursement for the cost of printer ink for printing photos, put at \$61, and the cost of photos being \$12.60.

- 74 In summary, Mr Jackson sought reimbursement of expenses (other than the filing fee) of \$4,686.60 comprising:

- (a) Mr Green – \$1,125 plus \$528, a total of \$1,653;
- (b) Mr Vaux – \$660 plus \$2,300, a total of \$2,960;
- (c) Printer ink of \$61 and photographs of \$12.60, a total of \$73.60.

- 75 I observe that the cost of obtaining an expert's report and the cost of an expert's attendance at a hearing are ordinarily regarded as disbursements that should be claimed as costs of the proceeding. Sometimes an applicant in the Tribunal will seek an order for payment of the costs associated with obtaining a consultant's report as damages in the proceeding, on the basis that the need to obtain the report arose directly naturally from the respondent's breach of contract, and that the cost is therefore a type of damage. No such argument was presented in the present case, and I accordingly find that Mr Jackson cannot recover the fees charged by his expert witnesses as damages. If he seeks to recover these expenses, he must do so as part of any claim for costs.



- 76 I reserve costs. The attention of the parties is drawn to Division 8 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). Any party seeking costs has liberty to apply. Any application for costs is to be referred to me, and I will make orders as to how the application is to be dealt with.
- 77 I also reserve the issue of whether Mr Jackson is entitled to an order under s 115B of the VCAT Act for reimbursement of the filing fee he paid. Any application by Mr Jackson for such an order can be dealt with at the time any application for costs is dealt with.

**MEMBER C EDQUIST**