

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP 1292/2016

CATCHWORDS

Domestic Building; Claim for damages for alleged defects

FIRST APPLICANT	Mrs Arina Devi Sharma
SECOND APPLICANT	Mr Jitendra Sharma
RESPONDENT	SJ Builders Pty Ltd (ACN: 154 574 544) t/as SJ Builders
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	20 August 2018
DATE OF ORDER	20 August 2018
CITATION	Sharma v SJ Builders Pty Ltd (Building and Property) [2018] VCAT 1305

ORDERS

- 1 The respondent must pay to the applicant damages in the sum of \$700.
- 2 Issues of interest, costs and reimbursement of fees are reserved.
- 3 The applicant has leave to make an application in respect of interest, costs and reimbursement of fees within 30 days. Any application must be supported by written submissions.
- 4 **The Principal Registrar** is directed to refer any application for interest, costs or reimbursement of fees to Member Edquist who will make directions regarding the filing and service of response submissions by the respondent.
- 5 **The Principal Registrar** is directed to return to the respondent the exhibits physically tendered at the hearing.
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Member C Edquist

APPEARANCES:

For first applicant: Mrs A D Sharma in person

For second applicant: Mr J Sharma in person

For respondent: Mr S Philip, director

REASONS

- 1 In April 2014 Mrs Arina Devi Sharma and Mr Jitendra Sharma (“**the owners**”) entered into a major domestic building contract with SJ Builders Pty Ltd for the construction of a house on their property in Wollert, on the northern outskirts of Melbourne.
- 2 A number of disputes arose regarding defects in the house and in 2016 the owners instituted this proceeding at the Tribunal.
- 3 At a compulsory conference held on 9 June 2017 a number of the owners’ complaints were settled. Others were abandoned. Three claims were left for determination, namely those relating to:
 - cracking in the concrete floor of the garage
 - the spa bath
 - the bamboo flooring
- 4 At the conclusion of the compulsory conference the proceeding was listed for hearing in October 2017, so that the remaining disputes could be determined. For reasons it is not necessary to explore, the October hearing date was vacated and the proceeding was ultimately listed for hearing before me today.
- 5 At the hearing, Mr Sharma appeared in person, and the builder was represented by a director, Mr Santi Philip.
- 6 Following the conclusion of the evidence, having regard to the nature of the complaints, I considered that a view was necessary. I met with the parties and the owners house after the lunch break. At the conclusion of the inspection, I indicated to the parties that I would deliver my decision in writing.
- 7 At the hearing, the owners relied on a report they had procured from Mr Ahmad Elsaafin of Houspect, based on an inspection on 12 October 2017. Mr Elsaafin is a builder holding DBU registration. Far from objecting to the admission of this report on the basis that Mr Elsaafin was not available for cross-examination, the builder sought to rely upon comments contained in it.
- 8 The owners also referred to quotations they had obtained in support of some of their claims.
- 9 The builder relied on a report prepared by Mr Daniel Gallo of Gallo Property Inspection dated 22 May 2017. The owners did not object to the admission of this report, even though Mr Gallo was not called as a witness.
- 10 The owners had filed with the Tribunal an inspection report prepared by Mr Bruce Grahame of the Victorian Building Authority (“**the VBA**”), and the parties were happy for me to refer to that report even though Mr Grahame was not called.

- 11 At the outset the parties confirmed to me that the defects in issue were the three defects left unresolved following the compulsory conference. However, during the course of the hearing, the owners sought to make a claim in respect of the cost of replacement of carpet in a bedroom, which had been damaged by water which had escaped from a faulty spa pump. The spa pump had been fixed at the expense of the builder, and no complaint was made about that. However, flooding from the faulty pump had soaked carpet in the bedroom, as well as damaging the timber flooring in the kitchen/living room area. The claim for damage in respect of the timber floor had been previously pressed, but not the claim in respect of the carpet. Understandably, the builder's representative objected to the claim for the carpet being made at the hearing, as he had received no prior notice of it.
- 12 As a matter of procedural fairness, I find that it would be unfair for the owners to be allowed to make a claim for damage to the carpet now, on the basis that their failure to give notice of this claim prior to the hearing has deprived the builder of the opportunity to inspect the carpet beforehand and form a view as to liability, and also as to the need - which the owners assert - that it is necessary for the carpet to be replaced.
- 13 The owners' claim is accordingly limited today to issues with the concrete floor, the spa bath and the timber floor.

Cracking in the garage floor

- 14 The owners said they wanted \$2,000 damages in respect of the garage floor on the basis that it was cracked.
- 15 In respect of this issue, Mr Philip on behalf of the builder, drew my attention to this statement at section 4 of Mr Elsaafin's report:

There are several hairline cracks in the garage concrete slab. The cracks run the full extent of the width and length of the garage and appears to be due to be typical shrinkage. (sic)
- 16 Mr Philip then drew my attention to a passage contained in Mr Gallo's report, where, after noting that a vehicle had been located in the garage which had restricted inspection, he noted "The overall condition of the garage visible is fair". He went on to say:

The concrete floor is generally in good condition. However minor cracking was noted. Cracking can be quite common for a concrete floor. Recommend these cracks be monitored for further movement.
- 17 The owners highlighted that Mr Elsaafin also had recommended future monitoring of the garage floor. They both gave evidence that the floor was continuing to crack and that the cracks had both widened and lengthened. However, they produced no photographs or measurements of the current state of the cracking. They accordingly were not able to demonstrate at the hearing that the cracks had widened to the point where they exceeded the

1.5mm standard identified in the Victorian Building Authority Guide to Standards and Tolerances at section 1.01. (“**the VBA Guide**”).

