

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D201/2009 & D220/2009

CATCHWORDS

Building defects; damages for delay, house slab laid lower than specification;

APPLICANT	Silkwood Dream Pty Ltd (ACN 094 070 667)
RESPONDENT	Battista Luca
WHERE HELD	Melbourne
BEFORE	Member L. Rowland
HEARING TYPE	Hearing
DATE OF HEARING	19, 20 and 22 April 2010
DATE OF ORDER	15 June 2010
CITATION	Silkwood Dream Pty Ltd v Luca (Domestic Building) [2010] VCAT 1094

ORDER

- 1 The applicant, Silkwood Dream Pty Ltd pay to the respondent, Mr Battista Luca \$1,487.27 forthwith.
- 2 The parties may apply in writing for an order for costs by 31 July 2010. If there is no application by either party by 31 July 2010 there shall be no order as to costs. The parties are directed to Section 109 of the VCAT Act.

MEMBER L. ROWLAND

APPEARANCES:

For the Applicant	Mr J. Lewis of Counsel
For the Respondent	Mr R. Sorensen of Counsel

REASONS

Background

- 1 The applicant builder, is a medium sized building company of residential homes. In January 2008, Mr Luca, the owner, entered into a Housing Industry Association building contract with the builder to build a Columba series home for \$215,275 upon Mr Luca's land at Epping. The works commenced on 1 April 2008 with a completion date of 21 December 2008.
- 2 The builder claims \$12,662.50 being the balance due under the building contract. It is not disputed that \$12,662.50 would be due under the building contract but for Mr Luca's counterclaim. Mr Luca counter-claims \$250,000 for the cost of rebuilding the house or alternatively \$94,000 for defects and \$3,762 damages for delay.
- 3 The major issue between the parties is the finished height level of the slab. The slab was poured in early April 2008 whilst Mr Luca was overseas. He returned at the end of April to find the slab laid and the frame partially constructed. Mr Luca was extremely disappointed to find that the slab was laid approximately 300mm below the level of the footpath. Mr Luca complained to Mr Addamo, director of the builder. Mr Addamo told Mr Luca that the slab was laid according to the plans. A survey report by Baker Monahan in January 2009 confirmed that the house slab had in fact been laid 80mm lower than indicated on the plans and the garage slab had been laid approximately 140mm lower than indicated on the plans. The elevations on pages 4 and 5 of the final drawings show the base of the house below the existing ground level. The building plans allowed the builder to scrape the site to a maximum of 150mm to level the block before the slab was constructed.
- 4 No evidence was led by either party as to whether there were any discussions about the finished floor level of the house or slab prior to the contract being signed.
- 5 Mr Luca's block of land sloped from the northern side of the block down to the southern side of the block. The house on the northern side sits higher than Mr Luca's home. The house on the southern side sits lower than the Mr Luca's home, but the southern neighbour's garage is elevated and sits higher than Mr Luca's home and garage.
- 6 The building works continued throughout 2008. For a number of reasons it was a difficult relationship. The completion date was extended by the builder to 21 January 2009 on account of Mr Luca undertaking his own plumbing and carpentry works to the house.
- 7 On 26 November 2008 Mr Luca had a walk through inspection of his home. He completed an inspection report detailing approximately 30 items of defective works. Most of the defective items noted were rectified by the builder. The following defects remain alive in this proceeding; (i) layout of

the tiles in the hallway; (ii) incorrect installation of the kitchen fan (which is conceded) and; (iii) defective brickwork (which is conceded in part).

