

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1350/2016

CATCHWORDS

Domestic Building Contracts Act 1995 – s.8 – implied warranties as to quality of work – s.9 – entitlement of subsequent owner to enforce warranties – defective waterproofing of bathroom – no entitlement of builder to repair defects – reasonableness of Owners conduct in refusing to allow Builder to repair –extensive mould present due to prolonged water leakage - extent of repair required – evidence – whether reasonable for Owners to vacate premises while repairs effected – allowance of cost of alternate accommodation.

FIRST APPLICANT	Carmel Notaro
SECOND APPLICANT	Daniel Notaro
RESPONDENT	Evolve Living Pty Ltd (ACN 116 208 032)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	20 December 2016
DATE OF ORDER	3 March 2017
CITATION	Notaro v Evolve Living Pty Ltd (Building and Property) [2017] VCAT 329

ORDER

Order the Respondent to pay to the Applicants \$43,377.90.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	In person
For the Respondent	Mr J. Constantino, Director Mr I. Manganakis

REASONS FOR DECISION

Background

1. The Applicants (“the Owners”) are the owners of a dwelling house at Hillside (“the House”). The House was constructed by the Builder between August 2006 and March 2007 pursuant to a major domestic building contract that it had entered into with a Mr and Mrs Polidano. The Owners purchased the House from Mr and Mrs Polidano in November 2013 and took possession in February 2014.
2. By section 8 of the *Domestic Building Contracts Act 1995* (“the Act”) there were implied warranties in the major domestic building contract (amongst other things) that the work would be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract and that all materials to be supplied by the Builder for use in the work would be good and suitable for the purpose for which they were used. By section 9 of the Act, the Owners, as subsequent owners of the House, are entitled to the benefit of those warranties.
3. The Owners claim that the warranties were breached in that the building work was defective and they seek damages for the cost of rectifying the alleged defects which are set out in the report of their expert, Mr Smallman. According to this report, the cost of rectification is assessed at \$77,972.50 plus a Builder’s margin of 20% and GST. The Owners also claim the cost of alternate accommodation for themselves and their daughter for a period of 28 days while the remedial works are carried out.
4. The Builder acknowledges the existence of a number of the defects but disagrees with the scope of the works proposed. It says that it is and always has been willing and able to rectify the problems and seeks the opportunity to do so.

Hearing

5. The matter came before me for hearing on 20 December 2016 with one day allocated. The parties appeared in person. I heard evidence from the Owners and from the director of the Builder, Mr Constantino.
6. Expert evidence was given by Mr Smallman on behalf of the Owners and by Miss McKay on behalf of the Builder. There was a very wide gulf between the figures given by the respective experts for the cost of rectifying the defects. Whereas Mr Smallman had assessed the cost at \$77,972.50, Miss McKay’s assessment was only \$6,115.95. Both figures were for the gross cost, before allowing for a Builder’s margin and GST.
7. At the conclusion of the evidence I informed the parties that I would provide a written decision.

The complaint

8. Before purchasing the House the Owners were aware of a small wet patch on the laundry ceiling under the ensuite shower. They were informed that there had been a leak from the shower that had been fixed.

9. After they moved into the House the Owners noticed that the patch was getting larger and in March 2015 they contacted Mr Constantino. When he visited the House he told them that he had had problems with the shower but that he had rectified them. He said that he thought the problem was with the trap under the shower base and he made a time to come back with a camera to view the underneath of the shower base through a light fitting hole in the laundry ceiling.
10. He returned with a camera about a week later. No leak from the trap was seen but there was extensive mould found on the underside of the particle board flooring and surrounding timbers under the shower recess and the subfloor area was wet. Mr Constantino said that he thought that the waterproofing had been compromised. The shower base was then examined. The tiles had been laid flat without any mitre to the waste and there was no fall on the floor towards the central waste pipe. Instead, there was a fall towards the back area of the shower and a fall towards the openable shower screen door.
11. Mr Constantino said that the construction had not been done properly and that he proposed to remove the particle board flooring and replace the first row of tiles to match the floor. A discussion then ensued as to what was to be done. Mr Notaro, who is a plumber, said that he wanted the whole bathroom re-tiled and offered to do the demolition work and the plumbing. Mr Constantino said that he was not prepared to do that. Mr Notaro said that if the Builder was not willing to do the whole job properly he did not want him to start.
12. About a month later Mr Constantino returned with a tiler and removed two tiles from the floor directly in front of the ensuite shower recess to see if he could purchase tiles of a matching colour. The Owners pointed out that the shower recess in the other bathroom had been tiled in the same way and Mr Constantino told them not to use it.
13. Mr Constantino returned twice with tiles for the Owners to choose and they chose some tiles but thereafter there was no contact.
14. Mr Constantino said that he told the Owners when he inspected the shower that he was happy to fix the levels in the shower base. He said that he approached a number of suppliers and tried to match the colour of the tiles and told the Owners that he was having difficulty finding matching tiles. He said that they both told him that unless the replacement tiles were the same they would not accept them. He said that when he telephoned to say that he had a matching tile, he was told that it was too late because these proceedings had already been commenced.

