

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP 1469/2018

### CATCHWORDS

*Domestic Building Contracts Act 1995*; implied warranties; whether the building works are defective; whether respondent builder liable for water damage; assessment of damages; whether the applicants entitled to costs.

|                         |   |
|-------------------------|---|
| <b>FIRST APPLICANT</b>  | Hayley Brivik   |
| <b>SECOND APPLICANT</b> | Hadley Bortz  |
| <b>RESPONDENT</b>       | Bernard Opat Pty Ltd  |
| <b>JOINED PARTY</b>     | Madeleine Neff  |
| <b>WHERE HELD</b>       | Melbourne   |
| <b>BEFORE</b>           | Member F Marks  |
| <b>HEARING TYPE</b>     | Hearing   |
| <b>DATE OF HEARING</b>  | 21 February 2019  |
| <b>DATE OF ORDER</b>    | 25 March 2019   |
| <b>CITATION</b>         | Brivik v Bernard Opat Pty Ltd (Building and Property) [2019] VCAT 397 |

### ORDERS

- 1 The respondent must pay the applicants \$6,776.
- 2 The respondent must reimburse the applicants, the application fee paid by the applicants of \$212.50.
- 3 The respondent must pay the applicants' costs of \$1,800.

### MEMBER F MARKS

#### APPEARANCES:

|                      |                            |
|----------------------|----------------------------|
| For the Applicants   | Ms H Brivik and Mr H Bortz |
| For the Respondent   | Mr Bernard Opat, director  |
| For the Joined Party | No appearance              |

## **REASONS**

### **INTRODUCTION**

- 1 The applicants (Owners) own a unit in a 3-story complex of units located in Hotham Street St Kilda (Complex). The respondent carries on business as a builder (Builder). In or about 2011 the Builder carried out building works on the units in the Complex which involved refurbishing the bathrooms.
- 2 In 2014 the Owners purchased their unit in the Complex. In December 2017 the Owners became aware of a leak in their bathroom. The Builder was notified immediately. Mr Opat, director of the Builder, inspected the Owners' shower in December 2017 and again in September 2018.

### **OWNERS' CLAIM**

- 3 The Owners claim that the Builder is liable for defective building work which has now been rectified. They claim damages of \$15,000 and costs.

### **BUILDER'S DEFENCE**

- 4 The Builder says the building works are not defective. It says:
  - (a) The units in the Complex have a history of leaking water caused by burst pipes;
  - (b) The Owners have failed to maintain the shower in their unit;
  - (c) The building works are over 7 years old and are not warrantable.

### **HEARING**

- 5 The Owners represented themselves at the hearing and gave evidence. The Owners called Mr Peter Mackie, building consultant, as an expert witness. Mr Opat, director of the Builder, represented the Builder and gave evidence.

### **MR MACKIE'S REPORT**

- 6 Mr Mackie prepared a report dated 4 May 2018 following his visual inspection, in April 2018, of the Owners' shower and other showers in the Complex. He was asked to investigate water leaking from the showers. Mr Mackie's report listed the items which he considered to be defective building work.
- 7 Mr Opat denied that the building work was defective. He disagreed with the observations and conclusions in Mr Mackie's report. He set out his response in an email dated 12 September 2018.
- 8 Mr Opat said the building works carried out in 2011 were cosmetic and not structural. They involved removing the tiles, fittings and fixtures, making good the plaster with solid render, installing a leak control flange on the

shower drain and applying 2 coats of waterproofing membrane and retiling. He said the Builder did not alter the existing floor. He said this showed that the building works were not defective.

- 9 At the start of the hearing Mr Opat said that the Builder installed a waterproof membrane in the Owners' shower in 2011 and it had not failed. At the end of the hearing, after Mr Mackie and Mr Opat had given evidence and been cross examined, Mr Opat conceded that the waterproof membrane could have failed.
- 10 Throughout the hearing Mr Opat continued to make the point that his plumber had not been allowed to carry out a pressure test which he said would have identified if there were a leak in a pipe in the Owners' unit. He did not explain, and I do not see how a pressure test could assist in identifying a leak from a shower base.