- 8 On 23 December 2008 Mr Luca arranged for an Archicentre inspection to be carried out by Mr Mammone, architect. Mr Mammone prepared a report detailing 72 items of defective or incomplete works. The Archicentre report was not delivered to the builder until early February 2009. The builder rectified the majority of defects identified in the report.
- 9 Mr Luca had a further 10 minute walk through of his home on either 6 or 11 February 2009.
- 10 On 13 February 2009 the builder determined that the home was complete and issued Mr Luca with a final invoice for \$12,662.50. An occupancy certificate was issued the same day. Mr Addamo said the works were completed on 12 February 2009. Mr Luca said the last day of works by the builder was on 16 February 2009.
- 11 Mr Luca refused to pay the final account on the grounds that his home had not been built according to plan in that the slab was lower than indicated on the plans. The builder refused to give Mr Luca possession of the home until the final account had been paid. By this time, Mr Luca had received the Baker Monahan survey report that the house slab was 80 mm lower than specified on the plans and the garage was 140mm lower than specified on the plans. Mr Luca did not want to accept the home because of the lowness of the slab. Mr Luca wanted Mr Addamo to purchase the home from him.
- 12 The parties attended a conciliation conducted by the Building Commission in early March 2009 but the matter could not be resolved.
- 13 On 31 March 2009 the builder issued proceedings in VCAT claiming the balance owing under the building contract. On 7 April 2009 Mr Luca commenced proceedings against the builder seeking \$400,000 to demolish and rebuild the home due to lowness of the slab and defective works.
- 14 In June 2009 Mr Luca inspected the building with the quantity surveyor retained by him.
- 15 On 17 July, 2009 Mr Luca's former solicitors wrote to the builder's solicitors demanding the keys to his home.
- 16 On 24 September 2009 Mr Luca's current solicitors forwarded a further letter demanding possession of Mr Luca's home. Shortly thereafter, Mr Luca changed the locks to his home and recovered possession.
- 17 In December 2009 Mr Mammone, from Archicentre prepared a further report. Twelve defects remained from his report of December 2008. A further 31 new defects were added to his report of December 2009 which now together with the 12 existing defects form the basis of Mr Luca's claim in these proceedings.
- 18 The final hearing of the claims commenced on 19 April 2010 and was heard over 3 days. Mr Mammone, architect and Mr Morris, building estimator

and quantity surveyor gave expert evidence on behalf of Mr Luca. Mr McLennan, building surveyor consultant, was retained by the builder. The three experts attended a view of the Mr Luca's home on the second day of hearing. Generally, I preferred the evidence of Mr McLennan to Mr Luca's experts. He gave evidence in a forthright manner, he made concessions where appropriate and pointed out defects not detected by Mr Luca's experts.

19 Having heard the evidence of the expert witnesses at the view and considering each of their reports, I make the following findings in relation to the claims as set out in Mr Luca's further particulars of points of claim dated 15 April 2010.

1. Metal capping along garage wall is sloping inwards and potentially may retain water.

This defect is carried over from Mr Mammone's report dated December 2008. On site, the experts confirmed that the capping was not sloping towards the building but was flat or sloping away from the garage. Mr Mammone was concerned that the capping has the potential to allow water to pond and seep into the corners of the building. Mr McLennan said that the water could not pond on flat capping and that in any event with recent heavy downpours any leakage into the corners of the garage should be evident. There was no evident leaking into the corners of the garage. However, Mr Luca said that he had observed a water leak from the middle of the wall. I accept his evidence on this point. This leak may have a different cause from that proposed by Mr Mammone. Mr McLennan estimated it would cost \$100 to fix the capping. Mr Morris proposed replacing the capping at a cost of \$1105. There is not sufficient evidence before the Tribunal to determine the cause of the leak or the rectification cost. In order to finalize the issues between the parties I will allow \$550 to Mr Luca to repair the leak to the garage.

2. Rear of house, exceptionally rough mortar at pipe penetrations into brick wall behind hot water unit.

This defect is carried over from Mr Mammone's report dated December 2008. The builder had attempted to repair the mortar around the service pipe joins but the repair is still not of a reasonable standard. This defect was accepted by Mr McLennan. Mr McLennan allowed \$208.72 to carry out the repair. Mr Morris allowed \$1163.00 on the basis of a stand alone job and included the disconnection of the services by other qualified trades. I allow \$208.72 including the builder's margin of 20% as the builder had the opportunity to repair the brick work but failed to do so to a reasonable standard.

3. Rear of house – mortar bed and perpends in brickwork located above top LHS corner of Rumpus sliding door exceed 15 mm.

This defect is carried over from Mr Mammone's report dated December 2008. The builder attempted a repair. On site, Mr McLennan accepted the defect. Mr McLennan estimated the cost of repair between \$700 to \$800. Mr Morris allowed \$951 on the basis of a stand alone job. I allow \$750.

