

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D269/2007

CATCHWORDS

Defects, liability, quantum.

APPLICANTS	Colleen Heather Sherrington, Geoffrey Harold Sherrington
RESPONDENT	Hewcon Pty Ltd (ACN 070 289 011)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Young
HEARING TYPE	Hearing
DATE OF HEARING	4 December 2007
DATE OF ORDER	15 May 2008
CITATION	Sherrington v Hewcon Pty Ltd (Domestic Building) [2008] VCAT 918

ORDER

- 1 The Respondent will pay the Applicants \$8,240.00 on the claim, such sum to be paid within 30 days of the date of these orders.
- 2 Subject to no party filing and serving a contrary submission within 21 days of the date of these orders, there is no order as to costs, including any reserved costs.

SENIOR MEMBER R. YOUNG

APPEARANCES:

For the Applicants	Ms C. Sherrington and Mr G. Sherrington in person
For the Respondent	Mr D.W. Hewson, Director

REASONS

A INTRODUCTION

- 1 The Applicant Owners filed an application seeking orders that the Tribunal award them compensation for defective works carried out by the Respondent Builder in the construction of their apartment at 1/1137 Doncaster Road, Donvale. The Applicants had initially sued the developer of the apartments on the subject property. By orders made by consent of 27 June 2007; the builder, "Hewcon" Pty Ltd (ACN 070 289 011)" was joined as the Respondent and the previous Respondent was, accordingly, released from the proceeding.
- 2 At a hearing of 28 June 2007; the parties settled this proceeding under the Terms of Settlement ("terms"). The Builder agreed to return to the site and carry out rectification works and investigations as to whether the Respondent considered some allegations of defective work were made out.
- 3 In a letter dated 29 September 2007, the Applicants wrote to the Tribunal seeking to have the proceeding reinstated on the grounds that the Respondent had failed to comply with the terms. The Tribunal reinstated the matter in its orders of 30 October 2007 and the parties were required to file and serve affidavits stating their evidence in chief and exhibiting any relevant documents. The hearing of the reinstated proceeding took place on site at the subject apartment on 4 December 2007.
- 4 In setting out these reasons I intend to deal with a number of general matters that the Respondent raised in his affidavit. Following that I intend to deal with each of the allegations of failure by the Respondent to comply with the Terms of Settlement in turn. I will deal with each of these allegations in turn; by first setting out the Terms of Settlement in respect of individual items, followed by the Applicants' submission as to the non compliance by the Respondent with the terms and the Respondent's response to the Applicants' allegations. Finally, I will set out my determination in regard to the specific allegation.
- 5 At the hearing of the matter evidence was given by Mr Sherringham for the Applicants and Mr Hewson for the Respondent. After hearing evidence from the witnesses I conducted an inspection of the matters in issue.
- 6 The Respondent in his affidavit submitted that the Applicants' claim is limited to a breach of the statutory warranties under s8 of the *Domestic Building Contracts Act 1995* ("the Act"). I accept that this is so and although it is not specific in the Applicants' claim; their allegations of defective work are within the bounds of the implied warranties under s8 of the Act; specifically:-

"(d) *the builder warrants the work will be carried out with reasonable care and skill ...*"

- 7 The Respondent also submitted that the Applicants have not suffered any loss in relation to the alleged defects which the Respondent claimed were patent at the time of purchase of the apartment by the Applicants. Further, the Respondents submitted that the Applicants had not made available any documentation of a building inspection undertaken on behalf of the Applicants at the time of purchase. No evidence was addressed before me that established that the defective works complained of by the Applicants was patent at the time of their purchase. However, this is really a red herring because patent or not; if the builder, built the premises under a major domestic building contract and had acquired the compulsory domestic building insurance; then such a builder is liable under s9 of the Act to a prospective purchaser.
- 8 No evidence was adduced before me that any building inspection had been organized by the Applicants or that any had taken place, none is required by law. As it is, if the vendor is an owner-builder and the property is being sold within the period that any domestic building warranty insurance would apply. As such, I do not consider that this submission is made out.
- 9 I have ordered monetary compensation in my determination. The Respondent has made a number of attempts at rectification; however, with the poor standard of the Respondent's rectification work I consider that a number of the Applicants' concerns as to the builder's standard of workmanship are justified. Examples of the builder's substantial rectifications are the Respondent's failure to seal the annulus between the drain and the circular cut out in the concrete floor slab of the balcony above their living room windows and sliding door letting water drain through the balcony slab and down the joint external wall of their living room. Second, the Respondent's failure to properly carry out and complete the painting of the render and paint on the living room wall under the Unit 5 balcony. To date I do not consider that when the Respondent has carried out rectification work it has done with a view to providing to the owners what they are entitled to under the statutory warranties; rather the work has been carried out in a slap dash fashion. I accept the Applicants' concerns about the Respondent's commitment to satisfactory rectification work. I do not consider it is appropriate in these circumstances to order the Respondent to return and carry out the balance of the work under the terms.

