

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL CLAIMS DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D389/2006

**CATCHWORDS**

Domestic Building, defects, further submissions without leave.

<b>FIRST APPLICANT</b>	Nicole Owen
<b>SECOND APPLICANT</b>	Richard Owen
<b>FIRST RESPONDENT</b>	Robert Rechtman
<b>SECOND RESPONDENT</b>	Punctual Plumbers Pty Ltd (ACN 064 686 031)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING</b>	2 August 2006
<b>DATE OF ORDER</b>	14 August 2006
<b>CITATION</b>	Owen v Rechtman (Domestic Building) [2006] VCAT 1651

**ORDER**

- 1 Ms Ben-Simon, solicitor for the Respondents, was given leave to appear as the First Applicant, Mrs Owen, is also a solicitor.
- 2 The Second Respondent must pay the Applicants \$6,380.00 forthwith.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the First Applicant	In person
For the Second Applicant	In person

### **REASONS**

- 1 The Applicant-Home Owners' claim is for \$8,867.00 being \$8,567.00 as the cost of rectification of their bathroom and \$300.00 for the Building Commission report of 29 July 2005.
- 2 At the beginning of the hearing, Ms Ben-Simon expressed concern that the Respondents had not been provided with a copy of the quotation for repair until the hearing. There was no adequate reason for the Applicants to fail to provide a copy of the quotation. It was provided by Team Tradesmen ("TT"), dated 23 May 2006 and it was clearly the basis of the Applicants' claim, which was filed on 7 June 2006. After a short break to read the quotation, I asked Ms Ben-Simon if she wished to have the matter adjourned, which she considered and declined.
- 3 A contract was entered between the Applicants and the Second Respondent for renovation of the Applicants' bathroom. The work was completed in or around 3 March 2004 and the contract sum was \$10,736.00. The contract sum did not include the cost of certain materials, such as tiles, the bath and the vanity, which were supplied by the Applicants.

#### **Claim against the First Respondent**

- 4 As the contract was between the Applicants and the Second Respondent and the Applicants failed to provide a reason for the First Respondent to be liable, although invited to do so, liability falls on the Second Respondent alone.
- 5 Where the Second Respondent is found to be liable, it is because it has breached its contract with the Applicants by failing to undertake work in accordance with standards of reasonable workmanship. Although the written component of the contract was very brief, I find that it is an implied term, necessary to give business efficacy to the contract, that the work will be done to this standard.

#### **Alleged defects**

- 6 The Applicants alleged that certain aspects of the bathroom are not in accordance with standards of reasonable workmanship. In particular they say that water leaking from the bathroom into the dividing brick wall between the bathroom and the kitchen has caused damage to the wall. Their evidence is accepted that the First Respondent has made numerous unsuccessful attempts to rectify the water leakage, and the First Respondent's own evidence is accepted that he has visited the site "twenty or thirty times" to try to rectify the leaking. Their claim does not include any sum for rectification of the kitchen, which is under renovation, but is

limited to steps to prevent further leaking and consequent make-good works within the bathroom.

- 7 The Applicants relied upon the Building Commission report (“BC Report”) prepared by Mr Rozenbes. Ms Ben-Simon objected to the report and said that it “isn’t entirely independent” as the First Respondent alleged that Mr Rozenbes spent more time speaking to the Applicants than to him. No sworn evidence was called concerning this allegation. Ms Ben-Simon also said that some of the items claimed in the quotation were not in the BC Report. In addition to the items in the BC Report, the Applicants claimed that crazing in the ceramic vanity top has been caused by the Respondents.
- 8 The Respondents queried the methods of rectification described in the BC Report and also the cost of rectification. The First Respondent provided his own quotation for the work which, he said, allowed for the work described in the BC Report. Given the First Respondent’s spectacular failure to eliminate the source of water after “twenty or thirty” attempts, his evidence about how it can now be achieved is viewed with some degree of scepticism. It is also reasonable, in the context of these repeated failures, that the Applicants have another tradesperson complete the rectification. The damages to which they are therefore entitled is the cost to them of that other tradesperson, rather than the cost to the Respondents of doing the work.
- 9 The items the Applicants claim require rectification, as listed in the quotation, are as follows:

Trade 1 of TT quote

- 10 The first section of the quotation by TT is for labour to:
  - a Demolish bathroom wall tiles, excluding wall tiles between the vanity and the entry door,
  - b Demolish bathroom floor tiles,
  - c Remove bath, re-frame and re-install bath,
  - d Re-render walls or install cement sheet as required,
  - e Re-sheet floor with new cement sheet and yellow tongue flooring,
  - f Membrane walls in shower and above the vanity floor 1.5m from shower in accordance with Australian Standards,
  - g Tile all walls and floor in straight pattern, with tiles supplied by owners,
  - h Grout all tiles, and
  - i Cork tiles and clean bathroom and polish tiles.
- 11 The only items discussed under this heading are the ones about which the Respondents made submissions. The remainder are accepted as necessary.

## Bath

- 12 The First Respondent submitted that the bath could be removed and “a couple of rows” of tiles above the edge of the bath removed, the bath removed, flashing installed in accordance with the bath manufacturer’s specifications and then the bath replaced.
- 13 The BC Report states at item 1.1 that the most likely cause of leaking is that the Respondent did not follow the bath manufacturer’s installation instructions, but chased it into the masonry. The BC Report’s recommendation that the bath be removed and reinstalled in accordance with the manufacturer’s recommendations is accepted, and it is accepted that the TT method of removal and re-installation is necessary.

## Wall Tiling

- 14 The First Respondent submitted that it was unnecessary to remove all wall tiling in the bathroom. It is noted that the TT quotation does not call for the removal of all wall tiling, and the First Applicant’s evidence is noted that matching wall tiles can be obtained. It is found that it is reasonable to undertake the degree of tiling described in the TT quotation.

## Floor and Floor Tiling

- 15 The First Respondent submitted that it is not necessary to remove and install new yellow tongue flooring, cement sheet and all floor tiles. It is noted that the BC Report could not determine whether a new floor was necessary and that the floor was not “bouncy”.

## Cost of Item 1 of TT quotation

- 16 No amount is allowed for removal and replacement of yellow tongue. Further, item 3.1 of the BC Report contemplates that some but not all of the tiles will be removed and replaced. The Applicants are entitled to the cost of removal and relaying of tiles within a 1.5 metre radius of the shower rose, which will require removal and re-installation of the toilet, but not of the vanity. As, on the evidence of the First Respondent, the floor tiles are glued to cement sheet, an allowance is made for replacement of cement sheet beneath the affected tiles.

## Cost of Item 1 of TT quotation

- 17 The cost of this item is not broken down but is given as \$4,207.50. In the absence of evidence as to the cost of the sub-items, \$707.50 is deducted as the approximate cost of the items disallowed. The Second Respondent must pay the Applicants \$3,500.00 for this item.

## Item 4 of TT Quotation

- 18 The TT Quotation allows \$1,131.00 for terminating and re-installing the vanity waste and taps, toilet, bath waste and taps and installing a new vanity top to be supplied by the Applicants, about which more is said below. Work associated with the vanity is not allowed, and in the absence of better

evidence, the Second Respondent must pay the Applicants \$900.00 for this item.

#### Supply of tiles and grout

- 19 The First Respondent asserted that the tiles to be purchased by the Applicants, at a cost of \$769.00 (which includes grout), are of better quality than the tiles installed initially. The First Applicant's evidence is accepted that the tiles are the same as those purchased initially, and as it was the Second Respondent's breach of contract which necessitated the replacement of the tiles, it is reasonable that the Second Respondent pay for them. It appears that the floor tiles are allowed in the quotation of Creative Design Tiles as Medditrien Graphite at \$24.00 per square meter. 4.5 square meters was allowed in the quotation, and if this is halved and an allowance made for grout saved and possibly one chrome angle, the saving would be in the region of \$70.00. The Second Respondent must pay the Applicants \$700.00 for this item.

