

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D745/2008

**CATCHWORDS**

Domestic building work – paving – concrete poured in the rain – unacceptable appearance – negligent to pour concrete when rain is expected

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|-------------------------|--|
| <b>FIRST APPLICANT</b>  | Bruce Smith  |
| <b>SECOND APPLICANT</b> | Cathy Daly   |
| <b>RESPONDENT</b>       | Ian Elhan, trading as Statewide Concrete Paving  |
| <b>WHERE HELD</b>       | Melbourne  |
| <b>BEFORE</b>           | Senior Member R. Walker  |
| <b>HEARING TYPE</b>     | Small Claim Hearing  |
| <b>DATE OF HEARING</b>  | 12 March 2009  |
| <b>DATE OF ORDER</b>    | 23 March 2009  |
| <b>CITATION</b>         | Smith & Anor v Elhan trading as Statewide Concrete Paving (Domestic Building [2009] VCAT 453 |

**ORDER**

1. The name of the Respondent is corrected to Ian Elhan, trading as Statewide Concrete Paving.
2. Order the Respondent to pay to the Applicants the sum of \$15,786.00.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

|                    |                                      |
|--------------------|--------------------------------------|
| For the Applicants | Mr B. Smith and Ms C. Daly in person |
| For the Respondent | Mr I. Elhan in person                |

## REASONS

### Background

1. The Applicants are the owners of the dwelling house at 10 Venice Street Box Hill South (“the House”). The Respondent, Mr Elhan is a concreter carrying on business as a sole trader under the name “Statewide Concrete Paving”.
2. In about July last year the Applicants requested the Respondent to provide a quotation for the replacement of the concrete driveway of the House. They contacted him after seeing a sample of his work at a house nearby.
3. A quotation dated 7 July 2008 was given to replace the driveway from the front council footpath to the house and down the side of the house to the garage for a total price of \$8,470.00. The strength of the concrete was to be 25 mega pascals and it was to be stamped and coloured with a slate pattern in accordance with a colour chart shown to the Applicants by Mr Elhan.

### The work

4. The concrete was poured on 8 August 2006 by Mr Elhan and Paul who appears to have been his subcontractor. According to Mr Elhan’s evidence, before the pour, he expressed some concern to Paul that perhaps they should not pour the concrete on that day because rain was expected. After discussing the matter between themselves they decided to proceed.
5. Unfortunately, after the concrete had been poured and while they were stamping the colour and pattern on it, it rained and continued to rain for the rest of the day and for the succeeding two days. The effect of the rain was to ruin the appearance of the concrete so that it became quite unattractive and quite unacceptable in terms of quality. Mr Elhan acknowledged that was the case.

### The aftermath

6. After the damage caused by the rain became apparent discussions ensued Mr Elhan and the Applicants during which Mr Elhan suggested there were two possibilities namely, to pull up all the concrete and relay it, which he was not prepared to do, or to grind the surface of the concrete and apply a clear finish so as to create a polished concrete effect. He suggested to the Applicants that they inspect a floor at a retail centre in Nunawading as a sample of how the finished driveway would look if this were done.
7. The Applicants say that they inspected the floor in Nunawading after which Mr Smith telephoned Mr Elhan and told him that that was not the finish they had wanted, that if Mr Elhan wanted to try out his suggestion they would see what it looked like but if they did not like it they would not accept it. Mr Elhan’s version of this conversation is slightly different. He suggests that the Applicants agreed to accept the driveway if he ground and polished it.

- 8 I think it is unlikely that they would have agreed to that. The stamped and coloured surface they had contracted for was very different and although they appear to be easy going people I think it is more likely that they simply agreed to see what it would look like and then make a decision. I therefore accept their version of the conversation.
- 9 Following this conversation, Mr Elhan agreed with his subcontractor Paul that the latter would “take over” the job and receive the last payment from the Applicants. Paul then hired a grinding machine, which Mr Elhan said was the wrong size, and attempted to grind it himself. He then left the site, taking with him the clear finish that was intended to be applied to the driveway that had been stored in the Applicant’s garage. He has not been seen since.

### **The hearing**

- 10 The matter came before me as for a small claim hearing on 12 March 2009 and after hearing evidence from the parties I went out to the site and inspected the driveway.
- 11 It has been somewhat roughly ground but not down to the full depth of the impressions made by the metal pattern. Clearly, if one were to attempt to have a polished concrete finish on this driveway considerably further grinding would be required. The thickness of the concrete at the time of the pour was said to have been 100mm. The depth to which the pattern was impressed is unknown but, since the grinding would necessarily need to go down to the full depth of the impressions, it follows that the thickness of the driveway would be correspondingly reduced.
- 12 No isolating material has been used to separate the driveway slab from the brickwork of the house. There have been saw cuts placed in the concrete but one very substantial panel remains uncut which and it has cracked in three directions.
- 13 Further down the driveway towards the garage there was a saw cut that extended only two thirds of the width of the driveway. There is an uneven crack from the end of this saw cut to the other side of the driveway on an angle, which looked most unsightly.
- 14 There is some ponding of water on the driveway indicating insufficient attention to the question of fall and the low point near the front door of the house has no drain hole.
- 15 Quite obviously, the concrete has standard blue metal aggregate since, at the time it was poured, it was not intended that it would be ground down to have the aggregate exposed.
- 16 Mr Elhan referred me to the site in Nunawading where he had sent the Applicants. I have inspected the floor at that address and find it to be a polished concrete floor similar to many I have seen in the past. At the invitation of the Applicants I also looked at the driveway of the nearby house referred to above and it has a very attractive appearance.

## Conclusion

- 17 It is an implied term of any contract for work and materials that the work will be done in a proper and workmanlike manner using good and sufficient materials. It is also an implied term that it be done with all reasonable care and skill. Attempting to lay concrete in the rain is a breach of that implied term. It is trite that concrete should not be poured in the rain. If it is, and rain was expected, as in this case, it is the concreter's negligence, not the owner's bad luck. I am therefore satisfied that Mr Elhan is in breach of the contract to do the work.
- 18 I am also satisfied that the Applicants have given the Respondent an opportunity to remedy the defective work by grinding it down on the condition that if they were not satisfied with the appearance they would not accept it. I am satisfied that the Respondent agreed to that. I am also satisfied that the Respondent's workman left the site without having completing what it was that was agreed to be done. The Applicants, after seeing what the final appearance would be after Mr Elhan applied some clear finish to a ground section of the driveway, have decided that they do not like the finish. I accept that is the case
- 19 That being so, there is no alternative but to pull up the concrete and have it re-laid. I put that to Mr Elhan as a possibility but he indicated that he was not prepared to do it.
- 20 The Applicants have produced a quotation from another contractor to carry out the work for a price of \$16,940.00. Mr Elhan said that that was an excessive price and that he would do the job for \$8,000.00. Considering the amount that was originally on the quotation and the fact that there is now reinforcement in the concrete that will make the removal of the concrete very difficult and costly, I think that it is likely to be a highly optimistic price and, quite probably, a cost price to Mr Elhan. In any case, no other quotation or expert evidence as to the cost of replacement has been produced.

## Damages

- 21 I calculate the amount to be awarded as follows:

|  |                    |
|--|--------------------|
| Amount paid by the owners to the Respondent                              | \$7,316.00         |
| Costs of removal and replacement of concrete                             | <u>\$16,940.00</u> |
|  | \$24,256.00        |
| Less the amount for which the Respondent<br>had contracted to do the job | <u>\$8,470.00</u>  |
|  | <u>\$15,786.00</u> |

- 22 The Applicants sought to recover an amount of \$400.00 being the cost of obtaining advice from a building expert, Mr O'Meara. However no report was obtained from Mr O'Meara and he was not called to give evidence.

This was listed for a small claim hearing and it is not the practice of the Tribunal to make orders for costs in these hearings unless there is some very good reason for doing so. Had Mr O'Meara prepared a report then the costs of obtaining that report might have been allowed as a disbursement but that is not the case here.

- 23 Mr Smith also sought compensation for the fact that he had to change his working arrangements to be at the hearing and has suffered loss due to the fact that he generally works interstate. As I explained at the hearing, it is not the practice of the Tribunal to award costs for a party's own attendance.

**Order**

24 The order to be made will be as follows:

1. The name of the Respondent is corrected to Ian Elhan, trading as Statewide Concrete Paving.
2. Order the Respondent to pay to the Applicants the sum of \$15,786.00.

**SENIOR MEMBER R. WALKER**