

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.D1272/2013

CATCHWORDS

Domestic Building, Res judicata, issue estoppel, Anshun estoppel, subject of previous proceeding.

APPLICANT	Mr Ramesh Kottai
RESPONDENT	Scope Constructions (Vic) Pty Ltd (ACN: 100 435 710)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	22 August 2014
DATE OF ORDER	24 November 2014
CITATION	Kottai v Scope Constructions (Vic) Pty Ltd (Building and Property) [2014] VCAT 1461

ORDERS

- 1 I strike out the following paragraphs from the Applicant's Points of Claim of 27 May 2014:
8.1 to 8.5 inclusive, 8.9, 8.10, 8.12, 9.1, 9.2, 9.4 to 9.6 inclusive, 9.8, 9.10, 9.11, 9.13, 9.15 and 9.16.
- 2 The Applicant has sought leave to withdraw paragraphs 8.14 and 8.15 and they are withdrawn.
- 3 **The proceeding is set down for a directions hearing before Senior Member Lothian on 11 December 2014 at 9:00 a.m. at 55 King Street Melbourne with an estimated hearing time of 1 hour, at which time orders for the further conduct of the proceeding will be made, and any application for costs will be heard.**
- 4 Costs reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr N Andreou of Counsel

For Respondent

Mr D Triaca of Counsel

REASONS

- 1 Mr Kottai, the Applicant-Owner, owns a home in Waterways. It was built under a contract between him and the Respondent-Builder. The Owner has brought three different applications to the Tribunal and has also made three complaints to Consumer Affairs Victoria (“CAV”) leading to conciliations.
- 2 This proceeding came before me on 22 August 2014 on the Builder’s application under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) to dismiss or strike out the proceeding.
- 3 On 22 August 2014 Mr Andreou of Counsel appeared for the Owner and Mr Triaca of Counsel appeared for the Builder. It was the first time the parties were legally represented at a hearing.

HISTORY

- 4 According to the Owner’s Points of Claim of 27 May 2014 (“PoC”), the relevant building contract was dated 3 June 2009 and the occupancy permit was issued on 25 February 2010. The common point in the Owner’s claims is that all three concern the roof, at least to some degree.
- 5 Briefly, on 4 November 2010 the Owner lodged his first application with CAV which was conciliated on 26 November 2010. On 9 February 2011 the Owner lodged the first application with the Tribunal, in D48/2011, which was heard on 30 June 2011. The Owner engaged Blue Sky Roof Inspections to report on the roof, and the date of the report is 10 May 2013.
- 6 After receiving the report, the Owner made a second application to CAV and on 16 July 2013, it conducted the second conciliation. On 16 August 2013 the Owner lodged the second application at the Tribunal, in D891/2013, which was heard and dismissed on 17 October 2013. On 27 November 2014, the Owner lodged his third application with the Tribunal.

OWNER’S CLAIMS

D48/2011

- 7 On 9 February 2011 the Owner commenced a proceeding against the Builder and the Owner’s household insurer, AAMI Ltd. The amount of the claim was \$1,500. The claim was described as: "as per AAMI report the roof has been poorly constructed." The documents accompanying the Owner’s application included reports to AAMI from Construction Production (Aust) Pty Ltd of 11 September 2010 and from Dittrich Enterprises Pty Ltd trading as State Roof Service of 24 September 2010.
- 8 The Construction Production report is headed “Make Safe Findings” and includes:

What was seen at attendance

- a. Make safe to 2 x storey home on roof.

Action/repairs undertaken

- b. We found the capping tiles to the home had blown off from severe winds – South West had 3 x capping tiles and the North West had 6 x capping tiles dislodged.
- c. We have placed plastic over the area to avoid further damage.
- d. Property left safe.

Works to be carried out:

- The capping tiles will need to be replaced and repointed.[sic]

- 9 The State Roof Service report included the following:

Expert Opinion on Findings

Storm damage had occurred at this multi-story dwelling with a concrete tiled roof.

Strong winds have dislodged several capping tiles on 2 upper rear hips.

A further make safe has now been attempted by installing lead flashing over the affected areas for temporary weather proofing.

The bedding mix applied beneath the capping tiles is weak and has not bonded with the capping tiles sufficiently (faulty work).

