

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D681/2005

**CATCHWORDS**

Domestic Building, method of rectification, builder seeks order for specific performance, measure of damages, contingency

[2006] VCAT 301

<b>APPLICANTS</b>	John Marriot, Lisa Marriot
<b>RESPONDENT</b>	Techcor Developments Pty Ltd
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	23 – 25 February 2006
<b>DATE OF ORDER</b>	7 March 2006

**ORDER**

1. The Respondent must pay the Applicants \$31,096.00 forthwith.
2. There is leave to apply for costs

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the Applicants	Mr M Klemens of Counsel
For the Respondent	Mr J Forrest of Counsel

## REASONS

1. The Applicants' claim is under the warranties pursuant to sections 8 and 9 of the *Domestic Building Contracts Act 1995* ("the Act"). They seek the cost of rectification of water leaks associated with balconies which they say is \$55,542.00.
2. Liability for the leaks was not in dispute at the hearing, although the extent of necessary work was. The Respondent abandoned those aspects of its defence and contested quantum, the issue of whether it should be entitled to rectify rather than paying the cost of rectification and the necessary scope of works. The Respondent says the reasonable costs of rectification carried out by an independent builder is \$22,916.00 in accordance with Mr Lees' report, plus an amount to raise a beam, which is discussed in detail below. The Respondent says that the appropriate order is either that it return to rectify, with the work to be completed within a month, or that the Respondent pay to the Applicants the cost to it of doing the work. That cost was estimated at the beginning of the hearing as \$10,668.00 to which must be added \$900.00, which was the Respondent's estimate of the cost to raise the beam.

### History

3. The Applicants are the owners of a three storey dwelling at 1/100 Railway Place, West Melbourne. It is a retro-fitted factory and stands on the brow of a hill above the West Melbourne rail yards. The building work was undertaken by the Respondent Builders in 1999 and a Certificate of Occupancy was issued on 30 June 1999.

4. After the building work was completed, the property was sold twice; the second time to the Applicants. They moved in on 22 December 2001 and in January 2002 the first floor ceiling leaked.
5. The ground floor habitable rooms extend right to the street wall of the old factory, which is to the west of the home. The first floor has a balcony which is approximately 2 metres wide. It also extends to the west wall of the old factory. The second floor (top level) has a balcony which is set back 2.5 metres to allow light and air to reach the first floor balcony. It is 1 metre wide.
6. Both the first and second floors have windows and door units which are from north to south, a pair of windows, a pair of double doors, a narrow column clad with rendered board, another pair of double doors and another pair of windows. They are collectively referred to below as “windows” and sit on floors which do not step down from interior to exterior. They are over 2 metres high and approximately 7 metres long.
7. The experts agree that leaks, which are still not completely cured, are from beneath the window and door units. Mr Norman Faifer, who gave evidence for the Applicants, also expressed the view that there are other sources of leaks such as the box gutters on the western edge of the first and second floors and the membrane beneath both balconies.
8. The first floor balcony is wooden slats with a metal tray beneath it. The second floor balcony is now tiles over membrane, although when the Applicants took possession, it was also wooden slats over a zinc tray.
9. Mr Marriott provided a timeline of events as part of his evidence which is accepted as reliable. The relevant items are:
  - 22 December 2001 - Applicants moved into the house.

- January 2002 - Ceiling leaked.
- 5 February 2002 - Applicants reported leak to Respondent.
- March 2002 - Numerous telephone calls from the Applicants led to a visit from Mr Ken Bateman of the Respondent who, between March and September 2002 - arranged for more silicone to be applied, bitumening of the gutters and an extra gutter with relief pops through the outside wall.
- October 2002 - the Applicants telephoned the Respondent to say there were still leaks. The Respondent cut inspection holes in the first floor ceiling to try to discover the source of the leaks.
- 2 January 2003 - the Applicants wrote to the Respondent reiterating their distress at the delay in attempting to fix the problem and reciting that there were still holes in the first-floor ceiling and still no surface on the second-floor balcony, which consisted of the zinc tray and substrate. It is relevant to quote from the second page of the letter:

