VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D291/2005**

CATCHWORDS

Domestic building – defective product – burden of proof.

APPLICANTS:	Aniceto Co Hee, Luisa Co Hee
FIRST RESPONDENT:	Spanline Australia
SECOND RESPONDENT:	Spanline Home Additions Pty Ltd t/as Spanline Home Additions Melbourne Westside
WHERE HELD:	Melbourne
BEFORE:	Senior Member D Cremean
HEARING TYPE:	Small Claim Hearing
DATE OF HEARING:	9 September 2005
DATE OF ORDER:	15 September 2005
MEDIUM NEUTRAL CITATION:	[2005] VCAT 1982

ORDERS

1. I order on the claim for the Applicants in the sum of $9,481.82. Stay of one month.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For the Applicants:	In person
For the First Respondent:	Mr Anthony Jay Way
For the Second Respondent:	Mr Anthony Jay Way

REASONS

1. This hearing is the continuation of the undefended hearing on 12 August 2005. However, so as to prevent any injustice to the Respondents (which were represented on this occasion by a director), I commenced the hearing again. I had formed no definitive views on the previous occasion, I should add.

2. I accept and find on the evidence that there are holes in the window frames supplied on behalf of the Respondents by "Hoppers Crossing Glass" and installed at the Applicants' premises.

3. I accept the evidence of both Applicants that they did not drill such holes. Each was cross examined. I found them to be truthful and honest. They had, I accept, personal and direct knowledge of the conditions at their premises. I could see no reason why either of them would have drilled the holes.

4. The Respondents denied any responsibility for the holes. Evidence, however, was only given by Mr Way. He called no other evidence. In particular, he called no evidence from "Hoppers Crossing Glass". He had not previously sought to make "Hoppers Crossing Glass" a party. This surprised me, in both respects, because Mr Way did not impress me as unresourceful. Further, he did not have any direct personal knowledge of the Applicants' premises. He was left only to speculate. He said that "no one" could have had any reason to drill the holes. But that, at the same time, could extend to the Applicants as well, in my view.

5. In any event, I consider I may draw inferences favourable to the Applicants from the Respondents' failure to call any evidence from "Hoppers Crossing Glass"; or to explain properly, why no such evidence was sought to be called. It is not for the Tribunal to advise a party before a hearing about the evidence to call. The Respondents could always have sought independent legal advice. Evidently, however, they chose not to do so and have relied upon the expertise and knowledge of Mr Way.

6. Nothing in the submissions of the Respondents persuades me I should not find in favour of the Applicants. Mr Way's evidence, in all the circumstances, did not satisfy me that the case is one which should be dismissed as not having been made out on the balance of probabilities.

7. I order for the Applicants.

8. Informing myself as I may under s98 of the *Victorian Civil and Administrative Tribunal Act* 1998, I rely upon the lower of the quotes as the cost of repairs or rectification, and I order in their favour in the sum of $9,181.82. I allow them $300.00 as excess in respect of the flooring. The total is $9,481.82.

9. I order in favour of the Applicants in the sum of $9,481.82 with a stay of one month.

SENIOR MEMBER D CREMEAN