Item 1

- 10 **The Respondents will inspect unit one bathrooms (2). If the inspection shows water draining away from the drain holes then the Respondent shall rectify by no later than 1 August 2007 by raising tiles, correctly levelling and relaying same or similar tiles if same aren't available, so that water drains correctly down the drain holes.**
- 11 The Applicants submit that the bathroom floor in both bathrooms only drains towards the shower in the immediate vicinity of the shower, that is an area approximately bounded by the walls of the shower and the shower

screen. Normal showering in the ensuite shower, which is to some extent exacerbated by their elderly nature, results in water splashing outside the immediate vicinity of the shower screen. There is a general floor waste approximately in the middle of the bathroom but the slope of the bathroom is not towards the floor waste but rather the slope of the bathroom floor runs from the back wall of the bathroom to the front wall so that the water escaping the confines of the shower runs through the bathroom door and into the bedroom area. The Applicants submit that the Respondent should relay the floor tiles on the bathroom floors so both bathroom floors drain effectively to the general floor wastes near the centre of the bathrooms.

- 12 The Applicants submit that the Respondent forwarded them an email on 27 July 2007, subsequent to the terms of 28 June 2007, that said:-

“We have conducted an inspection of the bathrooms. In regards to the bathroom, the shower waste is contained in the bath. In the ensuite the shower waste is located under the shower rose and is free draining with adequate falls to drain shower waste under normal conditions. In both the bathroom and ensuite there is also an overflow waste which is not in the vicinity of either shower. In this instance, the overflow wastes are not required as your apartment is not located above a sole-occupancy unit. (Refer BCA: Clause F 1.11 & FP 1.6 attached).

Accordingly, no work is required or necessary in relation to item 1.”

- 13 In his affidavit of 26 November 2007 Mr Hewson set out the Respondent’s defence to this allegation as:-

- (a) *bathrooms-shower wastes operate correctly and no rectification work is required as the water drains correctly; and,*
- (b) *in any case this item was an item that was able to be inspected by the Applicants at the time of purchase.*

- 14 Mr Hewson said in his oral evidence that taking into account in a bathroom operating under normal conditions with a shower mat and towelling on the floor, the overflow could be diverted to the floor waste in the centre of the bathroom.

- 15 Mr Hewson also maintained in his evidence that the drain holes referred to in the terms were the shower waste outlets only and not the general floor wastes in each bathroom. I disagree. The allegations by the Applicants regarding the draining of the bathroom floors has consistently identified the general bathroom floor wastes as the wastes to which the bathroom floors did not drain; it was not the shower wastes. Given the number of inspections the Respondent has made of the subject premises in the presence of the Applicants I consider it must have been apparent to both parties that the Applicants’ allegations involved the slope on the bathroom floor in the vicinity of the general floor wastes. Further, the shower in the bathroom is located in the bath so that there is no sense in making a

reference to lifting the floor tiles and releveling the bathroom floor levels to drain to the shower waste if that waste was located in a shower. I reject this submission.

- 16 Upon inspection and the shower being demonstrated in the ensuite under conditions that I considered on observation were normal for elderly people, showering water did escape from the shower area onto the general floor of the bathroom and ran towards and drained across the bathroom floor into the bedroom. This occurs because of the modern type shower screen which does not have a door and entry to the shower is open and there is no hob to the shower. As such, I consider given the expertise and competence expected of a builder, it should have been apparent to the Respondent that water could under normal conditions escape from the shower area and to prevent escape into the bedroom the bathroom floor should drain to the general floor waste. I do not consider that it is determinative that the Respondent was not required to install a floor waste under the BCA. It should have been apparent to the Respondent with this type of shower screen that water could escape and that the balance of the bathroom floor, outside the shower area, should drain to a floor waste. A floor waste is not workable or useful unless the floor it services drains towards it. Therefore, I consider that the Respondent should be required to correct the slopes on the bathroom floors so that they in effect drain to the floor waste. I do not consider that it is relevant that this could have been inspected by the Applicants prior to purchase. Further, even if it was relevant it would require a degree of inspection that is not normally carried out and for which a normal prospective purchaser would have no authority to carry out without the express permission of the vendor. I accept the Applicants' estimate of the damage of \$2,000.00.