4. South side of house – exceptionally poor patch repairs.

This defect is carried over from Mr Mammone's report dated December 2008. The builder has previously attempted a repair to this corner of the house. Mr McLennan accepts that some of the repair work is not to a reasonable standard. Mr McLennan allowed \$538.54 to carry out the repairs. Mr Morris allowed \$1,430. Mr Morris allowed for a greater scope of works and the replacement of many more bricks than allowed by Mr McLennan. I find that the scope of works proposed by Mr McLennan will adequately remedy the defect. I allow \$538.54.

5. Shower waste in ensuite shower is not central in base.

This defect is carried over from Mr Mammone's report dated December 2008. It was agreed by the experts that the shower waste is not central in the shower base. The fact that the waste is not central is not immediately obvious on a casual visual inspection. Mr Mammone agreed that the defect is cosmetic only. I find that it is not reasonable or necessary to relocate the shower waste to make it central. I allow \$100 by way of damages.

6. Ensuite shower screen is installed with a 4mm bow.

This defect is carried over from Mr Mammone's report dated December 2008. Mr McLennan accepted the defect. The builder had an opportunity to repair the defect but did not do so. Mr McLennan allows \$175.48 and Mr Morris allows \$316. I allow \$175.48.

7. East wall of ensuite is bowed excessively.

This defect is carried over from Mr Mammone's report dated December 2008. At the view, a 2.4 metre level placed on the wall showed a 5mm bow. Under the Guide to Standards and Tolerances, a bow may be considered to be a defect if the bow is more than 4mm over two metres. The guide is indicative and not prescriptive. A two metre level was not placed on the wall. Visually, the wall looked straight with no obvious bow in the wall and I dismiss the claim. Mr McLennan did quite fairly point out that there was a peak in the top row of tiles along the east wall which may have given the appearance of the wall being bowed. An allowance for the peaked tiles has been allowed at Item 39.

8. Defective paint around vent in family room.

This defect is carried over from Mr Mammone's report dated December 2008. Mr McLennan accepted the defect. The defect is proved. The builder had an opportunity to repair it but failed to do so. Mr McLennan allowed \$190.42 to repair the defect. Mr Morris allowed \$330. Taking into account the relatively small scope of works required to repair the defect, I allow \$190.42.

9. Kitchen island bench-vertical join in carcass on dining room side, the laminate is loose as well as inconsistent gap along joint.

This defect is carried over from Mr Mammone's report dated December 2008. Mr Mammone could not detect the loose laminate at the view. Mr McLennan denied the inconsistent gap and said that the join was acceptable and indeed was "as good as they come." Mr Mammone said the gap along the join was too irregular. I find that the join is acceptable. The claim is dismissed.

10. Kitchen stone top support over dishwasher opening is poorly supported by reason of a join in the particle board support in the middle of the dishwasher opening.

This defect is carried over from Mr Mammone's report dated December 2008. Mr Mammone reported that by reason of the particle board join under the stone bench top, it did not properly support the stone bench top and it was at risk of cracking. It has not cracked at this point. Mr Morris allowed for the replacement of the stone bench top at \$9958. Mr McLennan did not accept there was a defect but proposed that the bench top could be further supported by a metal angle at an installed cost of around \$250. Mr Morris agreed with this method of rectification. The builder, whilst denying the defect, acceded to the claim of \$250 to avoid the risk of a future claim. I allow \$250 to enable a metal angle to be installed.

11. Kitchen exhaust fan incorrectly positioned.

This defect is carried over from Mr Mammone's report dated December 2008. The builder accepts that the exhaust fan was incorrectly positioned. Mr Luca has relocated the exhaust fan. He was charged \$350 by an electrician to relocate the ceiling fan and perform two other jobs unrelated to the claim. In addition, Mr Luca incurred \$70 in materials to repair the ceiling which he did himself. I allow \$70 plus \$116.66 a third of the electrician's bill making a total of \$186.66.

