

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP798/2014

CATCHWORDS

Domestic building dispute; defective tiling works; conflicting expert evidence as to the cause and the appropriate method of rectification; failure of an expert's report to comply with Practice Note VCATPN 2: Expert Evidence and expert retained by a party acting as an advocate for that party

APPLICANT	Lisa Dwell (nee Bzovy)
RESPONDENT	Nava Homes Pty Ltd (ACN 050 194 879)
WHERE HELD	Melbourne
BEFORE	Member B Thomas
HEARING TYPE	Hearing
DATE OF HEARING	4 March 2015
DATE OF ORDER	29 April 2015
DATE OF WRITTEN REASONS	29 April 2015
CITATION	Dwell v Nava Homes Pty Ltd (Building and Property) [2015] VCAT 660

ORDERS

1. I direct the Principal Registrar to amend the record to correctly identify the Applicant as Lisa Dwell (nee Bzovy).
2. The Respondent must pay the Applicant the sum of \$12,991.00 forthwith.

MEMBER B THOMAS

APPEARANCES:

For Applicant

Lisa Dwell

For Respondent

Leo Nada, Manager

WRITTEN REASONS

1. In 2009 Mrs Dwell (“the Owner”) entered into a contract with Nava Homes Pty Ltd (“the Builder”) for the construction of a new home in Williamstown.
2. The construction of the home included the supply and laying of approximately 100 square metres of internal ceramic tiling. The Owner contends the laying of the tiling is defective and claims \$16,469.50 for its removal and replacement.
3. Mrs Dwell called, as her expert witness, Mr David Graham, the Director of Ceramic Tile Systems Pty Ltd. Mr Lada, the Manager of NAVA Homes Pty Ltd, appeared on behalf of the Respondent and called Mr Darren Love, the Director of Darbecca Pty Ltd, Building Consultants and Quality Inspectors, as its expert.

The Issues

4. There are two issues to be determined:
 - (a) Was the installation of the tiling defective or non-compliant with the relevant Australian Standard and/or the 2007 Building Commission Guide to Standards and Tolerances?
 - (b) If so, what is the appropriate method and reasonable cost of rectification?

Background

5. The tiling is approximately 100 square metres in area and comprises the front entry, hallway, kitchen, meals, family room, study, side passage, bathroom, laundry and toilet areas. The tiles are 600 x 300 mm in size, imported from Indonesia, fawn/brown in colour, fully glazed, cushion edged and rectified.
6. The tiling was laid as a stack bond pattern using approximately 2.5 mm to 3.00 mm width grout joints straight and true in both directions.

Was the installation of the tiles defective or non-compliant?

7. Mr Graham inspected the tiling on 19 July 2014 and provided a report to Mr and Mrs Dwell dated 28 July 2014 in which he opines that:
 - The surface of the tiling exhibits random cracking and there are drummy tiles indicating that they have de-bonded;
 - Australian Standard (‘AS’)3958.1 Part : 2007 (Guide to installation of ceramic tiles) requires movement joints to be installed in any tiling dimension in excess of 9 metres in area;
 - No intermediate movement joints had been installed in an approximately 21 lineal metre dimension;

- AS 3958.1 clause 5.6.4.5 requires that all perimeter joints should be filled with flexible sealant to cater for building movement;
 - No tiling joints up to walls had been installed and fixed elements had been filled using hard field type grout material;
 - The tile adhesive used is a cement based product without any determinable flexibility;
 - AS 3958 requires a minimum contact between the tile and the laying bed of 80% and a minimum bed thickness of 3 mm;
 - The adhesive product used had only achieved an approximate 50% contact with the tile backs with an approximate reduced bed thickness of 2 mm;
 - The tiling system is under stress and is likely to worsen as further thermal conditions occur, such as concrete shrinkage which occurs continuously for approximately 24 months after placement; and
 - Drying cracks in the concrete slab surface can create transfer cracks in the tiles.
8. In cross-examination, Mr Graham stated that he had inspected one tile produced by Mrs Dwell, which had been removed before laying of the tiles had been completed, because the tile was cracked. Inspection of the underside of the tile showed that the adhesive had not been applied correctly resulting in de-bonding and cracking of that tile and 19 other tiles.
9. He considered that adhesive had not been adequately applied to other cracked tiles.
10. He referred to the 2007 Building Commission's Guide to Standard and Tolerances which states that:
- Tiles are defective if they are cracked, pitted, chipped, scratched, loose or drummy on completion.*
11. At the commencement of the hearing, Mr Lada produced a report by Mr Love, which was undated but was said to comprise:
- First Response 30/10/2014 – Second Response after Inspection 03/02/2015.*
12. Although Mr Love's report is signed and dated 29 October 2014, no explanation was given by for the failure to file and serve the report not less than 10 days before the commencement of the hearing in accordance with paragraph 24 of Practice Note PNVCAT 2: Expert Evidence (the Practice Note).
13. Although the report claims to comply with the Practice Note, clearly it does not comply with paragraphs 8 (*An expert has a paramount duty to the Tribunal and not to the party retaining the expert*), 9 (*An expert*

witness has an overriding duty to assist the Tribunal on matter relevant to the expert's expertise), 10 (An expert is not an advocate for a party to a proceeding) 11(What must be included in the report of an expert witness), 16 (The format of an expert witness report), and 24 (When must an expert witness report be filed and served).