“The Techcor tradesman who visited our premises (George and Russell) have both quite independently suggested that the only way to guarantee a satisfactory repair is to remove the third floor windows [top floor] and replace the entire zinc sheeting and refit the windows correctly. Whilst this may not be attractive to you (due to costs) it is equally of concern to us as we have secondary glazing applied to the insides of the windows and removal of the external windows would need great care to remove and refit them without damage. I have been very patient because I understand how tracing a leak that occurs only under certain (although common for West Melbourne) wind and rain combinations can be difficult, but enough is enough. Two of your staff say there is a way forward and I have allowed you to try the old “patch and hope” method. So what I would like from Techcor is a definite plan, supplied to us in writing and with a reasonable timeline, to return our house to a liveable state. This means fixing the leak, ensuring the balcony drains correctly into a gutter, replacing the decking, re-plastering and painting the ceiling etc. You may choose to “patch and hope” again but the risk is yours as if it leaks again you will have to remove and refit and no doubt repaint all over again (and this time I will not allow this to take 12 months) so the decision is yours to make and I look to hearing your plans”.

Of particular significance is the reference to the solution which calls for removal and refitting of the windows.

- March 2003 - A membrane was installed on the second floor balcony which, Mr Marriott said, the tiler nailed through in 4 places. Mr Marriott's evidence is accepted on this point.
- 21 April 2003 – the Applicants wrote to thank the Respondent saying

“I am pleased to say that we have had some heavy rain over the past few weeks (and, as yet) have seen no evidence of a leak ....”
- April-November 2003 – no leaks were detected by the Applicants.
- December 2003 – the Applicants discovered a leak which was reported to the Respondent by letter in January 2004.
- February-August 2004 – the Respondent:
  - Cut more inspection holes in the ceiling,
  - Added more silicone,
  - Clad the second floor window sill in zinc in an attempt to prevent water entering beneath it and
  - Carried out unsuccessful flood tests.
- August 2004 – there were signs of water entry on the ground floor ceiling.
- October 2004 – Brett Andrews of the Respondent visited the Applicants' home and suggested more caulking after cutting more inspection holes. There was a disagreement between Mr Bateman and Mr Andrews because Mr Bateman said he didn't think the problem could be rectified by caulking alone.
- October 2004 – the windows were re-caulked.

- November 2004 – severe leaks, including leaks from the smoke alarm on the ground floor ceiling. The problem was reported to Mr Bateman but the Respondent did not respond.
- 6 January 2005 – the Applicants wrote to the Respondent reiterating the problems experienced by them over 3 years and updating current problems with continued leaks, continued ceiling damage and continued holes in the ceilings. Significantly the letter said:

“Ken Bateman has been very helpful but I think you know that he’s now as frustrated as we are and welcomed the involvement of Brett Andrews. While Brett has been equally helpful he has not been very reliable in progressing the issue. I have correspondence from him stating the entire situation will be fixed by the end of November 2004 and the ceiling fixed by Christmas. Not only did this not happen but we seem to have been forgotten about. I am hoping that as the holiday period draws to an end that you can ask Brett to help resolve our problems in a proactive and timely manner. Brett has also promised that when the problem is truly fixed to everyone’s satisfaction Techcor will ensure that multitude of fixes and patches and silicone applied to under sills, walls, etc. will be repainted/recoloured and made to look professionally finished.

Suffice to say we are very unhappy with this on-going situation. If you ask him you’ll find that we have been very reasonable and tolerant despite many, many months of inconvenience and disruptions. As you can imagine with our house warranty soon to expire our patience has now come to an end. We have not had full and fair use of our property for over 3 years ...

Please note that we were also promised, but did not receive, official written notification from Brett as to exactly when the warranty on this building will expire, although Brett did state that Techcor would treat the problem as “an existing issue” that would be resolved after the house warranty expires. But please forward this information and confirm Brett’s statement ASAP.