## **ARE THE FOLLOWING ITEMS DEFECTIVE?**

### **Tile spacer not removed before grouting**

- 11 Mr Mackie said the building work was defective because the tile spacer had not been removed to allow for complete grouting around the tile.
- 12 Mr Mackie referred to clause 5.7 (e) (Grouting) in AS 3958.1 – 2007 which states:

- (e) Finish grout to the depth of the cushion on cushion – edge tiles. All joints of square edge tiles should be flush with the surface of the tiles. Tool the top surface of the grout to provide a contoured depression no deeper than 1 mm for up to 6 mm wide joint, and to 2mm for a 6 to 10 mm wide joint.

NOTE: spaces may impair the performance of the system if left in place.

- 13 Mr Mackie considered that the failure to tool the top surface of the grout and remove the tile spacer, was a defect because the works did not comply with the Australian Standard.
- 14 Mr Opat said the tile spacer had been in place for 7 years and therefore was not warrantable. He said as a dispute about the building works had arisen 7 years after completion of the works, the Builder was not liable.
- 15 I reject Mr Opat's evidence. Section 134 of the *Building Act 1993* provides that a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work. Here, the occupancy permit was issued on 20 July 2011. The Owners filed their application with the Tribunal on 4 October 2018. I find that the Owners commenced their action against the Builder within the requisite timeframe set out in section 134 of the *Building Act*.
- 16 Mr Opat said that as grout was not waterproof, the real guarantee of waterproofing was the installation of the membrane. He agreed that the

membrane needed to work. He said the Builder had installed the membrane in the Owners' shower when renovating their bathroom and reiterated that the waterproofing had not failed.

- 17 I do not see how the fact that the Builder installed a waterproof membrane in 2011, in some way excuses it from failing to grout around the tiles in a proper and workmanlike manner.
- 18 I prefer Mr Mackie's evidence to Mr Opat's. I find this item to be non-compliant with AS 3958.1 – 2007. I find that this item is a defect because the tile spacer was not removed by the Builder at the relevant time resulting in the area around the tile spacer missing grout.

**No waterproofing located minimum 20 mm into shower riser**

- 19 Mr Mackie said that there was no waterproofing in the riser and this amounted to a defect. He used the term riser, to refer to the riser in the drain. Mr Mackie referred to clause 5.12 of AS 3740 – 2004 which states:

5.12 MEMBRANE TO DRAINAGE CONNECTION

5.12.1 Concrete Floors

For membrane drainage connections in concrete floors, any one of the following shall apply:

- (a) the drainage riser shall be trimmed to the floor level of the concrete substrate or screed with all internal burrs removed and the waterproofing membrane terminated a minimum of 20 mm into the riser.

- 20 Mr Mackie's evidence was that the Builder did not comply with the Australian standard.
- 21 Mr Opat denied this item was a defect. He said that the Builder had installed a leak control flange which, in his opinion, removed the need for waterproofing the drain to a minimum of 20mm as required by AS 3740 – 2004. He produced an invoice and an undated statement from his plumber Owen Thomas, who said he installed a leak control/puddle flange in the Owners' shower in 2011.
- 22 I accept that the Builder installed a leak control/puddle flange in the Owners' shower in 2011 as part of the renovation works. However, I do not see how the installation of a puddle flange excused the Builder from failing to install a waterproof membrane which terminated a minimum of 20 mm into the drainage riser. Mr Opat did not explain why the installation of a puddle flange exempted the Builder from liability.
- 23 I accept the evidence of Mr Mackie that the Builder did not comply with clause 5.12.1 (a) of AS 3740 – 2004. I find that although the Builder may have installed a leak control/puddle flange, its failure to install a waterproof membrane which terminated a minimum of 20 mm into the drainage riser, amounted to defective building work.

### **No sealant around shower floor to wall tiles**

24 Mr Mackie said that the failure to put sealant between the shower floor and the wall tiles was a defect. He said the sealant was required as part of the waterproof system. Mr Mackie referred to AS. 3740 – 2004 which states:

#### 1.5.25 Waterproof System

A combination of elements that is required to achieve a waterproof barrier as required by the Australian Standards.

- Substrate, membrane, bond breakers, sealants and finishes.

25 In or about September 2018, the Owners obtained a quotation from Strategic Tiling and subsequently engaged it to do the rectification work on their shower. The Owners produced Strategic Tiling's quotation dated 21 September 2018, and its invoice dated 15 October 2018.

26 Strategic Tiling's invoice stated that there were gaps around the bottom of the floor tiles because the walls were tiled before the floor and there were no silicone seals inside the shower joints. Strategic Tiling's list of defects and rectification works were consistent with Mr Mackie's evidence.

