

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D830/2009

CATCHWORDS

Domestic Building List – Alleged defect causing damage. Claim for cost of repairs. Alternate cause of damage submitted. Respondent not given an opportunity to inspect or to repair.

APPLICANTS	Lisa He, Da Kuang (K.D.)
RESPONDENT	Costas Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member D. O’Halloran
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	5 February 2010 and 11 March 2010
DATE OF ORDER	15 March 2010
CITATION	Lisa He & Anor v Costas Constructions Pty Ltd (Domestic Building) [2010] VCAT 283

ORDER

1. That the respondent pay the applicants the sum of \$2,498.23 within 14 days of the date of this order.

Member D. O’Halloran

APPEARANCES:

For the Applicants Mr Da Kuang (K.D.) in person

For the Respondent Mr George Costas in person

REASONS

Background

- 1 The first named applicant is the current owner and the second named applicant is the previous owner of the premises at unit 1, 6 Carawatha Road, Doncaster (the premises).
- 2 The respondent is a building construction company, owned and directed by Mr George Costas. Mr Costas is also a building contractor.
- 3 The respondent built the premises for the applicants in approximately 2006. Since that time, the premises have been used as an investment property and have been tenanted.

The Applicant's Claim

- 4 The applicants say that the work completed by the respondent when it constructed the premises was defective. In particular the plumbing to the trough cabinet was defective, which resulted in leaking water that has caused damage to the timber bottom plate, the door frame and architraves, laundry cabinet and walls.
- 5 The applicants seek compensation in the amount of \$5,514.70 being the cost of repairing the damaged caused.
- 6 The applicants also seek payment in the sum of \$660.00 being the cost of the report from Buildspect, Building Consultants.
- 7 The respondent denies that the plumbing to the trough cabinet is the cause of the damage. The respondent submits that the damage was caused by water leaking from a tenant's washing machine.
- 8 Further, the respondent submits that irrespective of the cause of the damage, the respondent was not given an opportunity to inspect and repair the damage. The respondent submits that if the respondent had repaired the damage the cost would have been in the vicinity of \$1,900.00.

Evidence and Submissions

- 9 The applicant presented a building report from Mr Peter Mackie of Buildspect Building Consultants, dated 25 August 2009 and a signed letter from Rowan Flude Building and Renovations Pty Ltd dated 25 September 2009.
- 10 Both documents referred to attendances at the premises on 04 August 2009. Mr Flude is also the author of the repairs quotation in the amount of \$5,514.70.
- 11 The applicant has provided numerous photographs of the relevant area.

- 12 The respondent has submitted a report from Paul Phillips Building Consultant, dated 15 January 2010 and referring to an inspection that took place on 02 July 2009. It is apparent from this report and the evidence of the parties that Mr Phillips never attended to inspect the premises.
- 13 Mr Mackie, Mr Flude and Mr Phillips did not attend to give evidence. Any reference to their evidence is a reference to their written report.
- 14 Mr Phillips confirms that his report is compiled from verbal information from Mr Costas together with written reports from the first named applicant and the Buildspect report, referred to above. Only Mr Costas and the second-named applicant attended the inspection on 02 July 2009.
- 15 On 02 July 2009, the walls, doors, architraves and cabinet were all still in place. The next time Mr Costas inspected the premises on 05 August 2009 the repair work was completed and the walls, doors, architraves and cabinet replaced.
- 16 The work carried out by Mr Flude on 04 August 2009 included the removal of the trough cabinet, the architraves, timber door, skirting tiles and plaster wall. Mr Flude and Mr Mackie had the opportunity of viewing the relevant area with all these items removed. Mr Costas did not.
- 17 Numerous photographs have been taken of the relevant area, with the items removed and those photographs have been made available to Mr Costas.
- 18 The evidence of Mr Flude and Mr Mackie is that they found the plumbing to the trough cabinet was defective in that there was inadequate sealant and adhesive material and the slab rise had been cut on such an angle so as to leave a minimal overlap.
- 19 The evidence of Mr Flude is that the plumbing came apart at the slab rise as he was about to cut the piping at the elbow.
- 20 After considering a number of alternatives, Mr Mackie concluded that the damage was caused by a leak to the trough cabinet plumbing at the slab rise joint. Mr Mackie eliminated any other possible causes, including a leaking washing machine. Mr Flude agreed.
- 21 The applicants say that this conclusion is supported by the fact that the laundry floor has a floor waste point and that water runs away from the walls to this floor waste point. The applicants submit that any water from a leaking washing machine would run away from the machine and toward the floor waste hole in the centre of the laundry room.
- 22 Mr Costas submitted that the floor waste point was only designed to drain water overflows where water is pumped at high volume. Mr Costas submitted that leakage of water at low volume would collect

in the area of the leak rather than drain off to the waste point. He said that it was a slow leak from the washing machine.