If we do not receive a firm written commitment from you to fix our house within agreed dates acceptable to us before the end of January 2005 I will pass the entire matter ... on to our solicitors for formal action”.

10. There was no evidence to indicate the Respondent had provided the written confirmation sought by the Applicants that they would not be disadvantaged by the expiration of the warranty period.

- 26 January 2006 – a Renderer from the Respondent arrived unannounced to do some work and said “these windows need to be pulled out to do the job properly”.
- 2 February 2005 – the very heavy rain experienced in Melbourne led to gross leaks. At least 55 litres of water was collected in buckets. On the advice of Mr Bateman, the Applicants punctured the ground floor office ceiling to allow water to escape in an attempt to prevent the ceiling from collapsing.
- 3 March 2005 – Exterior walls were re-rendered 3 times.
- 25 April 2005 – Mr Bateman wrote to say the leaks were “essentially design problems, and not building problems”.
- 23 May 2005 – The first floor ceiling holes were repaired and ground floor office ceiling replaced.
- 25 May 2005 – The Applicants telephoned the Respondent seeking painters for the ceilings.
- 1 June 2005 – the painters attended the Applicants’ home.
- 14 June 2005 – the Applicants sent the Respondent Mr Faifer’s report of 2 May 2005.
- On 23 June 2005 the Respondent wrote in reply, saying in part:

“I have received correspondence with the attached opinion provided by Mr. Faifer.

I am a little perplexed by the timing of this commissioned report.

Mr Faifer has been contracted by you to provide an opinion at the same time as Techcor were honouring our warranty obligations, a copy of the subsequent opinion has been supplied after warranty works have been completed and after water testing has been undertaken by

yourself, Technor and natural rainfall occurrence. Water testing by Techcor, yourself and natural rainfall showed no sign of water ingress yet Mr Faifer says urgent attention to water ingress is required.

What could Mr Faifer see that no one else could observe?

Why were Techcor not provided this information?"

11. Proceedings were issued by the Applicants on 15 September 2005. At the site inspection undertaken as part of the hearing on 23 February 2006, there was evidence of water staining on the first floor ceiling, apparently from beneath the second floor windows, and on the ground floor. Mr Marriott's evidence was also accepted that there has been water through the ground floor fire alarm, which had previously been replaced.
12. At the commencement of the hearing, Mr Forrest for the Respondent announced that alternate "with prejudice" offers had been made in January of 2006. They were either that the Respondent would undertake the work described in Mr Lees' report, to the satisfaction of Mr Lees or that it would pay the cost to it of doing that work of \$10,668.00. Neither offer included a component for costs.
13. The offer to return and rectify was renewed at the end of the second day of the hearing, but did not specifically include an offer to raise either beam. This offer and the offers of January were the first offers to do work since June 2005.

### **Should the Builder return to repair the works?**

14. It is frequently desirable that parties agree, at an early stage, that builders return to site, however ordering it at a late stage is fraught with peril. In the

words of Deputy President Aird in *Carroll v Tuddenham* [2005] VCAT 2711:

“Whilst I accept that it is invariably more cost effective for the original builder to carry out rectification works, I am concerned given the history of this dispute, and the builder’s attitude as displayed by the correspondence referred to above, that if I were to allow the builder to return such an order may lead to further disputation between the parties. In my view, having regard to the provisions of s53(1) of the DBC Act *‘the Tribunal may make any order it considers fair to resolve a domestic building dispute’* I am satisfied that it is preferable, and in the interests of all parties, that there be a monetary order.”