27 Mr Opat denied that the item was a defect. He said there was no requirement to silicone between the shower floor and the wall tiles because the Owners' shower was built from solid brick with a concrete floor.

28 Mr Opat said the Builder installed the wall tiles before the floor tiles and laid the new tiles on the existing floor. He said this would not have an impact if the waterproofing membrane was working. He reiterated that the required building work had been done. He later said that the Owners were required to maintain the silicone.

29 I prefer Mr Mackie's evidence to Mr Opat's evidence, which I found to be inconsistent and contradictory. First, Mr Opat said there was no requirement to silicone but did not explain why the Builder did not have to comply with the relevant Australian standard. Second, Mr Opat said that the silicone was to be maintained by the Owners and was not warrantable.

30 I find that this item of building work was defective because the Builder failed to put silicone between the shower floor and the wall tiles in the Owners' shower.

### **Water leaking from shower screen when flood tested**

31 In April 2018 Mr Mackie carried out a flood test when he inspected the Owners' shower. He did so by filling the shower base with water and letting the water sit for 15 minutes. He observed water coming out between the shower screen and the floor hob. He concluded that the Owners' shower leaked. In his opinion the waterproofing system was incorrectly installed.

32 Mr Mackie said that the Builder had failed to comply with AS 3740 – 2004. He referred to the following:

#### 4.3.1 Shower Floors

Falls in shower floors shall be sufficient to prevent water from ponding within the shower area and shall prevent water from discharging outside the shower area.

#### Appendix B

##### B 3 .5 .1 General

Waterproof barriers are required to prevent downward or sideways movement of water into adjoining construction or rooms.

##### 1.5.25 Waterproof System

A combination of elements that is required to achieve a waterproof barrier as required by the Australian standards

- substrate, membrane, bond breakers, sealants and finishes.

- 33 Mr Mackie said the fall in the shower floor needed to be sufficient to prevent water from pooling and discharging outside the shower area. He said, in this case, the water had discharged from the shower area because of the lack of fall in the shower floor. Strategic Tiling's quotation described the defective works as including the shower having been tiled incorrectly with no fall to the drain allowing water to pond.
- 34 Mr Opat denied that the building works were defective. First, he reiterated that the building works were cosmetic and not structural. He reiterated that the shower had been tiled correctly when the building works were carried out in 2011, with a fall in the floor tiles to the drain. Mr Opat did not provide any measurements of the fall. I fail to see how these facts address the issue in question. That is, whether a water leak, first discovered by the Owners in 2017, has been caused by the Builder's defective building work.
- 35 Second, Mr Opat denied that water was leaking from the Owners' shower. He said he did not see evidence of water egress when he inspected the Owners shower in December 2017 and September 2018. However, Mr Opat conceded that the Owners' video, taken in April 2018, showed water egression permeating between the tile and the aluminium strip in the shower. Mr Opat said that silicon and/or grout were not warrantable as these items were to be maintained by the Owners.
- 36 Again, I found Mr Opat's evidence to be inconsistent and contradictory. I have accepted that the Builder installed a puddle flange and a waterproof membrane. However, that is not to the point. Mr Opat's evidence did not directly address Mr Mackie's evidence that the shower leaked and that in his opinion, the leak was caused by defective building works. Even if I accept that Mr Opat did not observe a water leak coming from the Owners' shower at the time of his inspection, it is unclear as to what test he carried out at that time.
- 37 Mr Opat submitted that Mr Mackie's evidence should not be accepted because his inspection was only visual. I reject Mr Opat's submission. Mr

Mackie's evidence was that he did a flood test and after 15 minutes observed water leaking from the shower.

- 38 I accept Mr Mackie's evidence that the shower leaked following the flood test. I also accept Mr Mackie's evidence that a combination of elements was required to achieve a waterproof barrier and that, in this case, the waterproof barrier failed.
- 39 I find that the water leaked from the shower because of a failure in the waterproofing system. I find that the building work is defective.

### **Holes in the grouting**

- 40 Mr Mackie said that holes in the grouting amounted to a defect. He said that the grout had not been finished.
- 41 Mr Opat denied that holes in the grouting amounted to a defect. Mr Opat reiterated that the grout was to be maintained by the Owners and was not warrantable. He reiterated that the grout was not waterproof and that it should not have an impact provided the waterproof membrane was working. Again, I found Mr Opat's evidence to be inconsistent and contradictory.
- 42 I accept Mr Mackie's evidence that the grouting was to comply with clause 5.7 (e) of AS 3958.1 – 2007. I find the item to be a defect.