This had allowed the recent wind damage to occur more readily.

Note: This dwelling is situated in a high wind area.

The general condition of the remainder of the roof is in good order although the ridge mortar on the entire upper story roof has been poorly applied and is beginning to crack or peel.

- 10 The report from State Roof Service included a quotation for claimable repairs of \$970 and other repairs of \$1,180.

- 11 The proceeding was heard on 30 June 2011 and the Tribunal ordered:

By consent, claim is dismissed. The First Respondent expressly acknowledges its ongoing warranty with respect to the roof.

D891/2013

- 12 On 16 August 2013 the Owner commenced the second proceeding against the Builder. The claim was for \$4,500 and the grounds for claim were given as:

Based on the insurance and independent roofing reports.

(a) Roof tiles to be properly secured with silicon or proper clips where they overlap the soaker flashing.

(b) Paint the walls and ceilings including skirting caused by water ingress through the slipped tiles.

(c) Grouting and caulking the floor tiles.

(d) Seal gaps in skirting and walls.

- 13 The application was supported by a "Repairer Report" by Bill Slater of Townsend Building Services dated 28 February 2013 and a report by David Bishop of Blue Sky Roof Inspections dated 10 May 2013.

Townsend Building Services

- 14 The report had been prepared for the Owner's domestic insurer and it includes the following:

Client Discussion

We inspected the property with the Insured, Ramesh Kottai, who advised that the damage occurred 27 January 2013.

The insured stated that during heavy rain they noticed water stains on the living room ceiling and a significant amount of water over the living room tiled floor. They discovered a roof tile on the rear single-storey section of the home had slipped out of position leaving a gap between the tiles allowing water to enter the roof space.

Resultant Damage

Water stains on living room plaster ceiling and wall – the living room ceiling adjoins the dining, kitchen and entry which is a large expanse.

Cause of Damage

Townsend Building Services appointed Bill Slater to attend the property and he found that the damage was caused by a roof tile that was not properly secured that had slipped out of position allowing water to ingress ceiling area.

There was also one cracked roof tile allowing water ingress which I managed to replace with a spare tile that the insured was able to supply during my inspection.

This is a rear single-storey roof area that abuts a wall of the two-storey home with the soaker flashing that is fixed against the wall. The tiles have been cut against the wall and over the soaker flashing and are not properly engaged over the timber tile flashing allowing the tiles to slide out of position. Both these issues are maintenance related and not the result of an event.

Conclusion

My inspection of the property found that the water stains sustained to the living room ceiling / wall are related to water entering through a cracked roof tile and tile that was not properly secured subsequently leaving a gap for water entry. This tile has been placed back into position and the roof is now watertight however the tile will need to be properly secured.

- 15 Under the section "claim covered" was "yes" and the "quoted amount" was \$2,011.63.

- 16 Mr Bishop of Blue Sky Inspections was engaged by the Owner to inspect the roof. He described the general condition of the roof as "good", a comment that was repeated in his conclusion. On page 2 Mr Bishop said:

This is a general condition report focusing on any faulty workmanship or non-compliance issues.

Water ingress had occurred previously to the corners in the rear lounge area and some cut tiles were found (by others) to have slipped down out of position where they overlapped a soaker flashing.

Findings (General)

My overall impression of this roof is that it has been well installed using good quality materials.

There are however a number of issues which require some attention in order to prevent ongoing and future leak problems.

- 17 The areas reported upon were: upper storey roof, rear deck with tiled and metal deck areas, and front deck roofs.
- 18 The part of the report highlighted by the Owner was on page 5 where Mr Bishop stated:

Rear deck roof with tiled and metal deck areas

On the roof above the leak area and also in a similar area on the other side, there are downpipes which discharge large volumes of water onto the lower roof via non-compliant spreader pipes. Each spreader pipe discharges water from approximately 30 – 40 m² of roof area onto un-flashed tiles above soaker flashings. The "Installation Code for Metal Roofing and Wall Cladding SAA HB 39-1997" states that water from no more than 15 m² of roof area must be discharged onto a lower roof especially directly above a soaker flashing.