Item 2

- 17 **Install full length channel on the balcony of Unit 5, inspect for further damage and rectify as necessary. Not later than 1 October 2007.**
- 18 The Respondent maintains that the channel has been installed and is satisfactory. The Applicants cannot comment on this as they have no access to the balcony above. I have no evidence in relation to the installation of the channel to drain the balcony to Unit 5 above the subject premises other than Mr Hewson's oral evidence that the channel had been installed. I accept that evidence.
- 19 The Applicants further maintain that further damage had been identified in that rainwater came through a cut out in the concrete slab floor of the balcony above which, the circular cut out being required to allow a downpipe to come down from the balcony above. This cut out was not sealed and water ran off the balcony above and down the front wall of the Applicants' unit. The Respondent said that it had amended the downpipe by installing a different length of pipe with a bend and that it had blocked up the area between the pipe and the wall of the circular cut out.

- 20 Mr Sherringham gave evidence that the annular space between the pipe and the cut out (“the annulus”) was not properly stopped i.e. waterproofed and that water was still running out of the cut out. He produced a photograph which his affidavit of 5 November 2007 adduced that he took in the first two weeks of October 2007; this photograph showed water running out of the annulus during rainfall and down the external front wall of the Applicants’ living room.
- 21 I accept the Applicants’ evidence and I consider that the annulus between the downpipe and the cut out should be properly sealed with a puddle flange to prevent stormwater running down the Applicants’ wall. I will allow \$800.00 to carry out this work.

Item 3:

- 22 **Inspect by a concrete remediation specialist, in the presence of both parties, obtain a report from said specialist and carry out the report’s recommendation. Recommendations completed and carried out by 30 December 2007 to prevent water ingress.**
- 23 This allegation refers to suspended reinforced concrete slabs whose upper surfaces were exposed to the weather, where, due to the cracking of the slabs rainwater and draining water have penetrated through the cracks to drip onto the Applicants’ car in its designated carspace in the first instance; and in the second instance, to drip onto the suspended plasterboard ceiling of the ensuite bathroom in the vicinity of the shower and to discolour that ceiling and allow such water penetrating through the slab to drip from the ceiling plaster into the shower.
- 24 The Respondent organised an expert, Mr R. Grose of Australian Concrete Technologies Pty Ltd, to inspect and report on the floor slab above the Applicants’ car park and the floor slab above the ensuite bathroom. In his undated report Mr Grose identified two cracks in the floor slab above the Applicants’ car park that showed signs of water penetration. Likewise the crack in the slab above the ensuite ceiling had a crack showing water penetration leading to staining of the ensuite ceiling. Mr Grose recommended that the cracks required repair and that this should be carried out using the “*Structural Concrete Bonding Process*” by pressure injection of an epoxy adhesive resin; he recommended “*Concresive 1375*”.
- 25 The Applicants were not confident that this process would be sufficient and submitted that the proper way to stop any moisture penetration in these cracks was to angle grind V shapes between the upper surface and the soffit of the slab along the length of the crack showing water penetration and to repoint with mortar mixed with epoxy. The Applicants submitted that it was necessary to replace and repair the waterproof membrane on top of the concrete slab where cracks presently allow water ingress. This would involve removal and replacement of tiles on three to five balconies if the Respondent chooses to deal with the problems in one operation. This involves damage to properties other than the Applicants’ property. Under

the parameters of this dispute and the parties involved I cannot accede to the Applicants' requests except where I am dealing with their specific property i.e. the apartment and designated carpark. Further, I consider that the report of Mr Grose shows that he has carefully investigated and formed an opinion in regard to the cracking in the Applicants' slabs and I accept his opinion.

- 26 Mr Grose provided the Respondent with a quote dated 19 September 2007 as to the cost of rectifying the slabs in the recommended manner. The total estimated cost to rectify the cracks in the Applicants' car park and the ensuite roof slab was \$2,410.00. Mr Hewson for the Respondent estimated the cost to remove and replace the ensuite ceiling together with painting to be \$550.00. Allowing for the Applicants to engage an independent contractor and thereby there would be a margin for overheads, profit and GST I estimate that the work involved in the ensuite ceiling would cost \$800.00. This give a total rectification cost for the cracking roof slabs of \$3,210.00.

Item 4:

- 27 **Peel back render, inspect mortar, clean area, patch, apply rust inhibitor and repaint affected area under Unit 5 patio to be completed no later than 1 October 2007. Repaint to nearest joint.**
- 28 It is common ground that the Respondent had commenced this rectification work under the terms but it had not been completed. The Applicants said the Respondent's painter attended and applied two coats of paint. Mr Sherrington gave evidence that he did not consider the painting was sufficient, nor was it to a satisfactory standard. Further, the render had not been peeled back and the cracking and the area inspected. No rust inhibitor had been applied. Further, cracking was still occurring and needed to be repainted.
- 29 Inspection showed that horizontal cracking was occurring in the external masonry leaf of the apartment wall. The Applicants said this cracking was continuing. I did notice some rust staining and I consider it is coming from metal oxidation; therefore, this area should be painted with a rust inhibitor.
- 30 I consider that re-rendering of certain areas will be necessary and it will be necessary to carry this out over the wall together with the repainting and the application of the rust inhibitor if necessary and it appears from the photographs that accompanied the Applicants' initial application in this proceeding that there appears to be some metallic oxide staining. Therefore, I consider that the rectification cost that should be allowed for this item is \$1,500.00.