Inspection of the garage floor

- 18 At the inspection I noted that there were a number of significant cracks in the concrete floor of the garage. From my inspection, I was satisfied that at least 2 of the cracks exceeded the 1.5mm tolerance referred to in the VBA Guide. Accordingly I find that the floor is now defective, and requires rectification. However, I also find that the floor shows no sign of structural failure, and there is no basis to award damages assessed on the cost of demolishing and relaying the entire slab.
- 19 At the hearing, when I asked the owners how they justified the figure of \$2,000 they claimed, they had no real answer. They had obtained no up to date evidence as to the significance of the issues with the slab or what the appropriate course of rectification might be.
- 20 Mr Philip, on behalf on the builder, contended that the cracks could easily be dealt with by being filled with epoxy, and that the cost of doing this would be about \$100.
- 21 I accept Mr Philip’s evidence as to the method of rectification, but am not satisfied as to quantum.
- 22 Mr Philip’s assessment was based on the state of the cracks when he had inspected them with Mr Gallo in May 2017. I am satisfied on the basis of the owners’ evidence that the cracks are now wider and longer than they used to be. In the absence of any scientific evidence as to the length of the cracks to be filled, but doing the best I can on the evidence available, I assess the cost of rectification at twice the amount allowed by Mr Philip, and award the owners \$200 in respect of the garage floor.

The spa bath

- 23 It was common ground that the spa bath had not been installed parallel with the front edge of the bath hob, or parallel with the walls.
- 24 The earliest record of the defect drawn to my attention was Mr Graham’s report prepared for the VBA following an inspection on 6 April 2016.
- 25 Mr Philip gave evidence that following the VBA inspection he had arranged for rectification work to be carried out to the tiling.
- 26 It was following this work that the spa bath was inspected for the owners by Mr Elsaafin. He described the current situation in these terms:

The concern regarding the bath tub was in relation to the bath are not being centred into the hob correctly causing the tiles to the hob edge to be different sizes.

The right-hand side measured 84 millimetres. The left-hand side measured 89 millimetres. (5 millimetres difference).

The second concern regards the top surface of wall tile grout thickness above the bath hob.

The right hand side measures 15 millimetres. The left-hand side measures 11 millimetres.

- 27 Mr Elsaafin went on to indicate that on both sides of the hob the grout width exceeded the tolerance allowed for in the VBA Guide at 11.06. He indicated later in his report that the concerns regarding the bath tub are due to poor workmanship. He went on to say that the wall tiles above the bath hob should be removed and installed correctly, but this should not be done if no extra tiles were available from the original batch. He estimated the cost of doing the work at \$500-\$900.
- 28 The owners did not accept their own expert's view. They deposed that they had received advice from an un-named plumber that to remedy its defective installation, the bath would have to be removed and reinstalled. They had received an indicative price of \$15,000 to \$20,000 for this work. It was from this advice that they had derived the claim they had made in respect of the bath of \$15,000.
- 29 Mr Philip said that reinstallation was unnecessary, and referred to Mr Gallo's opinion that there were no defects in the bath. He also highlighted that even the owners' expert had assessed the rectification cost in the range \$500-\$900.

Inspection of the bath

- 30 At the inspection, I could not detect by mere observation that the front edge of the bath was not installed parallel to the front of the bath hob.
- 31 Turning to the grout issue, I acknowledge that when the difference in the width of the grout on each side of the bath was brought to my attention, I could see that the grout on the left-hand side was narrower than the grout on the right-hand side. However, this was not a feature that caught my eye immediately.
- 32 It is accepted by the builder that the bath has not been installed perfectly. However, it appears that the rectification work to the tiling carried out by the builder to date has significantly reduced the visual impact of the defect. Nonetheless, the owners will have to live with the existence of a defect they know exists. They are entitled to a small award of damages for loss of amenity in respect of this. I award damages of \$500 in respect of the bath tiling issues.

The timber floor

- 33 The remaining claim relates to the bamboo flooring in the kitchen/living room area of the house, which was partially damaged by water leaking from the faulty sump pump. The owners complaint is that the replacement boards supplied and fitted by the builder do not exactly match the pre-existing boards. They assert the difference is marked, and constitutes a defect.