The defects alleged

15. The Builder seeks the opportunity to rectify the defects found to be present. In the absence of agreement, a builder is not entitled to return to the site and carry out rectification work. There are cases where it might be argued that, by failing to allow the builder to return and rectify a defect, an owner has not mitigated the loss. However in the present case the Builder has had a long period in which to attend to what was known to be a serious problem and it has not done so.

Moreover, the relationship between the parties appears to have broken down and it is likely that, if I were to order work to be done, there will be a dispute as to whether or not it has been done or done properly and the matter will remain unresolved. In all the circumstances, I do not think that I should find that it is unreasonable for the Owners to refuse the Builder a further opportunity to carry out the necessary remedial work.

16. Although the principal claim relates to the rectification of the two shower recesses, Mr Smallman identified a number of other defects which form part of the claim. I will consider first the claim with respect to the ensuite shower and then I will deal with the other claims.

The ensuite shower recess

17. The failure of the Builder to provide a proper fall to the waste in the shower recess is acknowledged. The extent of water leakage into the ceiling space below is dramatically illustrated from the photographs, as is the prevalence of mould and mildew.
18. Mr Smallman also identified ponding of water in the corner of the shower recess near the door, missing grout, and also cracks in the tile that surrounds the floor waste. He said that the floor to wall junction has a bead of silicon around the perimeter which has failed and come away. He concluded that the waterproofing of the shower base has failed and that water damage to the substrate has been occurring over a prolonged period of time. He said that the water is leaking in an uncontrolled manner into the cavity between the first floor and the laundry plaster ceiling.
19. Miss McKay pointed to the caulked joints at the floor and wall junctions in the shower recess which, she said, would allow water to penetrate the structure at those points. She said that there were several areas, both within the shower enclosure and outside the shower, where the caulking material had been dislodged from the floor tile joints. She said that maintenance and upkeep was the Owners' responsibility after construction and suggested that their failure to carry out this maintenance had allowed water to penetrate the substrate and cause unhealthy conditions in the ceiling void. Nevertheless, she conceded that the waterproofing of the shower base has failed and that it is defective.
20. Miss McKay said that the cracks in the tile adjacent to the floor waste should be regarded as wear and tear. However it was pointed out that the hole that had been made in the particle board flooring to accommodate the shower waste was not neatly cut but rather, looked as though it had been created by some impact. Mr Notaro suggested that it appeared to have been done with a hammer and it certainly had that appearance. The significance of that, as explained to me in evidence, was that the puddle flange for the shower could not fit neatly into the flooring because the hole in the flooring was rough, so that a seal could not be achieved. Moreover, since this is the part of the flooring that should have been providing support to the cracked tile around the waste pipe, the cracks in the tile might be related to the damage done to the flooring material.

21. The rough hole made in the particle board floor for the waste is not suggestive of great care having been taken when this shower recess was constructed. The failure of the puddle flange to seal at the outlet and the uncontrolled water flow into the ceiling space below is more suggestive of failed waterproofing than any lack of maintenance by the Owners.
22. There is no doubt that the floor of the shower recess has to be replaced and that was not disputed. The issue is whether the entire ensuite floor needs to be replaced. Miss McKay said that the water leakage is only from the shower and not from the vanity sink or toilet. She said that there is no evidence that the water has penetrated the ceiling cavity elsewhere. She said that in the area where the two tiles were removed, she could see a grey waterproof membrane that had been broken when the Builder removed the tiles. She concluded from this that the bathroom floor had complied with the appropriate standard at the time of construction. I do not think that I can make that assumption.
23. There is a graphic photograph in Mr Smallman's report showing a steel ruler pushed through the particle board flooring outside the shower recess. Other photographs show what appears to be water staining on the bottom surface of the flooring material outside the shower recess. The photographs also show extensive deterioration, wetting and mould growth underneath the shower. The top chords of the two flooring struts supporting the particle board flooring under the shower recess are also water stained and appear to have mould growing on them. Mr Smallman said that they should be replaced. Miss McKay thought they could be plated with timber in order to reinforce them where necessary.
24. The photographs of the ceiling space show water leaking onto an electrical wire and light fittings. There is also a substantial deposit of yellow material on what looks like a cable that appears to have dripped from a gap between two sheets of flooring directly above. This photograph shows dampness and staining in the flooring extending some distance away from where the camera is. Mr Smallman's annotation to this photograph says that it shows timber rot in the floor joists and extensive mould growth. Since the shower waste does not appear in this photograph it would seem that the water damage to the particle board flooring is not confined to the area directly below the shower recess. Mr Smallman said that the bathroom needs to be dismantled and reconstructed to the required standard.
25. Although Miss McKay said that the Owners have failed to maintain the shower recess and that this has allowed water to penetrate the substrate, cause unhealthy conditions in the concealed floor area and contributed to the breakdown of the waterproof membrane due to the presence of water, there is nothing in the evidence to establish that any of this problem is due to any lack of maintenance on the part of the Owners. I accept Mr Smallman's opinion that it is due to the failure of the waterproofing of the shower base. I also accept his opinion that the floor of the ensuite should be replaced because it seems clear that the water damage extends well beyond the shower base.