One of the non-compliant spreader pipes has discharged water at just above where some tiles have slipped down. The tiles had slipped down due to not being properly secured with silicon or proper clips where they overlap the soaker flashings which are only 100 mm wide and are not capable of carrying extra run-off water from the spreader pipes. I believe this was the cause of the recent water ingress.

- 19 Mr Bishop's recommendations were:
- a. Clip all tiles overhanging soaker trays (even full tiles).
 - b. Install 90 mm PVC pipes from all spreader pipes off the lower roofs and directly into lower gutters. Install 90° bends to direct the water towards the nearest downpipe outlet.
 - c. Cut a new tile to go around the flu pipe and install a proper "Versatile" lead flashing with built in adaptable rubber pipe sleeve.
 - d. Make sure debris is not allowed to accumulate at the lower end of the valleys where the leaf guard goes across.
 - e. Upsize the lower downpipes to 90 mm where water from the upper storey roof is discharged.

20 The Builder filed and served answering material, including a report from Mr Bruce Grahame of the Victorian Building Authority of 14 October 2013. Mr Grahame did not find any work defective. Item 1 complaint was:

External – roof tiles not sitting correctly, broken tiles, flashing not sealed correctly, no weepholes.

Mr Grahame's response was:

1. The owner complained that a roof tile had slipped, resulting in water damage to internal area of the dwelling.
2. The roof tiles along the junction with the upper floor external wall were tight and not easily dislodged during the inspection.
3. Item 6.02 of the Guide to Standards and Tolerances states roofing and accessories are defective if they leak under normal weather conditions.
4. Due to the expiration of time since the issue of the occupancy permit, I could not conclusively determine that the defect is attributable to the builder's workmanship, therefore no defect was noted.

21 I heard this matter on 17 October 2013 and the order was:

For the reasons given orally, the proceeding is dismissed.

22 To give context to the application before me, the oral reasons were:

I am not satisfied you have proved your case, Mr Kottai. I am satisfied that you had a leak and I am very sorry this happened to you. But the issue is to attribute the leak to something the Builder or the Builder's sub-contractor has failed to do.

If I had clear proof that the Builder's sub-contractors did not install the [tile] clip, then you would have proven your case. I am not satisfied [that this is so] and I am dismissing the application.

23 The Owner wrote to the Tribunal on 18 October 2013 expressing concern about the outcome of his case and sending further material. An e-mail was sent to him dated 21 October 2013 from Customer Service, Civil Division stating:

Thank you for your further documentation in regards to the above claim. Unfortunately the matter has been finalised at VCAT.

Parties wishing to appeal a VCAT decision must do so within 28 days, and need leave of the Court to appeal. This leave to appeal must be given by the Supreme Court.

Should you wish to appeal the decision, you may wish to seek independent legal advice on how you wish to proceed with this matter, or alternatively contact the Supreme Court of Appeal [sic] on (03) 9639100.

24 The Owner did not seek reasons, appeal the decision, or, to my knowledge, seek a transcript of the hearing. It is also surprising that the Owner stated that he received communication that the order was final, but

that he had no knowledge he could appeal. The following is paragraph 22 of his affidavit of 14 August 2014:

I was informed by VCAT that the order made and final decision delivered in the Second VCAT Proceeding could not be overturned. I did not know, nor was I made aware that I could have made an application to appeal VCAT's orders.

This claim – D1272/2013

25 The Owner commenced this proceeding on 27 November 2013. His claim was stated as being between \$4,000 and \$6,000. In answer to the question "What do you want VCAT to do?" He wrote:

1. Builder to fix the roof tile gap along the flashing (refer photo attached).
2. Builder to fix the roof tiles along flashings with clips or a sealant.
3. Builder to fix the roof tiles to sit properly over the batten with lugs on to it.
4. Builder to fix the broken tiles where the mechanical vent is placed.
5. Check the entire roof and fix the clips if required to comply with Australian Standard.

26 The Owner referred to both the Blue Sky report which had been presented as the evidence in the previous proceeding and to photos and video recordings attached to his application.

27 On 21 January 2014 the Builder applied to dismiss all roofing issues which Mr Murphy of the Builder claimed had been addressed in the hearing on 17 October 2013 in proceeding D891/2013. On 30 January 2014 the Builder filed a counterclaim for \$68,161.15 for items such as visits to the Owner's property, time and expense concerning the VCAT proceedings, loss of business and \$10,000 for stress and anguish.