- 34 The owners seek the cost of lifting and replacing the entire floor. In their Points of Claim, they asserted the cost was \$12,390. This figure was derived from a quotation obtained from Harvey Norman dated 17 April 2017. The quotation was for the supply and installation of solid bamboo flooring at a cost of \$11,900, plus removal of the existing floorboards at a cost of \$490.
- 35 At the hearing, the owners reduced their claim to \$11,900, being the figure quoted by a property maintenance firm named “Snappy Tom” on 30 November 2017. This firm had allowed for the supply and fitting of 72 m² of bamboo flooring, plus demolition of the old flooring. No breakdown of the quotation into materials and labour was attempted.
- 36 Interestingly, the Snappy Tom quotation contained this observation about the bamboo flooring:
- The difference in colour is obvious with the naked eye. It looks like different batches of bamboo has been used. (sic)
- 37 Although I note this observation, I place no importance on it for these reasons. Firstly, implicit in the observation is the proposition that differences in colour between different batches of bamboo used to create a floor will render the floor defective. Apart from inferring that the author of the quotation was named Tom, I have no information about him, or his qualifications as an expert in timber flooring to give such an opinion. Secondly, Tom is not independent party, as he has a financial interest in persuading the owners to undertake a replacement of the floor.
- 38 The report prepared by Mr Elsaafin does not assist the owners. He records that the owners’ concern is that the type and colour of the floorboards in the hallway are different to the type and colour of those in the family room. He opines:
- After inspecting the floorboards, they are the same type in colour but may have come from a different batch due to the different shade of colour showing at one particular viewing angle.
- 39 After referring to the relevant section of the VBA Guide (clause 14.02) Mr Elsaafin does not say that the floor is defective.
- 40 The builder referred to the report of Mr Gallo, which recorded that the condition of the floors was generally good. Comments were made about loose skirting boards within the kitchen area, but no rectification of the floor was suggested.
- 41 The builder sought to rely on a brief report of an inspection of the flooring carried out on 24 May 2017 by a representative of Golden Fields Corporation Pty Ltd, but the owners objected to this. They challenged the accuracy of some of the factual statements made by the author and said they wanted to cross-examine him. In these circumstances, I place no reliance on the report.

42 The report prepared by Mr Grahame of the VBA following his inspection in April 2016 contain photographs which appear to show a clear colour variation between the existing flooring and the new flooring. Mr Philip did not dispute that the photo was accurate, but he said that the area of flooring in question had been replaced by him, and was no longer an issue. The owners did not agree with this statement.

Inspection of the floor

- 43 At the inspection I was shown the area of the bamboo floor which was said to have been replaced after the flood from the faulty pump. The affected area was mainly in a passageway adjacent to a bathroom which led into the kitchen area and the main living room.
- 44 This was quite a different area from the area shown in the photograph contained in the VBA report, and so it appears quite possible that Mr Phillip's recollection that he had replaced the area highlighted by Mr Grahame as having a colour variation was accurate.
- 45 When I looked at the allegedly affected area I found the alleged change in colour of the boards between the original area in the replaced area to be hard to detect. Importantly, when I asked the owners to show me which boards been replaced, neither Mrs Sharma or Mr Sharma could be specific as to precisely where the new boards started.
- 46 To my eye, it was clear that the boards in the new area and the old area were of the same type, that is to say they were all bamboo boards. I consider that it is inaccurate to say that the boards actually change colour between the old area in the new area. Rather, it is accurate to say that in the old area many, but not all, of the boards contain dark smudges. They give, in my view, the boards an interesting look. The dark smudges are absent in the boards of the new area. Significantly, they are also absent from some of the boards in the old area. This illustrates that timber boards can vary from batch to batch.
- 47 In my assessment, the slight change between the new boards and most of the old boards is not significant. The new boards are largely located in a side corridor that runs into the kitchen/living room area. It is not possible to see the new boards from the end of the living room near the windows at the end of the house, or from the hallway looking into the living room. Even when I stood in the living room looking into the corridor containing the new boards, the change of the boards, that is to say the absence of dark smudges, was barely perceptible. If it had not been pointed out to me, I may not even have noticed the change.
- 48 My overall impression was that the bamboo floor was very attractive. I reject the owners' contention that the change between the new boards and the old boards is so significant that it constitutes a defect. The change arises from the use of a new batch of boards when the floor was repaired. I find the floor is not defective and allow no damages in respect of it.

Summary so far

49 For the reasons outlined above, I have allowed \$200 in respect of the concrete floor in the garage, and \$500 in respect of the bath. The total award to the owners accordingly is \$700.

Interest, costs, and reimbursement of fees

50 It remains to deal with issues of interest, costs, and reimbursement of fees. In respect of interest, the attention of the parties is drawn to s 53(3) of the *Domestic Building Contracts Act 1995*. In respect of costs, the attention of the parties is drawn to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (“**the VCAT Act**”). In respect of reimbursement of fees, the attention of the parties is drawn to s 115B and s 115C of the VCAT Act.

51 The owners will have liberty to make an application for orders for interest, costs and reimbursement of fees within 30 days. Any such application can be in writing, and should be supported by brief submissions.

52 Of course, if the owner makes any application, the builder must be given an opportunity to respond before the owners’ submissions are considered, and orders made in chambers.

53 I will make orders accordingly.

C. Edquist
Member