Item 5:

- 31 **Inspect by a plasterer for evidence of no taping and tape if not so. Living room ceiling to be taped, plastered and painted no later than 1 October 2007.**
- 32 In his affidavit of 29 November 2007 Mr Hewson maintained that this defect would have been patent at the time of the Applicants' purchase of the property; thereby, they took possession of the property knowing the defect existed. As I have stated above this is not a proper defence. If defective work exists then under the implied warranties in the Act the Applicants are fully entitled to seek its rectification.
- 33 The Respondent recommended that the cracks needed to be cut out and retaped and the ceiling repainted. I could see the crack in the ceiling and it appears that the plaster board butt joints in the ceiling were not taped. I will allow this item as an item of defective work. The Applicants estimated that costs of rectification \$750.00 and Mr Hewson estimated the costs of rectification \$190.00. I estimate the cost of rectification at \$400.00.

Item 6

- 34 **Stairwell and kitchen tiles inspected for cracks. If damaged tiles exceed 5% the Building Commission's guidelines "Guides to Standards and Tolerances" will be replaced with same tiles or similar if same not available. Not later than 1 October 2007.**
- 35 The parties agreed that there are seven chipped tiles in the area of tiling of which the stairwell and kitchen forms part.
- 36 The Applicants' allegation is that in the stair and kitchen area there are 132 tiles and with the figure of 7 chipped tiles this gives a percentage of chipped tiles as 5.30%.
- 37 The Respondent submitted that the appropriate area of tiling that was to take into consideration in assessing whether the tiling was satisfactory was the continuous area of tiling. It is not isolated to the areas where the chipped tiles were located. The Respondent submitted that the number of the tiles the Applicants had allowed for should have added to it the following tiled areas; the landing between the top of the stairs and the front door and the laundry which was in behind the kitchen and entered via a door at the bottom of the stairs.
- 38 I consider that the area of tiling appropriate to the measurement of the 5% of damaged or cracked tiles should be the total contiguous area of that tiling. The reason for this being that if the tiles were required under the Guidelines to be replaced the whole contiguous area of tiles would need to be replaced so as to maintain a uniform visual appearance as presently exists. Thus, I consider the area of tiles to be taken into account in assessing whether the tiles are satisfactory is the total contiguous area. Adopting the owners' figures for the kitchen and stairway, I counted the

tiles on the landing and laundry. This gives a total number of tiles of 188 and; thereby, a percentage of damaged tiles over this area of 3.7%. Therefore, I do not consider that this is work that would be regarded as unsatisfactory under the “Guidelines to Standards and Tolerances”. Further, the cracked tiles were not all in the one spot and were sufficiently scattered to not draw specific attention to the chips in the tiles.

Item 7:

- 39 (A) Ceiling above ensuite shower. Slab above ceiling to be inspected by concrete remediation specialist to determine cause of damp patch.
 - (B) Affected ceiling section cut out and replaced and repainted. No later than 1 October 2007.
 - (C) Respondent to act on report as per (3).
- 40 All of the subitems in item 7 have been dealt with item 3.

Item 8:

- 41 Have plumber inspect drainage sump outside Unit 1 main bedroom, provided the plumber does not advance a compelling engineering reason for it to attention it would be removed and replaced with a single section of downpipe. No later than 1 October 2007.**
- 42 The Applicants informed me that this item had been dealt with in item 2.
- 43 This makes my total award of rectification costs to the Applicants of \$7,310.00. The Applicants sought accommodation costs for 4 days while the works were carried out; in particular, for the relaying and tiling of the bathroom floors, together with pet accommodation for their two cats over the same period at \$100.00 per night. The sum that is being sought is \$1,200.00. I consider that 4 nights is excessive and that with a properly organised contractor 3 nights should be sufficient and I will allow \$900.00. I will also allow the Applicants the application fee of \$30.00. This makes a total award that the Respondent must pay to the Applicants of \$8,240.00, such sum to be paid by the Respondent to the Applicants within 30 days. As this matter is a small claim, under \$10,000.00, I would be loath to make any orders as to legal costs other than the return of the application fee. However I will allow any such party time to make an application to the contrary. This completes my determination.

SENIOR MEMBER R. YOUNG