26. In assessing the cost, Mr Smallman has allowed for a much greater scope of works than that costed by Miss McKay. I accept that replacement of the water affected timber and flooring is needed and that consequently, demolition and asset protection will be required. There is a real health risk from mould spores, particularly considering that the Owners' four year old child is an asthmatic with a poorly controlled cough. Mr Smallman's allowance of \$897.50 for this seems reasonable. Miss McKay's assessment of \$440.00 does not make any allowance to address the danger from the mould spores.
27. There is no allowance in Miss McKay's figure for electrical and plumbing isolation which Mr Smallman has allowed for. I think that should be allowed. There is not much difference in the assessed cost of rebuilding the shower base. Mr Smallman's figure for the membrane cost (\$1,200) is twice that of Miss McKay but he has allowed for a larger area. I accept that the whole floor will need to be redone and so I accept Mr Smallman's figure. The same applies to the tiling. I accept that the larger area will need to be tiled.
28. Mr Smallman has allowed to replace the toilet, vanity and basin, mirror, towel rails and doorstop whereas Miss McKay has assumed that the existing fittings will be reused. I prefer Miss McKay's opinion. It is not established that the existing fittings cannot be re-used. Similarly, for the shower heads and the taps. Mr Smallman suggested that I should reduce his figure for these to \$240 if the existing items were to be reused.
29. On that basis, for the rectification of the ensuite bathroom I will allow Mr Smallman's figures, with the deletions that I have indicated, which amounts to \$15,347.50.

The laundry ceiling

30. The chief difference between the assessments for the rectification of the laundry ceiling is the treatment of the danger of mould. Mr Smallman has allowed for the replacement of the whole ceiling which I accept is necessary, whereas Miss McKay allowed only for the cutting out and replacement of the water damaged plaster.
31. I will allow for the protection and demolition works assessed by Mr Smallman at \$457.50. However I have insufficient evidence to justify his allowance of \$2,200.00 for a mould report and the engagement of a mould remediation specialist. I think that the electrical isolation figure of \$110.00, which is acknowledged to be a minimum figure, will be covered in the rectification cost of the ensuite shower because both areas can be isolated at the same time.
32. I do not think that allowing for two new light fittings is part of the repair. One light fitting has failed but it is now a number of years old and I have no electrical evidence to the effect that the failure is due to the water penetration. As to the other light fitting, it is not established that the exiting fitting cannot be put back.
33. Mr Smallman has made an allowance of \$9,900.00 for the replacement of the two posi-struts under the shower base that appeared to be water and mould affected. Most of this figure is taken up with engineer's fees. Miss McKay said

that although there were mould and water stains on them, the posi-struts did not appear to be structurally unsound. She pointed out that they rested on the perimeter walls and said that it was not possible to replace them. She said that the timber in the posi-struts should be cleaned down to remove the mould once the leak has been rectified and, if necessary, they could be plated with solid timber beams over the length of the shower base.

34. Although both experts are equally qualified, neither of them is an engineer. In view of the extent of the damage shown in the photographs, I think an allowance would have to be made for the cost of an inspection by an engineer and the carrying out of whatever scope of works might be required to ensure that the floor was structurally sound. The only assessment I have for that is Mr Smallman's figure.
35. These figures total \$12,055.00 and that amount shall be allowed

The main bathroom

36. As to the main bathroom, Mr Smallman said that the shower leaked badly when the water was run, with water leaking out onto the tiled floor. He said that it appeared that the shower had been "set up in an identical manner" to the ensuite and said that it should be similarly reconstructed.
37. Miss McKay said that, although water leaked through a small pinhole in the silicone joint at the base of the shower screen, she checked the falls and found that they were adequate. She said that there was no evidence of any water leak into the living room below.
38. Since there is no evidence of a similar problem in the main bathroom. I cannot assume that, because the ensuite shower leaked, the main bathroom shower must be similarly defective without some further evidence to that effect.
39. One clear difference is that this shower has adequate falls to the waste whereas the ensuite shower does not. Since Miss McKay has provided an explanation for the water on the bathroom floor, all that I can allow on this state of the evidence is a nominal \$25 to fill the hole in the silicone that she found.