28 The proceeding came before me for hearing on 6 February 2014. The Owner appeared in person and Mr Murphy appeared for the Builder. I converted the hearing to a directions hearing and included the following note before the Orders:

The Tribunal notes the Applicant's assurance that the area of the roof complained of in this proceeding is not the same as the area complained of in proceeding D891/2013, but also notes that claim detail 5 "Check the entire roof ..." which includes the area the subject of the earlier claim. The Tribunal also notes that the Applicant seeks to rely on the report of Mr Bishop of Blue Sky Roof Inspections, which was submitted in evidence in D891/2013.

29 Order 2 was that by 13 March 2013 the Owner was to file at the Tribunal and serve on the Builder points of claim setting out:

- (a) What the Applicant is now claiming;
- (b) The work to be done and the cost to repair items the Applicant claims are defective; and

(c) Why the items were not the subject of proceeding D891/2013 or D84/2011. [Underlining added]

- 30 Other procedural orders were made and I set the proceeding and any counterclaim down for hearing before myself on 9 May 2014 for one day.
- 31 There was a further directions hearing before me on 17 March 2014, extending various dates and adjourning the hearing from 9 May 2014 to 28 July 2014. Order 7 was:
- Should the applicant fail to comply with these directions other than for a compelling reason, the Tribunal will entertain an application from the respondent under s 78 of the *Victorian Civil and Administrative Tribunal Act* 1998.
- 32 The Tribunal became aware that the Owner's expert, Mr Hargrave, had undergone surgery and therefore set the proceeding down for a further directions hearing on 10 July 2014 to consider any further necessary amendments to the timetable.
- 33 On 10 July 2014 the Builder sought orders that the be matter struck out or dismissed. I ordered that any application under s 75 or s 78 of the VCAT Act be filed and served by 31 July 2014 and set the hearing down before myself on 22 August 2014.
- 34 The PoC recites salient facts concerning the building contract, the Builder's obligations to the Owner and the history of the building project. The alleged breaches are based on Mr Hargrave's report of 17 May 2014, and costs them at \$71,381.56. The Owner also claims "expenses and stress caused by [the Builder] of \$137,380".
- 35 At paragraph 28 of the Owner's affidavit of 14 August 2014 he stated that this proceeding is for:
- (a) rectification of damage caused following the completion of work by the [Builder] in accordance with the recommendations contained in the Blue Sky Report; and
 - (b) rectification of defects to the flue pipe in accordance with the agreement reached at the Second Conciliation.
- 36 There is no reference to the matters raised at paragraph 28 of the affidavit in the PoC, but even if there were, the second conciliation was on 16 July 2013; significantly before the hearing of 17 October 2013 in D891/2013.

SUBMISSIONS

By Builder

- 37 Mr Triaca handed up written submissions on 22 August 2014, and spoke to them. The Builder also relied on Mr Murphy's affidavits of 31 July 2014 and of 21 August 2014.
- 38 The Builder seeks to have this proceeding dismissed as an abuse of process, and relies on s75(1) of the VCAT Act which provides:

At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part of a proceeding that, in its opinion –

- (a) is frivolous, vexatious, misconceived or lacking in substance; or
- (b) is otherwise an abuse of process.

39 The Builder’s written submissions included a quotation from *Conwell v Langendoen* [2013] VCAT 1630 where Member Farrelly said:

- 12. There is a principle in law that an issue, once judicially determined, cannot be revisited for further or alternative judicial determination, save to the extent that a party has a right of appeal. The principle is often referred to as *res judicata*. Where the subsequent action purports to raise a new claim or cause of action founded on issues of fact or law which were necessarily decided by the prior determination, the principle is often referred to as issue estoppel.
- 13. The principle has been described as “a fundamental doctrine of all courts that there must be an end to litigation.”
- 14. The principle extends to claims which, although not directly raised in a previous proceeding, are claims which in all the circumstances *ought* to have been brought for determination in the prior proceeding. The extended principle, often referred to as *Anshun estoppel* in reference to the High Court case *Port of Melbourne Authority v Anshun* [1981] HCA 45; (1981) 147 CLR 589, has been described in the following terms:

Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

40 The Builder submitted that all matters the subject of this litigation were either heard and dismissed in D891/2013 (*res judicata*), or matters known to the Owner at the time of that proceeding – 17 October 2013 (the date of hearing and dismissal) (issue estoppel) or matters which should have been known to him at that date (*Anshun estoppel*).