- 23 The area of water damage to the wall, door architraves and cabinet is extensive and confirmed by the photographs. The issue is the source or cause of this damage.
- 24 Mr Costas has submitted that the photographs show that the worst water damage is located directly behind the point where the washing machine was and not at the point of the trough cabinet plumbing, that is, the slab rise. Further, Mr Costas submits that any damage in the area of the trough cabinet was caused by seepage from the area of the washing machine.
- 25 On the one hand, Mr Costas argues that there was sufficient sealant and adhesive on the piping and that there was no leak from the slab rise joint.
- 26 On the other hand, Mr Costas, within his report (paragraph 1.6.3) appears to accept that there was inadequate priming on the joints of the plumbing. However, he submits that the photographs show an absence of staining on the joints and thus the joints did adequately seal. Mr Costas submits that if they did not, the whole of the slab area under the trough would be stained, which it is not.
- 27 The applicants have submitted photographs that show staining of the trough cabinet plumbing itself, including the joint to the trough cabinet plumbing, at the slab rise. The applicants presented the piping itself. Staining can be observed on the piping.
- 28 Mr Costas says that when he attended on 02 July 2009 he ran his hand down the cold-water hose on the right side of the washing machine and felt water. He says he pointed this out to the second named applicant. Mr Costas says he then slid the washing machine forward, some water spilt out from the frame of the washing machine and there was water lying under the washing machine.
- 29 The applicants agree that when Mr Costas moved the washing machine on 02 July 2009 he found water underneath the washing machine. In fact, the applicants accept that the tenant's washing machine had a leak. The extent of the leak is not agreed. Mr Costas says that there was a pool of water under the washing machine. The applicants say that there was a film of water.
- 30 The applicants, however, do not accept that this leak was the cause of the damage. The applicants submit that there was insufficient water from this leak to cause the amount of damage observed in the area.
- 31 The applicants submit that the damage arose from water exposure over an extended period. The applicants say that the cabinet concealed the trough cabinet plumbing and therefore the leak went unnoticed for a long time. The applicants submit that although they

do not know how long the washing machine leaked, it is unlikely that any leak would have gone unnoticed for a long period, as the leak was not concealed.

- 32 The applicants submit that in order for the cabinet to soak up water and expand, the water would have to come from the internal area of the cabinet space. The applicants say that the kick rail material and protective covering prevents water from an external source soaking into the cabinet. The washing machine leak is external to the cabinet.
- 33 The applicants say that the kick rail was hard against the tiles and to get through the external water source would need to soak through the grouting. The second-named applicant conceded he was not an expert but he could not see how external water could get through to the internal section of the cabinet to cause damage.
- 34 Mr Costas says that he was not given an opportunity to inspect the damage and reduce the cost of any potential claim.
- 35 Mr Costas attended the premises on 02 July 2009 and in the absence of any alternative conclusion, the applicants appeared to accept that a leaking washing machine caused the damage. In those circumstances, Mr Costas maintained that he was not responsible for repairs.
- 36 The second named applicant attempted to repair the damage but called in Mr Mackie and Mr Flude on 04 August 2009, and they provided an alternative explanation. The second named applicant says he immediately rang Mr Costas but Mr Costas was unavailable.
- 37 The applicants gave evidence that new tenants, with a baby, were to move into the premises that evening, 04 August 2009. As such, the applicants instructed Mr Flude to complete the work.
- 38 The applicants say that by way of email of 26 July 2009, they advised Mr Costas of the arrival of their new tenants on 04 August 2009. Mr Costas did not dispute this evidence.
- 39 Mr Costas returned the call from the applicants on 05 August 2009, but by that time the work had been completed.

Findings

- 40 I do not accept the applicant's evidence that the leak from the washing machine only resulted in a small amount of excess water. I prefer the evidence of Mr Costas that the hose was moist and that water came from the frame of the washing machine and left a pool of water under the washing machine. There is no certainty as to how long the washing machine was leaking. Over a period, a great deal of water may have leaked.
- 41 Mr Costas has submitted that the applicants agreed that the cause of the damage was a leaking washing machine. While I accept that this

agreement occurred on 02 July 2009, it occurred at a time when no alternative conclusion was available. The arrival of Mr Flude and Mr Mackie on 04 August 2009 provided an alternative explanation and in those circumstances, I do not intend to simply hold the applicants to their earlier agreement.

