

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D145/2010

CATCHWORDS

Implied terms into agreement – work done in professional and workmanlike manner

APPLICANTS	Patrick Sheehy and Leanne Sheehy
RESPONDENT	Wozza's Bobcat & Concreting Pty Ltd (ACN 136 843 457)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	21 May 2010
DATE OF ORDER	1 July 2010
CITATION	Sheehy v Wozza's Bobcat & Concreting Pty Ltd (Domestic Building) [2010] VCAT 1128

ORDER

1. The respondent must pay the applicants \$7,700.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants:	Mr Patrick Sheehy and Mrs Leanne Sheehy (in person).
For the Respondent	Mr Wayne Goss (director of the respondent).

REASONS

1. This proceeding concerns a claim by the applicants who are the owners of a residential property located in Melton for the cost of demolishing and reinstating a concrete driveway constructed by the respondent at their property.

Background

2. In or around June 2009 the respondent, through its director, Mr Goss, met with the applicants at their property to discuss the construction of a stencilled driveway. Mr Goss provided the applicants (**'the owners'**) with a colour brochure setting out various options of designs and colours to which to choose. Mr Goss also provided the owners with a photo album of previous works undertaken by the respondent and various addresses where the respondent had undertaken similar work. This was to allow the owners to view the quality of past work performed by the respondent. According to Mrs Sheehy, Mr Goss had said that the respondent would undertake the proposed works to the same quality and finish as depicted in the brochure and photos given to the owners.
3. The respondent subsequently provided the owners with a quotation for \$5,200. The owners accepted this quotation and an oral agreement was thereby entered into between the parties.
4. As part of the agreed design, a rosette print was to be stencilled into the driveway near the entrance of the owner's house.
5. The works commenced on 8 September 2009 and were completed on 10 September 2009.
6. Mr Goss gave evidence that some of the coloured concrete used to create the faux paving had leaked under the stencil with the effect that the faux mortar lines became discoloured. He said that he attempted to rectify this by hand painting over the mortar lines. This was particularly evident around the rosette imprint.
7. The owners complained about the rectification work performed by Mr Goss. Nevertheless, full payment of the contract price was made but on the understanding that Mr Goss would return and address the owners concerns.
8. Mr Goss attempted to address the owner's concerns but without success. Consequently, there are sections of the concrete paving where it is evident that the mortar lines differ in colour. In addition, there are several areas where the concrete slab has now cracked.

The claim

9. The owners claim \$7,700 for the cost to demolish and reinstate the whole of the concrete driveway. Their claim is based on several grounds, namely:
 - (a) Section 9 and 11 of the *Fair Trading Act 1999*. The owners say that the respondent represented that it would undertake the work such that the finished product would not be blemished by hand painted mortar lines. Mrs Sheehy said that she believed the quality of the driveway would be as depicted in the colour brochure provided to her by Ms Goss when he first visited the site. Mrs Sheehy said that the respondent had engaged in misleading and deceptive conduct because the finished product was not in accordance with the colour brochure.
 - (b) Section 19 of the *Fair Trading Act 1999* (accepting payment without being able to supply as ordered).
 - (c) Section 24A of the *Fair Trading Act 1999* (right to payment for goods or services not supplied).
 - (d) Section 32J(a) of the *Fair Trading Act 1999* (implied conditions in supply of services).
 - (e) Section 32J(b) of the *Fair Trading Act 1999* (implied conditions in supply of services).
 - (f) Section 32JA of the *Fair Trading Act 1999* (fitness of services for purpose).
10. Mrs Sheehy gave evidence that she had obtained a quotation to remove and reinstate the concrete driveway for \$7,700. Mr Goss conceded that this was a fair and reasonable price for that work.

Findings

11. I find that it was a term of the agreement between the parties that the work performed by the respondent would be completed to the same quality of finish as depicted in the colour brochure given to the owners prior to entering into the agreement. I accept the uncontested evidence of Mrs Sheehy that Mr Goss, on behalf of the respondent, represented to Mrs Sheehy that the respondent would undertake the works to a similar quality as depicted in the brochure given to her. That meant that the driveway was to be free of any significant blemishes in the stencil pattern.
12. Even if Mr Goss had not made the representations to Mrs Sheehy, I find, as a matter of law, that it was an implied term of the agreement between the parties that the respondent would undertake works with due

care and skill. In my view, such a term is implied into the agreement in order to give that agreement business efficacy.¹

13. Further s 32J(a) of the *Fair Trading Act* 1999 states:

In a contract of supply of services there is –

(a) an implied condition that the services will be rendered with due care and skill.