By the Owner

- 41 Mr Andreou handed up written submissions and spoke to them. The Owner relied on his own affidavits of 14 August 2014 and 22 August 2014.
- 42 The Owner's written submissions were that the powers to strike out or dismiss under s75 of the VCAT Act should be exercised in accordance with the determination in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. I accept the submissions at paragraph 4:
- (b) it is a serious matter for the tribunal in an interlocutory proceeding that would generally not involve the hearing of oral evidence, to deprive a litigant of the chance to have their claim heard in the ordinary course. Accordingly, the tribunal should exercise caution before summarily terminating a proceeding; and
 - (c) for a dismissal or strike out to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, can on no reasonable view justify relief, or be bound to fail.
- 43 The written submissions acknowledged at paragraph 5 that:
- [a] proceeding which seeks to re-agitate issues that, as a matter of substance, have already been determined by a prior decision of the VCAT, may be an abuse of process.
- 44 The submissions referred to *Knight v CORE* [2003] VCAT 501, paragraph 17, where the then Deputy President Macnamara said:
- The question for determination here is whether ... Mr Knight is, ... *'seeking to re-agitate issues which have as a matter of substance already been determined in prior decisions'*. If he has, then the present proceeding is an abuse of process and is liable to be and should be summarily dismissed pursuant to Section 75. [Underlining added]
- 45 The submissions also referred to *Rein v Nurses Board of Victoria* [2004] 751 at paragraph 8, the last bullet point of which is:
- It appears that the current complaint is an attempt to circumvent the decision of His Honour Judge Duggan and to re-litigate the Board's decision which amounts to an abuse of process and ought not be countenanced. [Underlining added]
- 46 On the basis of the cases referred to in the Owner's submissions, an attempt to re-litigate is an abuse of process.
- 47 Mr Andreou's submissions at the interlocutory hearing included that the Owner was previously self-represented. I am not satisfied that this makes a difference to the parties' entitlements.
- 48 Mr Andreou submitted that matters about which the Owner "should have been aware" should not be determined in an interlocutory proceeding, but are matters for which evidence should be given and the relevant facts determined. He also said that if matters were subject to a current

conciliation before the CAV at the time of the previous hearing, the Builder does not come before the Tribunal with “clean hands” in an equitable sense, if he later objects to the Owner’s failure to plead these items.

- 49 I am not satisfied that having a matter before the CAV was a good enough reasons to fail to raise a known matter in the concurrent proceeding before the Tribunal.

RES JUDICATA - Have some matters been determined previously?

50 This applies to at least paragraphs 8.14, 8.15, 9.15 and 9.16 of the PoC.

51 Paragraphs 8.14 and 8.15 are headed “Previous Case # D891/2013” and were withdrawn by the Owner at the hearing on 22 August 2014. The equivalent paragraphs, 9.15 and 9.16, were not withdrawn, but I consider this was an oversight. I strike out paragraphs 9.15 and 9.16 as matters already determined.

ISSUE ESTOPPEL

Has the Owner sought to raise new claims founded on issues or fact necessarily decided by prior determination?

52 Paragraph 8 of the Owner’s written submission was that the Blue Sky report “focused on” the north side of the rear lower roof, and concluded with limited recommendations for rectification. However, I do not agree that this is a reasonable conclusion to draw from the report.

53 I accept the Builder’s written submission at paragraph 28 that:

The Blue Sky report is a thorough report that does not state that it is subject to any limitations. ... Further, this property has been the subject of three CAV investigations that required roof inspections and an insurance investigation that also required roof inspection. There is no suggestion in those reports that ... the inspections were limited.

54 I find that all roof-structure and roof-plumbing related matters are based on issues or facts previously determined, with the exception of those arising since 17 October 2013.

55 I find that the paragraphs to which this applies are: 8.1 and its costed equivalent, 9.1; 8.2 and 9.2; 8.3 and 9.4; and 8.12 and 9.13. I strike them out.