15. Further, in circumstances where a builder has always been willing to return to site and the rectification technique they proposed to adopt appeared, on reasonable assessment to be sufficient to rectify the defects, it would be hard for an owner to resist a builder seeking an order to return and rectify, or in the alternative, pay the cost to it of undertaking the work. The Respondent’s behaviour falls short of this standard. There is no evidence that the Applicants ever denied the Respondent access to the site and there is evidence in the form of the letter of 2 January 2003 (quoted above) that the Respondent was aware then of the necessity for the solution now agreed upon by its expert, Mr Rob Lees, and Mr Faifer. At very least, the Respondent failed to provide the Applicants with the “definite plan” they sought in 2003, but continued to rely upon the method characterised accurately by Mr Marriot as “patch and hope”.
  
16. The Respondent’s letter of 23 June 2005 quoted above, has a ring of moral outrage which was echoed in its cross-examination of Mr Marriot. However in circumstances where the warranty period was expiring and the Respondent appeared not to have responded in writing to the Applicants’ invitation to confirm that the leaks were “an existing issue” that would be resolved after the house warranty expired, Mr Marriot’s behaviour was prudent and he did no more than to protect the Applicants’ rights in circumstances where the behaviour of the Respondent could be interpreted as allowing the warranty period to expire to the detriment of the Applicants.

17. The Respondent's offer to rectify in January 2006 was up to three years too late to indicate a serious intention to take steps to rectify properly, and the Applicants are not unreasonable in their fears that if the Respondent were given yet another chance to rectify, the outcome could be unsatisfactory.
18. It was submitted for the Respondent that the Applicants had not made violent objection to the Respondent returning. As observed during the hearing, the polite and accommodating behaviour of the Applicants should not count against them and I am satisfied that they do not now wish the Respondent to return.
19. The Builder is not entitled to an order that it return to rectify the works.

### **The measure of damages**

20. In circumstances where it is found that owners reasonably refuse to have a builder return to rectify, they are entitled to the reasonable cost to them of having works done which are necessary to rectify breaches of the warranties under the Act.

### **Works which are allowed and damages allowed for them**

- **The agreed works**

21. Mr Lees and Mr Faifer agree that the works to be carried out are those described on page 9 of the Lees report of 9 January 2006 and that it is also necessary to raise the beam over the second floor windows, to enable them to be raised and placed on a 100mm hob. Mr Lees costed the work, excluding the beam, at \$22,179.00 and under cross-examination, Mr Faifer costed the same works at \$22,258.00. The costs are both inclusive of overhead, profit and GST and are very similar, for which the experts are to be congratulated. It is an indication that both are aware of, and take seriously their first obligation, which is to provide fearless and impartial

evidence to the Tribunal. The approximate mean of these two costs, being \$22,220.00 is accepted as the reasonable cost for rectification.

- **The beam works**

22. Mr Faifer's evidence under cross-examination was that the cost of raising the windows on the first and second floors would be between \$4,000.00 if no beams had to be moved, and \$10,000.00 if both had to be moved. At the site inspection attended by the Tribunal on 23 February 2006, Mr Forrest suggested that the plaster be cut above the first and second floor windows to determine whether it is necessary to lift beams. At that stage, Mr Faifer indicated that the position of the beams was probably not of great moment, but under cross-examination later that day there was some confusion which led to the Tribunal's suggestion that there be a further inspection to determine whether the beams needed to be raised. This inspection was carried out by the experts on 24 February. They agreed there was enough room to enable the first floor windows to be raised without raising the beam, and they agreed there was enough room to raise the second floor windows 65 mm.
23. Mr Lees suggested that to gain extra height, the existing beam could be stiffened with a steel plate then cut down by 35mm. Mr Lees' solution is accepted as sufficient.
24. After the second inspection, Mr Faifer gave evidence that the cost to raise the beam on the second floor by installing a new one would be between \$1,000.00 and \$2,000.00, and that the cost of the Lees solution would be \$900.00. Mr Lees' approximate agreement with Mr Faifer's estimate was communicated to the Tribunal by Mr Forrest. The amount of \$900.00 plus overhead, profit and GST must be paid by the Respondent to the Applicants for this item.