### **Grout below required finished height**

- 43 Mr Mackie said that this item was a defect. He referred again to AS 3958.1 – 2007 which sets out the required depth height of finished grout.
- 44 Mr Opat denied that the item was a defect. He said that the grout was to be maintained by the Owners and was not warrantable.
- 45 I prefer Mr Mackie's evidence to Mr Opat's. Mr Mackie observed the grout issues on inspecting the shower in April 2018. Again, Mr Opat did not to directly address the issue in question.

### **History of water leaks**

- 46 Most of Mr Opat's evidence centred around events relating to water leaks in other units in the Complex between 2014 and 2018. He said the plumbing in the Complex was 30 to 40 years old and that problems with water pipes in the concrete slabs and the walls were to be expected. He said he had been asked to do rectification work when the Builder was not liable for the water leaks.
- 47 Mr Opat referred to investigations of water leaks in the Complex carried out by Mr Bolt, an independent plumber, between 2016 and 2018. He said Mr Bolt concluded that the water leaks were caused by burst pipes. Although Mr Bolt referred to a leaking pipe, I did not find the emails supported Mr Opat's claims. Mr Opat submitted that because some of the historical claims had not been followed up by the Owners of units that this showed

that the leaks had been caused by burst or leaking pipes. Again, I found Mr Opat's claims to be without foundation.

- 48 Even if I were to assume that historically, the leaks were caused by burst or leaking pipes, those cases are irrelevant to my determination. Here, I must be satisfied on the evidence available to me, that the discharge of water from within the Owners' shower to outside the shower area, has been caused by the Builder's defective building works.
- 49 Mr Mackie said that he was not aware of whether there had been previous water leaks in the Complex caused by burst or leaking pipes. He said, if this were the case, it did not change his findings in relation to the Owners' leaking shower.
- 50 Mr Mackie was not aware whether the Builder installed a puddle/leak control flange and a membrane to the shower walls and floor. I do not find this to have any bearing on Mr Mackie's report or the evidence that he gave at the hearing.

### **Photographs**

- 51 Mr Mackie referred to various photographs in his report and to photographs taken by the Owners. He said the photos showed water damage to the walls of the Owners' unit resulting from water leaking from their shower.
- 52 Mr Opat produced hand drawn plans of the Owners' unit to support his contention that the water leaks were not caused by defective building work. I place no weight on these hand drawn plans as Mr Opat conceded at the hearing that they were not an accurate representation of the layout of the Owners' unit.
- 53 Mr Mackie agreed that the wall between the bathroom and the laundry appeared to have no evidence of water egression and there was no evidence of efflorescence on the walls, but he said that the walls showed signs of moisture. Throughout the hearing, and when cross examined, Mr Mackie maintained his opinion that the moisture which he observed in the Owners' unit related to water leaking from the shower base.
- 54 Mr Opat claimed that, if the membrane had failed in the shower, the water would travel along the mortar joint to the other side, behind the washing machine and dryer located in next room, but that here, there was no moisture behind the washing machine. Mr Mackie said the water tracks which he had observed running along a brick course would not be from a broken pipe. He said in his opinion the existing plumbing was not causing the water egression.
- 55 I prefer Mr Mackie's evidence to Mr Opat's. Mr Mackie is an independent building consultant who has worked in the building industry for many years. Mr Opat is a director of the respondent Builder and not independent.



### **Mr Stanilovic's report**

- 56 The Owners relied on an undated report from Mr Stanilovic of Restore (Mr Stanilovic's report), attached to an email dated 13 September 2018. Mr Stanilovic was not called to give evidence.
- 57 Mr Stanilovic's report set out the results of his investigations into the cause of the leak in the showers in a number of the units. The report was prepared in general terms and did not specifically refer to the Owners' unit. I have placed no weight on Mr Stanilovic's report because it does not refer directly to the Owners' shower.

### **FINDINGS**

- 58 I have accepted Mr Mackie's evidence and found that the items listed in his report on page 18, are items of defective building work. Having made these earlier findings, I have accepted Mr Mackie's evidence that water within the Owners' shower has discharged outside the shower area and that the defective building works have caused the shower to leak.
- 59 I find the Builder to be liable for the discharge of water from the Owners' shower. I find that the leaking shower has not been caused by items which are maintainable by the Owners.