ANSHUN ESTOPPEL

Should any current matters have been brought forward in earlier litigation?

What was the subject of earlier litigation?

56 I accept Mr Triaca’s submission that the subject of earlier litigation between the Owner and the Builder was whether the Builder had breached the building contract and if so, what damages would flow from the breach.

I include in “contract” the warranties implied by virtue of s8 of the *Domestic Building Contracts Act 1995* (DBC Act). I find the specific subject that litigation was roof defects. The question is thus whether any other non-roof related alleged breaches should have been “brought forward” (claimed) in D891/2013.

SPECIFIC PLEADINGS IN D1272/2013

- 57 In general, paragraph 8 of the PoC describes the alleged defect and paragraph 9 provides costing, based on Mr Hargrave’s report.

9.3

- 58 The matters of most value in the claim and counterclaim are the claims for items such as expert reports, time lost from work and family, and stress arising out of the course of litigation between the parties. These claims were not the subject of submissions on 22 August 2014.

- 59 Paragraph 9.3 is not reflected in paragraph 8. It is:

9.3 Expenses, stress caused by Scope Constructions

Expert Report, stress, anxiety, sleepless nights, loss of family time, out of hours work etc. **\$137,380.00**

- 60 The Tribunal has jurisdiction to award sums for claims such as personal inconvenience associated with litigation of this nature. Until this claim and the counterclaim are disposed of, there remains a dispute to be determined by the Tribunal.
- 61 This head of damage, for both parties, arises out of their ongoing dispute. I am not satisfied that this claim should be struck out.

8.4 and 9.5

- 62 Paragraph 8.4 and 9.5 concern roof insulation:

9.5 Roof Insulation not installed as per contract

Engage Energy Rater to assess the house and reissue a star rating report. **\$1650.00**

- 63 At point 8 of his report, Mr Hargrave states that Sisalation foil is missing under the roof tiles. I note that such a defect would have been present when the home was handed over to the Owner. Mr Hargrave said in his report that he had seen a certificate from Climate Zone 7 saying they had installed further insulation. He does not say so clearly, but indicates disbelief because “I was not knee deep in insulation”.
- 64 At paragraph 30 of his affidavit of 31 July 2014 Mr Murphy states that an independent rating agency reviewed the plans in July 2013 and subsequently R2.0 insulation was added to the roof space where there was already R5.0.
- 65 In paragraph 30(h) of the Owner’s affidavit of 14 August 2014 he expressed concern that the installation of extra insulation might be too heavy for the ceiling sheets. My understanding of the danger alluded to by

Mr Hargrave is that thick insulation could make it difficult for anyone in the roof space to find joists, in order to move around safely, rather than concern about the weight of the insulation.

66 The Builder alleges at paragraph 5 of Mr Murphy's affidavit of 21 August 2014 that the insulation issues and energy rating, which concern this item and the next, were raised in July 2013.

67 Either the matter complained of was within the Owner's knowledge before 17 October 2013, as it was an issue between the parties in July 2013, or the Owner has failed to plead the current issue, such as a failure to undertake work in accordance with an agreement to rectify. I strike out these paragraphs of the Owner's claim.

8.5 and 9.6

68 Paragraphs 8.5 and 9.6 concern wall insulation:

9.6 Wall Insulation damaged during construction

Owner should be compensated because the star rating will have been reduced. **\$20,625.00**

69 At paragraph 30(i) of his affidavit of 14 August 2014 the Owner stated that Sisalation foil was badly damaged during construction and not repaired. At paragraph 18(d) he said it was agreed at the second CAV Conciliation on 16 July 2013 that the Builder would seek advice about how to achieve an energy rating of 5.6.

70 Either the matter complained of was within the Owner's knowledge before 17 October 2013, or the Owner has failed to plead the current issue, such as a failure to undertake work in accordance with an agreement to rectify. I strike out these paragraphs of the Owner's claim.