## **Other items**

25. Unfortunately the experts were not in complete agreement about the necessary extent of works. The following items were included by Mr Faifer, but not by Mr Lees:

- **Replacement of windows or re-use of existing ones**

26. Mr Faifer said that the windows to both the first and second floor balconies had been “compromised” by their exposure to weather. When a spirit level was applied to them it was clear that neither sets of windows showed any sign of warping or rot and nothing was demonstrated other than a lack of paint, which has been taken into account in Mr Lees costings.

27. Mr Faifer’s evidence on this point was unreliable. Before the site visit he had given evidence that the doors were warped. His suggestion that they might have been warped at one stage and returned to straight was unbelievable and had the flavour of advocacy for the Applicants’ case. This line of evidence was unfortunate because it unnecessarily added substantial hearing time.

28. There is no additional allowance for replacement of windows.

- **Lay screed, re-install waterproof membrane for the first floor balcony, deeper and wider box gutters and letter-box sized overflow pop**

29. The Respondent submitted that the Applicants had failed to prove that there were leaks from the first floor balcony at any point other than beneath the windows. Nevertheless, Mr Faifer has given positive evidence that there are likely to be more sources of leaks than just beneath the doors, and Mr Lees does not totally discount this possibility. Mr Lees suggested water testing to determine if there are leaks from the front and side wall apron flashings. In response to Mr Faifer’s suggestion that a screed should be laid to the

existing balcony base to give fall across the balcony to the box gutter, Mr Lees said:

“The exact location of the leaks has yet to be determine[d] and it may be totally unnecessary to strip the existing balcony of timber decking and install a new screed.”

30. A point well made by Mr Forrest is that the Applicants bear the burden of proof, and no reason was given by them for the failure to water test the first floor balcony before the hearing. Further, it is noted that the only areas where leaks were still complained of were under the windows on the floors above, or to the east of those windows. Had there been signs of water ingress to the west of those windows, support would have been lent to the contention that there were water sources other than beneath the windows.
31. On balance, the Applicants have failed to prove that there are leaks from the membrane, and no amount is allowed for screed or membrane to the first floor balcony.
32. The Applicants also failed to establish that deeper and wider box gutters are necessary, but in response to the suggestion that a “letter box slot” sized relief pop be provided, Mr Lees said:

“This would be advantageous but due to the relatively small size of the balcony and the style of outlet I do not think it is necessary.”
33. In the context of the difficulty of accurately diagnosing the problem and the continuing doubt about the source of water, it is reasonable that this “advantageous” solution be paid for by the Respondent. It is relatively cheap and likely to contribute to keeping water away from potential leak points.
34. The amount allowed by Mr Faifer for this item is \$350 and in the absence of evidence from Mr Lees about the reasonable cost of the item, it is found that

the Respondent must pay the Applicants \$350 for this item, plus overhead, profit and GST.

- **Waterproof membrane, deeper and wider box gutters and larger overflow pop and reinstatement of wooden slats for the second floor balcony**

35. At the site inspection Mr Marriot stood on a number of tiles on the north end of the balcony, to demonstrate that they moved freely. It has been suggested for the Respondent that it is not necessary to replace all the balcony tiles; that four or five in that position will do. However it is also noted that tiles must be replaced in front of the windows. It is inevitable that the waterproof membrane will be damaged when these tiles are removed, and it is considered reasonable that the membrane be completely replaced. Further, Mr Marriot's evidence is accepted that he saw the tiler nail through the membrane in four places, which means that its integrity has been breached.

36. It was submitted for the Respondent that because signs of water appeared in the grout when the tiles were stood on (the grout darkened in colour), it follows that the membrane had not failed, however the Tribunal notes that a slow leak in a membrane is not inconsistent with a reservoir of water which can emerge under pressure.

37. The Applicants have proved that it is necessary to replace the membrane on the second floor balcony and re-tile. My task is made difficult because Mr Faifer's estimate is poorly itemised and does not distinguish between materials, labour and trades and it is not clear what Mr Lees' item 4 relates to. It appears to be for the tiles which must be replaced in that location and waterproofing of new hobs beneath the first and second floor windows.