### **DAMAGES**

- 60 The Owners claim damages of \$15,000. They include damages for:
- (a) Repair works to the Owners' shower carried out by Strategic Tiling as set out in its tax invoice dated 15 October 2018, of \$4,620;
  - (b) Repair works to the laundry wall, toilet wall and hallway of the Owners' unit arising from resultant water damage as set out in One Stop Trade quotation dated 7 November 2018, of \$2,156;
  - (c) Repair works to unit 11, which is located directly below the Owners' unit, which the Owners say has been damaged because of water leaking from the Owners' shower; and
  - (d) Mr Mackie's costs of \$550 for preparing his report for the Owners.
- 61 In a Directions Hearing on 28 November 2018 the Tribunal, on its own motion, joined Madeline Neff, the owner of unit 11, as a party to the proceeding. Ms Neff did not attend the hearing and was under no obligation to do so.
- 62 I explained to the Owners that I could not make any orders for damages relating to a claim that Ms Neff may have against the Owners for water damage arising from the Owners' leaking shower as no such claim was before me.
- 63 Strategic Tiling has carried out shower repair work and invoiced the Owners for \$4,620. I find that the Owners are entitled to damages of \$4,620 for that rectification work.

- 64 The Owners seek damages for the repairs to the walls in the laundry toilet and hallway which have been damaged by water leaking from their shower. They claim \$2,156. I find that the Owners are entitled to damages of \$2,156 for this repair work.
- 65 I find that Mr Mackie's report set out his observations and conclusions following his visual inspection of the Owners' unit and the other units in the Complex in April 2018. I find that Mr Mackie's report was required to document his findings following his visual inspection and that his costs comprise a part of the costs incurred by the Owners in filing their application in the Tribunal against the Builder.
- 66 I find that the Owners are entitled to damages of \$6,776.

### **COSTS**

- 67 At the end of the hearing the Owners requested that I make an order that the Builder pay their costs. They sought costs of \$550 for Mr Mackie's report and his costs of \$250 per hour for his attendance at the hearing.
- 68 Subject to Division 8 of Part 4 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act), the parties are to bear their own costs in the proceeding [s109 (1)]. However, the Tribunal may order that a party pay all or part of the costs of another party in a proceeding [s109 (2)]. The Tribunal may make such an order only if satisfied that it is fair to do so having regard to certain matters set out in s109 (3).
- 69 I am satisfied that in this case it is fair to make an order that the Builder pay the Owners' costs in this proceeding, having regard to the nature and complexity of the proceeding, the relevant strengths of the parties' cases and the following matters.
- 70 In my opinion the Owners' claim required expert evidence to enable the Tribunal to determine whether the leak in the Owners' shower was caused by the Builder's defective building works. It required an expert to inspect the Owners' shower, prepare a report and attend the hearing to give evidence. Mr Mackie attended the hearing for the better part of the day. He gave evidence based on his report and his visual inspection of the Owners' shower in April 2018. He was cross examined at length by Mr Opat about specific building issues.
- 71 Mr Opat set out his short response to Mr Mackie's report in an email dated 12 September 2018. Mr Opat did not rely on independent expert evidence. Mr Mackie was required to spend additional time at the hearing while Mr Opat gave his evidence so that he could ask Mr Opat relevant questions arising from Mr Opat's evidence.
- 72 Further, of significance is the fact that the hearing was delayed in the afternoon as Mr Opat was required to appear for the Builder in another proceeding listed for hearing at the Tribunal at 2.15pm on the same day.

- 73 Mr Opat failed to notify me of the other hearing. Consequently, I was required to stand the matter down to allow Mr Opat to appear at the other hearing at 2.15 pm to seek an adjournment. The hearing of this matter recommenced following an adjournment of the other proceeding.
- 74 I found Mr Opat's conduct to be disrespectful to the Tribunal and inconsiderate to Mr Mackie and the applicants. As a result, Mr Mackie was required to remain at the hearing well beyond the expected time required for him to give expert evidence and question Mr Opat.
- 75 I therefore consider it appropriate to order the Builder to pay the Owners' costs of \$550 for Mr Mackie's report and \$1,250 towards Mr Mackie's costs of appearing at the hearing.

### **ORDERS**

- 76 Having found for the Owners, the orders that I will make are:
1. The respondent must pay the applicants \$6,776.
  2. The respondent must reimburse the applicants, the application fee paid by the applicants of \$212.50.
  3. The respondent must pay the applicants' costs of \$1,800.

### **MEMBER F MARKS**