Water ingress front elevation

40. Mr Smallman said that the surface of the front balcony was not adequately sealed around the sides and instead of a flexible sealant, the Builder has relied on grout to seal the junction between the floor tiles and the rendered brickwork. He said the grout has separated from the wall junction allowing water to penetrate into the structure below which is made from untreated pine. He suggested that the balcony needs to have the edges around the perimeter of the tiled floor sealed with suitable flexible sealant.
41. He said that the fibro-cement sheets to the underside of the balcony should be removed to allow examination of the timber structure to ensure that it has not failed as a result of prolonged moisture exposure. He also pointed out that there were some rust marks from the mild steel lintels which should be stripped back to metal and mechanically cleaned and given two coats of alkyd primer.

42. Finally, Mr Smallman said that the door frame to the master bedroom on the balcony has a large gap of approximately 8 mm at the bottom. He said that no door seals were provided at the base and that moisture was affecting the timber doors. He said that water has been allowed to enter the fabric of the building for years.
43. Miss McKay pointed out that the staining on the ceiling underneath is at the sheet joint rather than at the edges and that the stain mark is very light. She said that the minor rusting to the steel lintels on the portico is considered to be normal wear and tear for a building of that age and that it is the owner's responsibility to maintain the paint and render finish to the building. She said that the gap under the door was less than 3 mm and that the opening leaf was binding on the door sill when opened. She said there was no evidence of water entry at the time of her inspection and that the carpet was dry to the touch and not stained.
44. I accept Mr Smallman's evidence that the perimeter of the surface of the balcony should be sealed. However as to the other matters there is a conflict in the expert evidence and I am not satisfied that there are any further defects established. I cannot see a specific individual costing for the sealing of the balcony but from the figures provided I will allow \$200.00.

Cleaning

45. Mr Smallman said that the rectification will generate a great deal of dirt and dust and it is reasonable to allow amount of cleaning which he has assessed \$780.00. That amount will be allowed.

Builder's margin

46. The experts agreed that an appropriate Builder's margin to allow on the above base costing is 20%.

Alternate accommodation.

47. Mr Smallman said that it would be impracticable for the Owners to continue living in the House whilst the repairs are affected. Miss McKay disagreed and said that the laundry ceiling would remain sealed up and that any wet and mouldy flooring materials could be wrapped and carried outside to prevent particles escaping into the air. She said the ensuite door could be left shut at the end of each work day and a towel could be placed along the bottom edge to prevent any dust or odour from escaping from the work area. She acknowledged that, given the Owners' daughter's state of health, they may choose to vacate the House but said that this should not be at the Builder's cost.
48. Given:
 - (a) the extent of the demolition work required;
 - (b) the medical evidence tendered to the effect that the owners' four-year-old child is a chronic asthmatic with an uncontrolled cough;
 - (c) the quantity of mould and mildew present and the danger that this presents to the occupants of the House, particularly the Owners' child;

(d) the dust that is likely to be generated by the removal and replacement of the plaster on the walls of the bathroom and the ceiling of the laundry;

I accept that the Owners will need to move out of the House while the repairs are affected.

49. Mr Smallman said that repairs to the House are estimated to take 28 days. Miss McKay said that it should take no longer than three weeks. Since I am not allowing for the reconstruction of the main bathroom I shall adopt Miss McKay's assessment. The figure provided in evidence for alternate accommodation in a serviced department is \$280 a day. For three weeks that will be \$5,880.00.

Conclusion

50. There will be an order that the Builder pay to the Owners the sum of \$43,245.90, calculated as follows:

The ensuite shower recess	\$15,347.50
The laundry ceiling	\$12,055.00
Main bathroom	\$ 25.00
Water ingress front elevation	\$ 200.00
Cleaning	<u>\$ 780.00</u>
Total	\$28,407.50
plus builder's margin	<u>\$ 5,681.50</u>
	\$34,089.00
plus GST	<u>\$ 3,408.90</u>
	\$37,497.90
Alternate accommodation	<u>\$ 5,880.00</u>
Total	<u>\$43,377.90</u>

SENIOR MEMBER R. WALKER