12. Replace mortar of house as not compatible with model home.

Mr Luca claims \$27,551 to repoint the whole of the house. Mr Luca contended that the mortar on his home was not of the same quality as the model house. He said that the mortar on his home

was coarser and was not flush like the model house. I observed the model house from the kerb side, from photographs tendered by Mr Luca and from photographs in Mr Mammone's report, but I could not determine any real difference in the mortar. I did observe that the model house exhibited even mortar beds and perpend. The model house had all the excess mortar removed from the brickwork and generally had a more consistent and neat appearance about the brickwork. Mr Luca's home did exhibit uneven mortar beds and perpend, with the extreme areas being subject to an order for damages to enable a repair. Some areas of brickwork are not capable of repair. The explanation for the excessively wide perpend is that the brickwork is set out based on a 230mm brick. The brick chosen (from another series of houses and not the Columba series) is a 226mm brick. There was no evidence of any warning given to Mr Luca that his choice of brick may not be suitable for his home. The claim for the whole house to be repointed is dismissed because I am not satisfied that there is any defect with the mortar. Repointing the house will not make even mortar beds or perpend. I am however satisfied that the brickwork is not to the same standard of the model house. Taking into account orders made to repair the worst areas of defective brickwork, I allow Mr Luca \$1,000.

13. Correct distribution of tiles in entrance and lounge.

The claim is to correct the distribution of floor tiles in the entrance hall. Mr Morris allowed \$9,913 to relay the entire tiled area which extends to all the passage ways, main bathroom, laundry, main hallway, lounge and kitchen. The complaint by Mr Luca is that the tiles are not laid symmetrically in the entrance hallway. Mr McLennan found that the tiler had commenced laying the tiles in the lounge room. Had the tiler commenced laying the tiles in the hallway there may be an unacceptable result elsewhere in the house. No alternative tiling plan was put before the Tribunal showing that the tiles could have been laid in better way. The hallway tiles are laid in an acceptable manner. I find no defect. However, Mr McLennan did find that the wall in the hallway is out of square by 15mm. This gave the appearance that the tiles were not laid correctly. Although not strictly claimed by Mr Luca I allow \$1450 to rectify the defect with the wall.

14. Excessively bowed trusses above pantry area which now place roof tile battens outside the allowable span.

Mr McLennan accepts the defect. The defect is proved. Mr Morris allowed \$475 to carry out rectification works. Mr McLennan proposed an alternative rectification method. Mr Morris agreed with the alternative method. I allow \$67.51 as per Mr McLennan's rectification method less margin.

15. Poorly graded metal capping

This is a repeat of item 1.

16. Masonry articulation joint compress approximately 5mm.

The articulation joint on the north side of the house is compressed by 5mm. Mr McLennan said that is not a defect but that the joint is performing as it ought to do. The defect is not proved. The claim is dismissed.

17. External brickwork cracking at base of bedroom 2.

At the view the experts agreed that the cracking was within tolerances set out in the Guide to Standards and Tolerances. The claim is dismissed.

18. Rumpus room window approximately 10mm higher on left hand side.

Mr McLennan said the tolerance was 15mm and therefore it was not a defect. I accept this evidence. Further, the defect would be largely corrected by the works carried out under item 3. The claim is dismissed.

19. Stepped and horizontal cracking to top LHS corner of the rumpus room.

There was some very fine minor cracking in this area. I find that the cracking is within tolerance. The claim is dismissed.

20. Brick perpends in the brick sills of the rumpus room windows exceed acceptable tolerances.

This defect was accepted by Mr McLennan. At the view Mr McLennan estimated \$350 to \$400 to repair the sills. Mr Morris allowed a sum combining items 18, 19 and 20. I allow \$400.

21. South wall of house at south east corner – mortar is exceptionally rough.

This claim is the same as Item 4.

22. Perpends in the brickwork of wall within the alfresco area vary in width with a number of perpends being approximately 20mm in width.

It was agreed by the experts at the view that the width of the perpends cannot be rectified (without rebuilding the house). The bricks are laid in accordance with a set up based on a 230mm brick. The size of the brick used was 226mm. It is now not possible to set out the bricks in any other way. However, the bricks are laid outside tolerance. I have made an allowance under Item 12 for this defect.