8.6 and 9.7

71 Paragraphs 8.6 and 9.7 concern the relative height of the porch floor and the interior floor:

9.7 Upper storey front porch floor level is 100 mm higher than shown on the building plans/contract

Pulled [sic] down and rebuild it to the correct level, **\$19,732.42**

72 Mr Hargrave reported on this alleged defect at point 8 of his report. I note that such a defect would have been present when the home was handed over to the Owner. The Owner annexed the report of the Inspection and Conciliation by Mr Panozzo of CAV of 22 May 2014 ("CAV3 report") to his affidavit of 14 August 2014. CAV3 includes "determinations" by Mr Panozzo which are not binding upon the parties, but express his view. The determination was:

Whilst the building inspector acknowledged that the builder failed to build in accordance with the contract drawings, no remedial work was recommended as the balcony is performing as intended.

- 73 The relevance of this finding is that there was neither a determination nor an agreement that the Builder would undertake work for this item after 17 October 2013.
- 74 Although the Owner has stated that he is an engineer working in the building industry, I cannot be satisfied that he was necessarily aware, or ought reasonably to have been aware, of this defect until it was brought to his attention by Mr Hargave's report. I do not strike out these paragraphs.

8.7 and 9.8

- 75 Paragraphs 8.7 and 9.8 concern difficulty opening the upper floor double doors because of latch problems:

9.8 Double doors to upper floor onto front porch

Prior to installing new floor joist, install support blocks in the floor joist on each side of the double doorframe, the frame on each side of double doors will require jacking and to a straight line and installed vertical timber blocks. [sic] **\$19,730.42** (*Included in the above item*)

- 76 At point 9 of his report Mr Hargrave states that the double doors does not open properly because the bottom latch cannot be fully raised. He attributes this to a badly bowed door sill that needs to be fixed by providing support within the floor joist structure. He proposed that the work be undertaken in conjunction with the work described at 9.7.

- 77 At paragraph 6.3 of his affidavit of 22 August 2014 Mr Murphy stated that the latch was "out of warranty", but nevertheless he had undertaken to rectify it and did so on 2 August 2014. This is after the date of the Hargrave Report – 17 May 2014. If the work has now been completed, it follows that this claim would not succeed. However I note that Mr Hargrave does not characterise the latch as the major problem concerning this issue.

- 78 In CAV3 Mr Panozzo stated that the problem was "one leaf of the balcony door can not open". He found that it was not a building defect, but noted the following outcome:

As a gesture of good will, the builder advised he will supply and install a drop bolt in order rectify the problem.

- 79 If work undertaken after CAV3 is defective, this remains an issue between the parties. I do not strike out these paragraphs.

8.8 and 9.9

- 80 Paragraphs 8.8 and 9.9 concern the method of fixing of the upper storey front porch ceiling.

9.9 Upper storey, front porch ceiling

Remove the ceiling sheets and install extra battens to the roof trusses, install new plasterboard sheet and cornice as per Boral recommendations and paint the new ceiling. **\$2,970**

- 81 At point 12 of his report Mr Hargrave states that the ceiling has not been installed as recommended for an alfresco area by the plasterboard sheet manufacturer, Boral.
- 82 In CAV3 Mr Panozzo said that the ceiling was adversely affected by moisture and questioned the appropriateness of using plasterboard. The CAV “determination” was:
- Builder will rectify as required. He will wash down with a prime sealer and apply external paint.
- 83 At paragraph 8 of his affidavit of 22 August 2014 Mr Murphy stated that he “attended the property to repaint the [upper floor] alfresco on 1 August 2014”.
- 84 At paragraph 30(l)(iv) of the Owner’s affidavit of 14 August 2014 he stated that the painting had been undertaken, but:
- I believe the ceiling has not been installed in accordance with Boral Plasterboard recommendations.
- 85 I am not satisfied that any failure to install the ceiling in accordance with the Boral recommendations was necessarily detectable until after 17 October 2013, and it is not clear precisely what “Builder will rectify as required” means. I do not strike out these paragraphs.