- 42 I accept the evidence of Mr Costas that the waste pipe in the laundry floor centre would only be useful when water is pumped at high volume. I accept Mr Costas' evidence that slow leaking water would collect in the area of the leak rather than run off.
- 43 I do not accept the evidence of Mr Costas that the trough cabinet plumbing was adequate. I accept the evidence of Mr Flude that it came apart easily, due to insufficient sealant and adhesive. I am satisfied that there has been a leak from the plumbing at the slab rise joint for some time and that leak has contributed to the damage. I am satisfied that this finding is confirmed by the stain marks on the plumbing pipe.
- 44 Both Mr Flude and Mr Mackie conclude that the plumbing at the slab rise is the sole cause of the damage. Both dismiss the possibility of a leaking washing machine. However, neither report refers to the evidence of Mr Costas, agreed to by the second-named applicant, that there was water at the base of the washing machine caused by the leaking washing machine.
- 45 I am not satisfied that Mr Flude and Mr Mackie would have eliminated the washing machine leak as a cause of the damage, had they been aware of the build up of water under the washing machine. I am therefore, satisfied that contrary to the reports of Mr Flude and Mr Mackie, a leaking washing machine cannot be eliminated as a possible cause of the damage.
- 46 I am satisfied there has been a leak from the washing machine for some time. Given the evidence of damage to the wall directly behind the washing machine I am also satisfied that the leak from the washing machine contributed to the damage.
- 47 The applicants have argued that an external leak could not reach the internal area of the cabinet, however, there has been no similar argument that the washing machine leak could not reach the architraves and wall. I am satisfied that a sustained level of soaking from a leaking washing machine is likely to cause damage to the architraves and wall and is also likely to find its way into the cabinet. The onus of proving their case rests with the applicants and they have not satisfied me that water from the washing machine could not reach the internal areas of the cabinet.
- 48 I note that neither Mr Flude nor Mr Mackie addresses this question. However, I presume this is because they were not alerted to the fact

that there was water collecting at the base of the washing machine, external to the cabinet.

- 49 The whole area from the wall to the door covers seven tiles. This encompasses the area of the cabinet and the washing machine. The cabinet covers the area of the first four and a half tiles and the washing machine the last two and a half. The slab rise is approximately 3.33 tiles from the wall – just short of the mid point of the area. The area of staining on the back wall commences at or about one tile in from the wall and extends across to the door.
- 50 Despite there being numerous photographs there are no photographs of the insulation bats or struts behind the first tile. The applicants carry the onus of proving the damage and claim. In the absence of evidence of damage at this point, I am unable to find that there is damage in the area of the first tile, beside the wall.
- 51 On this basis, I am not satisfied that the slab rise is the mid point of the water leak and damage. However, I am satisfied that the bulk of the damage occurs in the area of the slab rise and the washing machine and not to the other side of the slab rise.
- 52 It is not possible to calculate precisely the contribution that each source of water has made to the damage. Given the finding that the bulk of the damage occurs to the washing machine side and not the other side of the slab rise, I make the finding that the slab rise is responsible for one third of the damage and the washing machine leak is responsible for two thirds of the damage.
- 53 The respondent is responsible for the damage caused by the leaking trough cabinet plumbing. The respondent is not responsible for the damage caused by the leaking washing machine.
- 54 The premises were completed in mid 2006. Any Defects Liability Period has long since expired. The applicants have no legal obligation to provide Mr Costas with an opportunity to examine the alleged defect or to repair the damage alleged. However, the applicants do have an obligation to mitigate their loss and not to overstate their loss.
- 55 I accept that with the imminent arrival of their new tenants the applicants had no time to delay repairs. I am satisfied that had there been time the applicants would have given Mr Costas an opportunity to examine the area.
- 56 The applicants have freely provided Mr Costas with photographs and all details they have concerning this matter. I am satisfied that the applicants have acted reasonably in attending to the repairs.
- 57 Mr Costas has provided a quotation for the work, based upon completing the work himself. As I have said, the applicants have no

legal obligation to engage Mr Costas to complete the work, but his quotation is relevant to the issue of the reasonable cost of repairs.

- 58 I am satisfied that Mr Costas could have completed the repair work for an amount less than Mr Flude. Mr Costas is a building contractor who would have obtained materials without a mark up fee and his estimate does not factor in the costs of a plumber nor his profit margins.
- 59 Considering the extent of the damage I am satisfied that the account from Mr Flude, in the sum of \$5,514.70 is reasonable. I find that the respondent is responsible for one third of that amount, that is, \$1,838.23.
- 60 I am satisfied that the report from Buildspect was necessary for the purposes of the applicants proving their claim. The applicants will be allowed the amount of \$660.00 representing the cost of the Buildspect report.
- 61 There will be an order in favour of the applicants in the total amount of \$2,498.23.
- 62 In their written response, dated 01 March 2010 the applicants raise three additional alleged defects. These matters do not form part of their original application and have not been adequately addressed by the applicants, Mr Costas or the Tribunal. In those circumstances, I do not propose to make any orders with regard to those matters. Any claim in that regard, by the applicants, should be in the form of a separate claim to the Tribunal.

D. O'Halloran
Member
15 March 2010