14. In my view, s 32J(a) *Fair Trading Act* 1999 would, in any event, apply to the present case. Accordingly, the respondent's services should have been provided with *due care and skill*.

15. I was shown a number of photographs taken by the owners, which showed the painting to the mortar lines. In my view, the painting to the mortar lines depicted in those photographs is unsightly and significantly detracts from the overall appearance of the driveway.

16. I was asked by Mr Goss, however, to view the driveway and not to rely upon the photographs. Accordingly, I conducted an inspection of the driveway on 24 May 2010. In my opinion, the inspection of the driveway is consistent with what I had already seen in the photographs. There were areas of the driveway and in particular, the area around the rosette where hand painted mortar lines were clearly visible and detracted from the overall appearance of the driveway. In addition, there are several areas where the driveway had cracked. The cracks were greater than 2 mm.

17. The *Guide to Standards and Tolerances 2007* published by the Building Commission, states that cracks in concrete slabs greater than 2 mm in width are classified as category 3 cracks. Clause 2.10 of that publication states that *Category 3 and 4 cracks to slabs are defects*.

18. In my opinion, the combined effect of the hand painted mortar lines and cracking in several areas of the concrete slab constitutes a breach of the agreement between the parties. In other words, I find that the as-constructed driveway is not of a similarly quality to the driveway depicted in the brochure given to the owners. This is exacerbated by the fact that the discoloration of the mortar lines occurred in a conspicuous part of the driveway around the stencilled rosette, which was to have been a main feature of the driveway.

19. I accept, however, that the discoloration of the mortar lines occurred inadvertently as pigments seeped from under the stencil to destroy what should have been clean mortar lines in a critical part of the driveway. I also accept that this did not occur because of any wilful neglect on the part of the respondent but rather because of the high risk that some seepage of the pigment finish might occur. Nevertheless, the risk of ensuring that the finish of the driveway was to be substantially free of

¹ *BP Refinery (Westernport) Pty Ltd v Hastings* (1977) 180 CLR 266 at 283

blemishes rested with the respondent and a failure to achieve that outcome constitutes a breach of the terms of the agreement. This is because the terms of agreement placed a heavy burden on the respondent to ensure that the finish of the driveway was substantially the same as the colour brochure given to the owners prior to the making of that agreement.

Measure of Damages

20. During the course of the proceeding, I asked Mr Goss whether there was any alternative means of repairing the concrete driveway, other than demolition and reconstruction. In particular, I asked him whether it was possible to only replace isolated sections of the driveway rather than replacing the whole driveway. Mr Goss said that there were difficulties in isolating sections of the concrete slab because it was interconnected with reinforced steel. He offered no alternative solution.
21. The correct measure of damages arising from a breach of contract is the cost of putting the injured party in the same position it would have been in had the contract been performed in accordance with its terms.² In most cases concerning defective building work, the measure of damages is calculated by reference to the cost of rectification, where this is reasonable.³
22. In the present case, I find that the only practical means of rectifying the driveway is to demolish and rebuild the same. The question arises whether it is reasonable to assess damages on that basis or some other basis such as, for example, diminution in the value of the owner's property.
23. In the absence of any evidence as to diminution in value or alternative means of rectification, I find that assessing damages based on the cost of replacing the driveway is a reasonable course to adopt, notwithstanding the apparent harshness of that result.
24. Given my finding as to the breach of the agreement between the parties, it is unnecessary for me to consider the alternative claims made by the owners under sections 19, 24A, 32(b), 32JA of the *Fair Trading Act* 1999.
25. Accordingly, I will order that the respondent pay the applicants \$7,700.

SENIOR MEMBER E. RIEGLER

² *Robinson v Harman* [1848] 154 ER 363 at 365

³ *Bellgrove v Eldridge* [1954] 90 CLR 613