8.9 and 9.10

- 86 Paragraphs 8.9 and 9.10 concern squeaks in the floor of bedroom 4:

9.10 Bed 4 squeaky floor

Cut the plaster to provide large hole for access, two faces of 600mm lengths of 35mm x 35mm of timber to the floor sheet and floor joist with liquid nails and glue, screw fix in place and repaint. [sic]

\$1,240.93

- 87 At paragraph 33 of his affidavit of 31 July 2014 Mr Murphy said the Builder had not previously been advised of the floor squeak. However, the Owner said at paragraph 30(m) of his affidavit of 14 August 2014 that he complained of the squeaky floor in August 2010. He did not say that it had been the subject of any agreement to rectify, or “determination” by the CAV which might have extended the Builder’s obligations regarding this dispute.
- 88 At paragraph 11 of his affidavit of 22 August 2014 Mr Murphy states that the Owner installed a floating floor above the chipboard floor installed by the Builder.
- 89 On his own evidence the Owner was aware of this issue before 17 October 2013. I strike out these paragraphs.

8.10 and 9.11

- 90 Paragraphs 8.10 and 9.11 concern squeaky stairs:

9.11 Stairs from ground floor to upper storey

Install cut timber blocks and with glue placed on two faces, place them under the tread and on the riser vertical, removed the existing putty and colour match putty to be used, sanded and polished in three coats. **\$2,151.87**

- 91 At point 14 of his report Mr Hargrave states that work has been done to the stairs. However in the estimate of costs he includes further work to stairs that squeak, indicating that the stair installer's repairs might not have been sufficient.
- 92 At paragraph 8 of his affidavit of 14 August 2014 the Owner stated that he lodged the first complaint with CAV on 4 November 2010 concerning, among other things, squeaking stairs. He stated at paragraph 9 that the Builder agreed to do works including inserting timber blocks under the first flight of stairs to minimise squeaking and that in July 2011 the stair installer attended the home to rectify the squeak.
- 93 At paragraph 30(n) the Owner stated that, by way of rectification, the stair installer did not rectify the stairs as agreed, but drove nails through the top of each squeaky tread and filled the nail holes with light coloured putty.
- 94 The Owner would have been aware of any continuing squeak in the stairs well before 17 October 2013. I strike out these paragraphs.

8.11 and 9.12

- 95 Paragraphs 8.11 and 9.12 concern the method of fixing of the ground floor alfresco ceiling:

9.12 Ground floor alfresco ceiling

Remove the ceiling sheets and install extra battens to the roof trusses, install new plasterboard sheet and cornice as per Boral recommendations and paint the new ceiling. **\$3,018.12**

- 96 Mr Hargrave reports the same issue for this item as for 8.8/9.9, and for the same reason I will not strike out these paragraphs.

8.13 and 9.14

- 97 Paragraphs 8.12 and 9.3 relate to roof plumbing, but it is apparent that work has been done by the Builder since the Blue Sky report was provided to the Builder.

9.14 Downpipe Spreader in the front

The existing caps are to be removed and replaced with new ones. **\$671.34**

- 98 At paragraph 37 of Mr Murphy's affidavit of 31 July 2014 he states that:
Modifications complained of now were made at the request of the [Owner] in order to appease him in respect of issues raised by the Blue Sky Report, which was used in the Second VCAT proceeding.
... Mr Hargraves recommendations include removing the pipe extensions that were recommended by Blue Sky and requested by the [Owner].

- 99 At paragraph 13 of Mr Murphy's affidavit of 22 August 2014 he stated that after the second CAV conciliation in July 2013, the Builder returned to site to undertake work requested by the Owner, including work by Jacko's Plumbing. Mr Murphy stated that he was informed by Mark Jacko of that firm that his works were completed by 2 August 2013. He continued that since then, the Builder has done no work on site except for work done in response to CAV3. The only plumbing work reported in CAV3 was "roof gutter leaks and rust to roof fascia". However, the Plumbing Industry Commission were to be involved in this matter, there was no "determination" that the Builder should undertake building works and no agreement that it would do so.
- 100 Mr Murphy stated that this work was undertaken at the Owner's request and in accordance with the works suggested by the Owner's expert. Nevertheless, the matter complained of concerns work subsequent to the Blue Sky report. The Builder might have a good defence to this claim, but this is not the same as finding that the matter has already been determined or is subject to issue or Anshun estoppel. I do not strike out these paragraphs.

SUMMARY

- 101 I strike out the following paragraphs from the Owner's PoC:
8.1 to 8.5 inclusive, 8.9, 8.10, 8.12, 9.1, 9.2, 9.4 to 9.6 inclusive, 9.8, 9.10, 9.11 and 9.13.

COSTS

- 102 Costs are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN