

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D435/2006

CATCHWORDS

Defective work, Broken plumbing services, Allegation of concretor breaking services, Concurrent contractors on site

1ST APPLICANT	B. Tanner
2ND APPLICANT	Trinusteel Pty Ltd (t/as Nusteel Holmes)
RESPONDENT	Miratone Concreting Contractors Pty Ltd
WHERE HELD	On Site
BEFORE	Senior Member R.J. Young
HEARING TYPE	Hearing
DATE OF HEARING	29 August 2006
DATE OF ORDER	6 February 2007
CITATION	Tanner v Miratone Concreting Contractors (Domestic Building) [2007] VCAT 164

ORDER

- 1 The application is dismissed.
- 2 Subject to no party making an application in writing to the contrary within fourteen days of the date of this order, which application shall be filed with the Tribunal and served on the other party, there are no orders as to costs including any reserved costs.

Senior Member R.J. Young

APPEARANCES:

For 1st Applicant	In person
For 2nd Applicant	Mr. B. Tanner, Director
For Respondent	In person

REASONS

A INTRODUCTION

- 1 This application of 28 June 2006 filed by the applicant builder, B. Tanner and Trinusteel Pty Ltd (trading as Nusteel Homes), (*the applicants*), seeking damages in the sum of \$9,248.00 for the costs of rectification to damaged plumbing, allegedly caused by the concreting sub-contractor engaged by the applicants, Miratone Concreting, (*the respondent*); occurring when the respondent was excavating and pouring the reinforced concrete ground slab and beams for the sub-structure to the dwelling that the applicant was erecting at 81 Smedley Road, Park Orchards, for the owner, P. Wynne.
- 2 Although the respondent acknowledged that it had damaged some pipes, being either soil drains or stormwater drainage pipes, he said that he informed the applicants' site foreman, R. Savage. And that, as far as the respondent was aware, Mr. Savage contacted the applicants' plumber, Gill Drainage, who came to the site and repaired the damage. The applicants had installed the soil drains and stormwater drains under the reinforced concrete beams and slabs forming the dwelling's substructure prior to any work to install the sub-structure being commenced. The soil drains are the pipes that carry the grey water and black water from the dwelling to the sewer. The respondent said that he was not given a plan of the pipe locations by the applicants prior to or at any time when he was carrying out the work of excavating and pouring the reinforced concrete sub-structure to support the dwelling. Further, he submitted that although the watertightness of the soil drains and stormwater drains had been tested prior to his work being carried out, they were not tested after the plumber had rectified the damage he had indicated and this was not good practice.
- 3 Evidence was given for the applicants by Mr B. Tanner, who is a director of the second applicant, and by Mr Dennis Tanner who is a supervisor of the second applicant. For the respondent evidence was given by Mr Sam

Mirabito, who is the principal of Miratone Concreting and a written report from Mr J. Newbegin, consulting concrete technologist of Macs Technologies Pty Ltd was submitted to the Tribunal by the respondent. I will set down a summary of the evidence of each of the witnesses for the parties. This will be followed by a summary of the agreed facts and contentions between the parties, after which I will set out my analysis of the disputes in issue between the parties; finally, I will set out my conclusions.

B. APPLICANTS' EVIDENCE

- 4 Mr B. Tanner, director of the second applicant, gave evidence via a written submission and orally. He informed the Tribunal that the owners took occupation of the completed dwelling in the early part of 2006 and that shortly after moving in they reported a problem with sewage backing up. After a video camera had been used to check the soil pipes, it was found that the riser pipe from beneath the lower concrete slab and rising up the back of the retaining wall to service the soil drains on the upper level had been broken at the top of the riser, near a double inspection opening, and this was where the sewage was being blocked. The top of the soil pipe riser was approximately 1m below the bottom of the slab. The rectification required a hole being cut in the double brick retaining wall, which had reinforcing steel and concrete filling inserted into the wall cavity. Followed by the excavation of the wall back-fill, after which the top of the riser was re-built. Later, it was also discovered that the bend at the bottom of the riser was broken and this required further removal of sections of the retaining wall and the re-building of the bottom bend of the riser. The plumber who rectified the work, Gill Drainage, who was also the plumber in the initial construction of the dwelling, was of the opinion that the damage to the bottom of the riser behind the retaining wall was caused at the same time as the damage was caused to the top of the riser.
- 5 In April 2006 the sewage commenced to back-up in the ensuite bathroom, toilet and basins on the upper level and it was discovered, via a video

camera, that the soil drain fitting at the junction of the soil drain from the ensuite toilet and that from the ensuite basins was broken, blocking the sewage. It was Mr Tanner's opinion that, as the downstream broken pipe was higher than the level of the junction, the pipe downstream of the junction had been snagged and lifted by an excavator bucket.

- 6 To rectify this blockage a hole had to be cut in the tiled ensuite floor through the concrete slab to get to the broken junction which was replaced and the concrete slab and tiling reinstated. The seepage of sewage and grey water from this area ran along the trench of the discharging soil drain to the retaining wall where it discharged running down the rear of the retaining wall through the retaining wall and into the garage. This consequential damage also had to be rectified.
- 7 It is the applicants' contention that this damage to the pipes comprising the soil drainage and stormwater drainage system was caused by the respondent sub-contract concreter. Mr Tanner said that the back-fill to the sewers and retaining walls was material previously excavated from the sites including the trenches in which the pipes were laid. He said that at the time the site was very damp and the soil was very wet.
- 8 The backfill for the retaining wall was scoria around the agricultural drain which drained any free water from the rear of the retaining wall; and, the balance of the backfill at the rear of the retaining wall was loose topsoil from off-site or loose fill from the site, the back-fill was not compacted.
- 9 The respondent had broken a number of pipes in excavating for the substructure beams and slab and had informed the applicant's plumber, Gill Drainage, who had come and repaired this damage.
- 10 The second witness for the applicants was Dennis John Tanner, an estimator and supervisor of the second applicant. He gave evidence that the sub-contract with the respondent was created by the issue of a purchase order on 27 July 2005 for the beam and slab reinforced concrete sub-structure to the upper and lower levels of the residence and garage for the

sum of \$30,250.00. On completion of the work a tax invoice was received from the respondent for this sum. He said that the site was very muddy and this was confirmed at the time by the respondent; that it was raining and the weather conditions were very inclement. Work started shortly after the issue of a purchase order. Mr Tanner said that the applicant placed no restrictions on where the respondent could take his machinery on the site of the dwelling when carrying out his work. The applicants' supervisor on site, Mr R. Savage, reported to him that there had been damage done by the respondent to the stormwater drains and the plumber was arranged to come to the site and rectify such damage. Towards the end of October 2005 they discovered that waste water would not discharge from the laundry and upon inspection it was discovered that the soil drain under the slab had been crushed and the applicant had this repaired at no charge to the respondent.

- 11 In relation to the rectification of the damage that the applicants allege was caused by the respondent's lack of care, they prepared a schedule setting out the names of the rectifying subcontractors together with the details of their invoices and costs. The schedule also set out the rectification costs of the applicants. The rectification work costs totalled \$9,148.12.
- 12 Mr Sam Mirabito, principal of the respondent, gave evidence for the respondent. He agreed with the outline of the contract given by Mr D. Tanner. He said that the scope of the contract was to excavate the reinforced concrete beams and the ground slab, place plastic sheet under all areas where concrete was to be poured, fix all of the reinforced steel in place in the beams and slab; and, pour the concrete. To carry this work out he was given a set of the house plans, the architectural floor plans and the engineering drawings and a specification in full. However, he was not given a plan of the proposed locations of the stormwater drainage pipes or soil drains. He said that he was the second concretor on site, the initial concretor had excavated and poured the bored piles. He understood that the initial concretor wished to charge too much for the balance of the sub-structure works and the respondent was given the sub-contract. He said that

when he was first on site there were many damaged pipes; pipes were broken between the retaining wall and the back-fill and at the start of the grated drain.

- 13 He had seen very deep truck wheel track ruts due to the very wet soil and these ran across the site of the location of the dwelling, see photographs taken approximately July 2005. He disagreed that the riser was 1m deep he considered it was approximately 600mm deep to the top and that he had seen wheel tracks on the top of the riser. The riser had not been surrounded by a backfill of cohesionless granular backfill to support and protect it and that there was only normal fill around the riser. He was unsure if the bottom of the riser had been supported upon an anchor block to prevent it sinking due to any pressure from above the top of the riser.
- 14 There was a significant distance between the back of the retaining wall and the natural in situ soil and this required a large amount of back fill. The distance was approximately 1.2 to 1.5m wide as shown in photo 4. Mr Morabito said that he did not have to carry out any works over the top of the riser and his equipment did not go near the top of the riser. Mr Morabito did not know of the riser or its location. He considered that if the builders were concerned about damage to the riser they should have given him notice of its location.
- 15 After the backfilling of the retaining wall, which was carried out by other subcontractors of the applicants, he started excavation for the beams which sat on the existing bored reinforced concrete piles. He was using a 2.5 tonne excavator, '*Hitachi*', and there was no need to put the bucket down to push the machine along. At this stage in his evidence Mr B. Tanner said that direct force had been applied to the top of the riser and Mr Morabito replied that he considered this was done by the '*Bobcat*' used by the applicants' subcontractor to backfill between the retaining wall and the natural in situ soil.

- 16 At the time the respondent was working in the ensuite area fixing site steel reinforcement and this was the area where the Bobcat did the back-fill. In bringing his excavator onto the area behind the wall, Mr. Morabito said he brought it over the reinforcement. When he was excavating in the ensuite area the bucket snagged the stormwater drains and he reported the damage to Mr R. Savage. He understood that it was later rectified by Gill Drainage at the request of Mr Savage. At this stage he said Mr Savage was unsure whether he had damaged the stormwater drain or a soil drain. He said it was obvious when excavating when you had broken a pipe as a loud noise occurs. He specifically showed Mr Savage the broken fitting in the ensuite area that he had broken with the excavator. Gill Drainage, the applicant's plumbers, came to rectify the break and Mr Morabito said that he considered that it had been rectified. After the repairs he had been given the go ahead to pour the concrete slab and beams for the upper level.
- 17 He had done the excavation and preparatory works for the garage and basement slabs on the lower level at the same time, commencing in the second week of August 2005. The excavator broke a soil drain and he told Mr R. Savage. He laid the required plastic sheet under the slab location and fixed the steel reinforcement. The applicants had wanted the slab in quickly. When he returned to pour the concrete he found that the reinforcement had been taken out of the trenches and dirt left on the plastic sheet due to the plumber repairing the damaged pipes. After the repair of the damaged pipes and prior to the concrete pour there was no re-testing of all of the pipes that ran under the slab. Mr Morabito said that it was normal to re-test the pipes under the slab. If the pipes had been tested prior to the pour then this proceeding would not have occurred. It was his opinion that Gill Drainage did not repair all of the damage.
- 18 Mr Morabito said he was never given a plan of where the pipe services, either stormwater drains or soil drains were located.

- 19 The respondent submitted a report from Mr J.D. Newbegin, consulting concrete technologist, who gave opinions as to the method of work carried out by the respondent. Mr Newbegin had visited the site but only viewed it from the front boundary and attended the offices of the applicants and viewed a computer file of photos. Mr Newbegin said that it was always a potential problem where plastic pipes are used for drainage and sewerage under slabs when the excavations required for the supporting infrastructure is carried out with a mechanical excavator.
- 20 Mr Newbegin was of the opinion that the need to repair plastic plumbing after the use of mechanical equipment appears to be accepted as part of the cost of this method of construction. In his opinion some damage occurs on 80% of sites. Although it appeared that the applicants had tested the pipes prior to concrete being placed this did not appear to be done after all of the sub-structure work preparatory to the concrete pour had been carried out and when all of the plumbing repair work to any damaged pipes had been completed.
- 21 At the completion of the parties' evidence in chief I allowed them to have a discussion and ask each other questions in lieu of formal cross-examination. Mr. Morabito requested why the applicants did not have the plumber, Gill Plumbing, test all of the piped services after it had completed the repairs to ensure that there were no blockages immediately prior to the pouring of the concrete. Mr. B. Tanner replied that in 25 years of building he had never seen so much damage caused on one job when excavating for the substructure and this was work for which the respondent was solely responsible. Mr D. Tanner said that the applicants had accepted that the plumber had fixed what he had been told to fix. Mr Morabito replied that it was going by the word of the plumber that all that was required to be fixed had been fixed.
- 22 In reply to a question from myself, the applicants informed me that they had not given the respondent a plan of the pipe services. They confirmed that

the soil drains and stormwater drains had been pressure tested before the respondent's excavation had been completed. When I requested why they had not done it after the repair to the plumbing and prior to the pour, Mr B. Tanner replied that it had been never done before and Mr D. Tanner said that all the plumbing had been repaired. Mr Morabito said that if such pressure testing had taken place then there would not be the expensive repairs that were subsequently required. In reply to a query from myself the applicants said that they would be astonished if it was the Bobcat that had caused the damage to the riser at the rear of the retaining wall.

C. FACTUAL AGREEMENTS

23 The parties agreed that the initial work on the construction of the dwelling including the preparation and pouring of the ground slab and beams and bored piles was carried out during very inclement weather with a great deal of rain and the site was very muddy and the natural soil was churned up and very loose. There were deep wheel tracks left across the site of the dwelling by the brick delivery trucks and this was after the stormwater drains and soil drains had been installed. Mr Morabito gave evidence that the initial concreter who carried out the excavation and poured the bored piles also created some damage but it appears that this damage was rectified by the plumber, Gill Drainage; who pressure tested the pipe services after these repairs and found that they were satisfactory.

24 The respondent was not given a copy of the pipe locations on the site nor had the applicants marked any locations of pipe services that they considered were vulnerable to having heavy equipment pass over or work near them. There was agreement between the parties that the subsurface pipework previously installed by the applicants' plumber may be damaged by the respondent during his excavations for the beams and slab of the substructure; and, that if this occurred, the applicants would have such damage repaired by their plumber at their own cost. The problem in this case is that damage to the subsurface pipework, whenever the pipework was

installed and however the damage was caused, was not identified prior to the concrete for the substructure being poured. This meant that the costs to rectify the damage to the pipes was far higher than if the damage had been identified prior to the concrete being poured.

- 25 There was some damage caused by the respondent's work in snagging and breaking stormwater drains or soil drains. The respondent said that he reported all of this to the applicants' supervisor, R. Savage, who arranged for Gill Drainage to come and rectify such damage. The respondent is unsure whether all of this damage was rectified. The applicants submit that Gill Drainage rectified all of the damage it was informed about. The applicants submit that the damage was the worst that Mr B. Tanner with 25 years experience had seen by an excavator preparing the sub-structure. Both parties agree that there was no pressure test carried out at the end of the repair to the pipe services and immediately prior to the concrete pour.
- 26 It was the respondent's evidence that the applicants wished to have the sub-structure work completed as soon as possible and this was not denied by the applicants.
- 27 The terms of the contract and the scope of works is accepted by both sides are accepted as set out by Mr D. Tanner.

D ANALYSIS

- 28 Before getting into the applicants' specific allegations I wish to make a few general comments in relation to contractual obligations and responsibilities. The applicants, as builder, had entered into numerous sub-contracts to carry out the various works and trades that make up the construction of a dwelling and they had the responsibility to co-ordinate these. It is the applicants' responsibility for any damage caused by a sub-contractor to any other sub-contractor's work; for example, if the initial concreter had damaged pipes the applicants could not claim it was the responsibility of the subsequent concreter, the respondent. Therefore, to establish that damage was a breach of contract by the respondent, the applicants must be

able to establish on the balance of probabilities that the damage was caused by the respondent. And, this I consider to be the major hurdle faced by the applicants. Accepting that the pipe services were tested after the repair of any damage caused by the initial concreter who carried out the work on the bored piles, I accept that the work of the initial concreter is not responsible for the subject blockages experienced in the plumbing. There remains the problems of the concrete delivery trucks, the back-fill at the back of the retaining wall around the sewer riser by another contractor and the repair work carried out by the applicant's plumber, Gill Drainage.

- 29 In relation to the brick delivery trucks, photo 2 shows very deep wheel ruts across that area of the dwelling behind the retaining wall. These wheel ruts are filled with water and the wheel rut in the foreground of the photo shows a sudden increase in depth over a small length which indicates a softer material underneath and from the change in the surface material cutting across the wheel tracks it appears as though this could be a pipe trench. From my engineering experience I would consider in unconsolidated fill that such a sudden and deep wheel rut would indicate severe pressure on the pipe and a likelihood that any plastic pipe would break or squash under such a load. There were further deep wheel ruts further towards the rear of the site and behind the retaining wall which indicate there would also have been severe pressure on any pipes that were in this location.
- 30 Mr Morabito's evidence that the sewer riser behind the retaining wall was not bedded on any anchor block or protected and structurally supported by compacted cohesionless granular fill around the riser was not disputed by the applicants. The applicants said that the fill behind the retaining wall was carried out with unconsolidated fill materials, which appears to be a clay material. They gave evidence that they took care to check that the riser was not damaged during backfilling process. However, they could not categorically dispute Mr Morabito's evidence that he saw Bobcat wheel tracks across the top of the location of the riser, although they considered it

unlikely. The applicants did not dispute Mr Morabito's evidence that he did not work near the location of the riser.

- 31 Mr Morabato gave evidence that when excavating for the beams to the slab it was obvious when a pipe had been broken or damaged due to the sound and that he had informed the applicant's supervisor, S. Savage, of all of the damage he had caused and he understood that Mr Savage had contacted the applicant's plumber, Gill Drainage, to come and repair the damage and had instructed them. Mr Morabito could only consider, and this was especially so in the case of the ensuite which was damage he had reported, that Gill Drainage had not received complete instructions or managed to carry out all of the repair work. The applicants could not contribute any evidence to Mr Morabito's contention as neither Mr Savage or a representative of Gill Drainage were called to give evidence.
- 32 Mr Morabito said that he considered that a second pressure test should have been carried out. The applicants replied that they considered this was unnecessary. Factually, I have difficulty with the applicants' opinion. It was the evidence of Mr B. Tanner that he had never seen so much damage caused by a concretor preparing the slab and beams for the sub-structure as that which was caused by the respondent; therefore, I would have thought that it would have then been imperative for the applicants, as builders, to ensure that what they regarded as substandard work be checked and a second pressure test of the sub-slab pipe work was required to ensure such pipework was operational prior to the concrete pour. The applicants had already carried out a pressure test to ensure the satisfactory performance of the pipe services after the initial concretor had left the site, I would consider that a competent and prudent builder would consider that a second pressure test, on the completion of the respondent's work, was even more pressing given their opinion of the quality of the work. A pressure test immediately prior to the concrete pour would have shown whether Mr Morabito had reported any damage caused by him and that the plumber had rectified all damage so reported, also that Mr Savage had passed on all such notification

of damage from Mr Morabato to the plumber and ensured that the repair work was carried out. Therefore, I do not consider that the applicants have established that the damage found in the pipe services systems was the fault of the respondent. The respondent acknowledges that the damage in the ensuite area was caused by his work but it was not denied that he had reported this damage to the applicant supervisor and that rectification by the plumber should have been carried out.

- 33 If I have to select the likely source of damage for the sewer riser behind the retaining wall I would consider that the most likely source was the unconsolidated clay back-fill behind the retaining wall, which would not provide any support to the riser and that the Bobcat back-filling the retaining wall ran over the soil pipe close to the riser and the pressure from the machine caused the unsupported riser to fail at the top and the bottom. There was no evidence that the respondent's machinery was working in the immediate vicinity to the riser. Therefore, I consider that the applicants' action must fail.
- 34 If I am subsequently found to be wrong in this, I do not consider that the applicant is entitled to the damages in the sum that it seeks in any case. The applicants gave evidence that the work on the installation of the service pipes and the reinforced concrete sub-structure was carried out during very inclement conditions when the in situ soil was very muddy. They do not deny that they wanted the work to continue and the sub-structure to be constructed as soon as possible. They acknowledged that some damage would occur; however, it was the evidence of the applicants that the respondent had caused more damage than Mr B. Tanner had seen in 25 years of building. Having this information and knowing the cost of rectifying services that had been installed under a reinforced concrete slab and beam sub-structure, I consider that the applicants were under a duty to mitigate their damage and should have carried out another pressure test on the pipe services to ensure that they were operating satisfactorily prior to the concrete pour. As a very rough estimate I would consider that if the

damage had been found at this time the cost of carrying it out would be approximately one-tenth or less of the damages now being sought by the applicants.

E CONCLUSIONS

35 The applicant's application is dismissed.

36 The normal rule in the Tribunal is that each party bear their own costs; as the damages claimed is less than \$10,000 this is a small claim and it is unusual for the Tribunal to issue costs in small claims in the Domestic Building List. Therefore, I will make an order that there is to be no orders as to costs; subject to no party making a contrary submission in writing to the Tribunal with a copy to the other party within 21 days of the date of this determination. A party should note that if it makes an application for costs, which application will require a further hearing in this proceeding and the party fails in its application for costs, the costs of that subsequent hearing may well be in issue.

Senior Member R.J. Young

RJY:RB