23. Mortar bed at the base of kitchen window approximately 20mm in thickness exceeds maximum allowable tolerances.

There are two areas identified as requiring rectification by Mr Mammone. Mr McLennan accepts a defect to only one part of the base of the kitchen window and allows \$200 for rectification works. I accept the evidence of Mr McLennan and allow for repair of the kitchen window sill in the alfresco area. Otherwise I make allowance for the wider mortar beds under item 12. I allow \$200.

24. LHS of kitchen window missing trim

This is agreed. I allow \$50 as agreed by the experts.

25 & 26. Garage Level being 140mm below level and House level being 80mm below level.

It is not disputed that the garage slab has been laid 140mm below the specification on the plans and the house has been laid 80mm below the specification on the plans. According to the Guide to Standards and Tolerances, the tolerance is 40mm. It is not disputed that the deviation is outside tolerance. Mr Luca's expert valuer, Mr Ongarallo, gave evidence that in his opinion, the overall value of Mr Luca's home was reduced by \$20,000 by reason of it being set down approximately 300mm lower than ground level. The builder's expert valuer, Mr Biggs said that the house being built 80mm or even 300mm lower than street level would have no impact on price. Mr Biggs agreed that some purchasers may be put off by a house being set down low on a block, but taking into account the strong market demand and the numerous factors purchasers take into account, he considered that the lowness of the house, in this case by 80 to 140mm, would not have any impact on price.

I find that the builder did breach the contract by laying the slab lower than indicated on the plans and outside the 40mm tolerance. I accept the evidence that some purchasers will be resistant to purchasing a home set low on a block and this may have a small impact on price. Certainly, Mr Luca is dissatisfied with the result and for that breach I will allow him compensation fixed at \$4,500. The claim for \$250,000 to demolish and rebuild the house is dismissed.

27. Hairline cracking noted propagating throughout floor tiles across threshold of the broom cupboard.

Hairline cracking could not be detected on inspection and therefore was not proved. The claim is dismissed.

28. Hair line cracking propagating across floor tiles within lounge room.

At the view, the experts agreed that the cracking was within tolerance and therefore not a defect. The claim is dismissed.

29. Shower in bathroom – showerhead is noted to be approximately 35mm out of centre.

Mr McLennan agreed that the showerhead had not been installed in accordance with the plans. Mr Morris allowed \$981 to rectify the defect. Mr McLennan allowed \$620.68. The position of the showerhead although strictly not in accordance with the plans is still visually pleasing and the showerhead still functions correctly, if not better in the altered position. I find that it is not reasonable or necessary to relocate the showerhead. I make no allowance on the claim.

30. Chip in bathroom shower base.

Mr Morris allowed \$2,314 to replace the shower base. Mr Mammone acknowledged that it is industry practice to fill and polish chips rather than replace the whole shower base. It is not conceded that the builder caused the chip, however I accept Mr Luca's explanation that the chip occurred when the builder's plumber replaced the taps in the shower. I allow Mr McLennan's figure to fill and polish the chip less builders margin. I allow \$159.30.

31. The bathroom spout and tap set is not installed correctly.

This defect was evident on inspection and is accepted by the Mr McLennan. Mr McLennan allowed \$529.34 including margin. Mr Morris's allowed \$751. The builder has not had the opportunity to repair the item. I allow \$441.12 being Mr McLennan's figure less margin.

32. The tiling in the bathroom has a missing trim.

This defect is agreed. I allow \$20 as agreed by the experts.

33. The top edge of all internal doors not painted.

This defect is agreed. Mr Morris allowed \$728. Mr McLennan agreed with that costing. The builder has not had the opportunity to rectify this defect so I deduct builder's margin. I allow \$606.

34. Withdrawn.

35. Withdrawn.

36. Master bedroom ensuite – steel bracing cut by builder.

In order to effect another repair the builder cut some of the steel bracing in the internal ensuite bathroom wall. The builder asserts that the cutting of the bracing is of no consequence because the bracing was not performing a function. Mr McLennan, said that because of the complicated regulations concerning bracing,

builders tended to overbrace. Mr McLennan suggested that excessive bracing was not necessary on an internal wall and the plaster on its own would be sufficient to brace the internal wall. Mr Mammone said his report simply identified that the bracing had been cut but otherwise did not assert that the bracing was required. There is no bracing plan. I am not satisfied that the cut bracing is a defect warranting repair. I find the claim not proved.

37. Withdrawn.

38. Tile cracking in Master bedroom ensuite floor.

The propagating cracking of less than 1mm across the tiled floor is agreed by the experts to be within tolerance. There is a crack in the floor tile at the corner edge of the bath. The experts agreed that this is a stress crack. The crack, although agreed by the experts to be less than 1mm and within tolerance, is unsightly and very obvious upon a visual inspection. I find that the crack is unacceptable. The tile could have been laid with a join to avoid the inevitable stress crack. I allow Mr Luca \$100.

39. Cracking along the wall tile line in the ensuite.

The experts agreed that the cracking was in tolerance. Therefore the claim was not proved. Mr McLennan did quite fairly point out in his report at Item 7 that the tiles had not been laid correctly in that there was peaking in the middle of the top row of wall tiles. Although not strictly claimed I allow Mr Luca \$204.70.

40. The spacing between the toilet and bidet is 970mm instead of 860mm as per the construction documents.

The bidet cannot now be moved. Rectification is neither reasonable or necessary. I make no allowance on the claim.

41. Nail scrape along face of master bedroom suite door.

The defect is agreed. Mr McLennan allowed \$184.79 and Mr Morris allowed \$289. The builder has not had the opportunity to repair the defect. I allow Mr McLennan's figure less margin. I allow \$153.99.

42. Laundry external fly screen door missing.

At the hearing it was not disputed by Mr Luca that the contract did not provide for fly screen doors. The claim is dismissed.

43. Lounge room external fly screen door missing

At the hearing it was not disputed by Mr Luca that the contract did not provide for fly screen doors. The claim is dismissed.

Summary of defect claims

20. The summary of claims allowed is as follows:

Item 1	\$550
Item 2	\$208.72
Item 3	\$750
Item 4	\$538.54
Item 5	\$100
Item 6	\$175.48
Item 8	\$190.42
Item 10	\$250
Item 11	\$186.66
Item 12	\$1,000
Item 13	\$1450
Item 14	\$67.51
Item 20	\$400
Item 23	\$200
Item 24	\$50
Items 25 & 26	\$4,500
Item 30	\$159.30
Item 31	\$441.12
Item 32	\$20
Item 33	\$606
Item 38	\$100
Item 39	\$204.70
Item 41	\$153.99
Total allowed on defect claims	\$12,304.22

Damages for delay and lock out

21 By amended points of claim dated 24 September 2009 Mr Luca sought damages for late completion and for loss of rent for 10 weeks at the rate of \$350 per week. I find that the date for completion of the building contract was extended in accordance with the building contract to 21 January 2009. I accept the builder's evidence, that the building was completed on 12 February 2009. This entitles Mr Luca to damages for 3 weeks at \$500 per week, as provided in the building contract.

- 22 Mr Luca also seeks 10 weeks loss of rent at the rate of \$350 per week from 17 July 2009, when he first demanded possession until the end of September 2009 when he recovered possession. Mr Luca claims that he was unable to carry out other works including concreting and landscaping for the purpose of leasing the property. He claims he lost the opportunity to rent the property. There was no evidence that the Mr Luca intended to rent the property as he moved into the home himself. Mr Luca was otherwise living in his Reservoir property. The Reservoir property is currently vacant pending Mr Luca commencing renovations to it. There is no evidence that the either the Epping property or Reservoir property could or would have let during this period. There was no evidence as to the reason why Mr Luca did not recover possession at an earlier date. I find the claim for loss of rent not proved.
- 23 Mr Luca claims the cost of changing the locks to gain possession of his home. The claim is for \$120.00 locksmith charges, \$234.55 for replacement locks, a total of \$ 354.55. I allow that sum to Mr Luca, because the builder was not entitled to retain possession of the home.

Summary of successful claims

Mr Luca's claim on defects	\$12,304.22
Mr Luca's claim on delay	\$1,500
Change of locks	\$345.55
Total	\$14,149.77
Builder's claim	\$12,662.50
Net balance owing to Mr Luca	\$1,487.27

MEMBER L. ROWLAND