38. I was assisted by Mr Forrest's cross-examination of Mr Faifer, where the latter said the cost to make the substrate rigid would be approximately \$2,300.00 (half of \$4,600.00) and tiling would be \$1,800.00 for the 10.15m<sup>2</sup> of balcony. To this is added \$200 for additional waterproofing, but \$1,470.00 for supply and installation of 21 tiles in item 4 of Mr Lees costing is deducted to avoid double counting. The total is \$2,830.00.
39. The Respondent must pay the Applicants an additional \$2,830.00 plus overhead and profits and GST for this item.
40. In addition the Respondent must pay the cost of larger overflow pops through the front metal gutter to the eaves gutter, and a letterbox slot sized pop in the existing rain water head, which Mr Faifer has priced at \$50 each. The Respondent must therefore pay the Applicant \$100 plus overhead and profits and GST for this item.
- **Packer beneath second floor balcony baluster**
41. At the site inspection the balcony baluster was shown to be fixed on packers in an unsightly and amateurish way. The Respondent must allow the Applicants \$50.00 plus overhead and profit and GST for this item.
- **Different coloured and lumpy render**
42. The render pointed out on site was beneath the area where the awning on the second floor is attached above the windows. It can only be seen by standing directly beneath it and looking up. Further, it is to be expected that this area will be rectified when the work associated with raising the second floor windows is undertaken. There is no separate allowance for this item.

- **Overheads and GST**

43. These sums have been allowed for in the global sum for the agreed items. Both Mr Faifer and Mr Lees allowed 30% for overheads and profit, which is found to be a reasonable sum. The items to which overheads, profit and GST have not been added total \$4,230.00. To this sum must be added 30% for overheads and profit being \$1,269.00 plus 10% GST

- **Contingency**

44. Although it is unusual to allow a contingency, the Respondent has been repeatedly unsuccessful in locating the cause of the problem, the full extent of which might not be revealed until the windows are removed. In accordance with the recommendation of Mr Faifer, a contingency of 10% is allowed in case unexpected conditions are encountered. It is also noted that Mr Lees is uncertain about some items, for example, with respect to item (h) in the Lees report of 19 February 2006, to Mr Faifer's comment: "the yet to be proved detail of the (external stud wall to balcony join, the flashing detail joining the vertical and horizontal surfaces", Mr Lees responds; "This junction is under suspicion, however further testing and investigation is required." The item is not costed in the Lees costings of 9 January 2006.

45. The Respondent must pay the Applicants \$2,827.00 for this item, which is inclusive of overhead, profit and GST.

### **Cupping floor boards immediately inside the first floor doors**

46. This item was mentioned by Mr Marriot and questions were asked by the Tribunal, however it is accepted that this is neither an item which was pleaded by the Applicants, nor an item about which either party gave evidence. It has not been taken into account in coming to this decision.

**Amounts payable:**

Agreed items, inclusive of overhead, profit and GST		\$22,220.00
Raising the beam	\$ 900.00	
Relief pop to 1 <sup>st</sup> floor balcony	\$ 350.00	
2 <sup>nd</sup> floor balcony floor works	\$2,830.00	
2 <sup>nd</sup> floor relief pops	\$ 100.00	
2 <sup>nd</sup> floor balcony baluster	<u>\$ 50.00</u>	
Total items not agreed		\$ 4,230.00
30% overhead and profit on items not agreed		<u>\$ 1,269.00</u>
Items not agreed plus 30%	\$ 5,499.00	
10% on items not agreed including overhead and profit		<u>\$ 550.00</u>
Sub-total	\$28,269.00	
Plus 10% contingency		<u>\$ 2,827.00</u>
The Respondent must pay the Applicants		\$31,096.00

**SENIOR MEMBER M. LOTHIAN**