#### Item 5 of TT Quotation – materials

- 20 The TT Quotation allows \$1,314.00 for various materials. The materials are listed; their prices are not. The third sub-item is for floor sheets and cement sheets. In the absence of other evidence, I accept the evidence of the First Respondent that the cost of yellow-tongue flooring for the bathroom would be approximately \$300.00 and the cost of cement sheet would be approximately \$230.00. The Second Respondent is entitled to a saving of the whole cost of the yellow tongue and half the cost of the cement sheet, being \$115.00, or \$415.00 in total. The Second Respondent must pay the Applicants \$900.00 for these materials, to be supplied by Team Tradesmen.

#### The Shower Screen

- 21 The First Applicant's evidence is accepted that the shower screen is inadequate and was chosen by the First Respondent. The shower is above the bath. A section of the screen is fixed to the edge of the bath, then a further section hinges and swings out over the bathroom floor. In consequence, water striking the swinging part of the screen falls to the bathroom floor. The First Respondent said that the Applicants chose a bath which does not have a lip, so water is not directed back into the bath. However I am satisfied that the First Respondent was aware of this when the shower-screen was chosen. The First Respondent has also suggested that the existing screen can be rectified by swinging the existing hinged section over the bath rather than over the floor. The First Applicant's evidence is accepted that this would be likely to cause the screen to strike the shower rose. Her evidence is accepted that the only realistic way of rectifying the problem is for both the fixed section and the swinging section to extend further along the rim of the bath, and for the swinging section to then swing in.

- 22 The Applicants are entitled to the cost of the new shower screen and its installation, an amount of \$480.00. From this amount is deducted an amount to represent the fact that, had the Respondents specified a larger screen when the work was undertaken, the cost to the Applicants would have been greater, and an amount for the salvage value of the existing screen. In the absence of evidence regarding these items, the amount of \$100.00 is deducted. The Second Respondent must pay the Applicants \$380.00 for this item.

#### The Vanity Top

- 23 The Applicants provided the vanity top, which has evident crazing. The Applicants have been offered a new vanity top by the supplier who has expressed the opinion that some of the crazing might have been due to over-tightening of the waste pipe by the Respondents, although the letter from the supplier said that there was no evidence of this at the pipe. The Applicants have failed to prove the crazing was caused by the Respondents and no amount is allowed for this item.

#### Replace mirror

- 24 The Applicants said that the tiles in the splash-back behind the vanity should have waterproofing behind them, and that when they are removed the mirror is likely to be damaged and require replacement. There is no sign that water has penetrated behind the mirror and that removal of the splash-back tiles is necessary. Further, as it is likely that the Applicants will have the splash-back tiles removed to enable them to replace the vanity top, it is not reasonable that the Respondents should bear the risk of removal of the mirror. No amount is allowed for this item.

#### **The Building Commission Report**

- 25 The cost of the Building Commission report is categorised as being in the nature of costs and is not allowed.

#### **Later submission by the Respondents**

- 26 On 4 August 2006 the Respondents' solicitors wrote to the Tribunal, apparently concerning evidence given at the hearing. They had neither sought nor been granted leave to make any further submissions. It is clear that the Tribunal cannot have regard to such submissions in the absence of exceptional circumstances that were not apparent at the hearing date – see *Stockdale v Alesios & Ors* (1999) 3VL 169, *M Hill and G P Williams v Rural City of Wangaratta & Ors* [2000] VCAT 2593 and *Wharington v Vero Insurance No 3* [2006] VCAT 639. In circumstances where leave of the Tribunal has neither been sought nor granted, there is no indication that the consent of the Applicants has been sought and there is no indication that there are exceptional circumstances, I have neither read the further submission, nor had its contents communicated to me.

## **Summary**

27 The Second Respondent must pay the Applicants \$6,380.00 forthwith, being:

Labour in accordance with Item 1 of the TT quotation	\$3,500.00
Plumbing in accordance with Item 4 of the TT quotation	\$ 900.00
Supply of tiles	\$ 700.00
Materials supplied by Team Tradesmen	\$ 900.00
New Shower screen allowance	\$ 380.00

**SENIOR MEMBER M. LOTHIAN**