14. In his report and oral evidence to the Tribunal, Mr Love clearly subverted his duty to assist the Tribunal in favour of being simply an advocate for Nova Homes Pty Ltd. The report is dated 28 October 2014, contains photographs that do not have any accompanying explanatory notes and was not filed with the Tribunal until the day of the hearing or served on Mrs Diwel at all. Addendum A to the report was headed *Rectification Cost Estimate*, the value of which was shown as \$0.00.

15. Not only was Mr Love's response to Mr Graham's report initially prepared before he himself had inspected the tiling, his response to paragraphs 28-41 was simply an attack on Mr Graham's credibility. For example -

28. *The CTS report writer has made assumptions that are not within his area of expertise. I have read through Mr Graham's resume and found no formal qualifications that he has any conference to make these statements other than personal opinion. (sic) He is not noted as an engineer in either structural or thermal and his opinions are not fact. Mr Graham has taken a position of foretelling some future event that has not at this point occurred.*

Mr Graham's alarmist approach to suggest Critical failure may well cause the home owners to seek a costly legal assistance as they have taken Mr Grahams word for the near pending disaster that he would suggest is about to happen.

I caution all parties to seek qualified professional opinions that are based on solid engineering facts, rather than gut feel and pending gloom. [sic]

16. Mr Love states that –

- The first area of the house he inspected was the garage;
- There were 3 areas of cracking in the floor of the garage within the tolerances of AS 2870 (Slab and footings);
- There was no evidence of slab heave or slab failure in a thermal sense as suggested by Mr Graham;
- There are a number of cracked tiles in the kitchen area;
- The majority of tiles were firmly secured with no drummy sound other than one tile in the hallway;

- In his opinion the chipped tiles have been the subject of “impact loads” - *the dropping of a pot or the like onto the tile;*
- *The tiling has been installed to the minimum set out in the Australian Standards;*
- *the warranty on tiling is clearly published as being 24 months from installation;* and
- The performance requirements of AS 3958 have been met.

17. In his oral evidence Mr Love stated that:

- There is approximately 105 square metres of tiling;
- He tapped approximately 40% of the tiles for drumminess;
- 80% adhesion to a 400 x 400 mm tile would be considered acceptable;
- The adhesion of the tiles was within the tolerances set out in the Building Commission Guide to Standards and Tolerances 2007;
- Most builders do not install expansion joints in tiling, although they should; and
- He was told by Mrs Dwell that the damage to the tiles as depicted in his photographs 16 and 17 was caused by impact damage

18. In response to Mr Love’s report and evidence, Mr Graham stated in evidence that:

- AS 3958.1 Clause 5.4.5.2 calls for the installation of control joints; it simply states where they should not occur depending on the type of traffic;
- There is no reference in Clause 5.4.5.2 to residential, commercial or industrial tiling environments;
- The only distinction between those environments is with regard to the appropriate type of adhesive to be used;
- As tiles get larger, more movement joints should be installed;
- A 600 x 300 mm tile is a large tile;
- AS 3958.1 Clause 5.4.7 does not state that 80% bonding to the substrate is acceptable and is referring to individual tiles, not the total tiled area.
- If a tile is pressed into the adhesive without back butting, only partial adhesion will be achieved;
- A crack across a corner or only part of a tile indicates insufficient adhesive support;

- Clause 5.6.2 states that thin-bed fixing using the notched trowel method should be used for internal tiling applications where dry conditions prevail. No other method is suggested ;
- If more than 50% of a tile sounds drummy to tapping, the whole tile is drummy;
- The first sign of a critical failure is the edge tiles being cracked or drummy which indicates an insufficient gap between the edge of the tile and the timber skirting which causes the tile to crack regardless of whether it is drummy; and
- What may appear to be impact damage to a tile may be caused by insufficient adhesive supporting the tile.

Discussion

19. Mr Graham's report is detailed in its observations and comments and the supporting photographs clearly demonstrate the condition of the defective tiles. His Discussion addresses the cracking, lack of movement joints and de-bonded, drummy and loose tiles by reference to the relevant Australian Standard and the Guide to Standards and Tolerances.
20. Mr Love's opinion and conclusions are in direct contradiction to those of Mr Graham. For reasons that are not apparent, Mr Love commenced his inspection with the garage floor where he noted three areas of cracking all of which were less than 1 mm in width. However, he did not explain the relevance of AS 2870 (Slab and footings) to AS 3958.1(Guide to installation of ceramic tiles).
21. Without identifying particular paragraphs in Mr Graham's report, Mr Love claims that Mr Graham has *made several comments in relation to concrete shrinkage and the like*. He opines that *Given my experience with Slab Heave and slab failure ... the slab to this particular dwelling is performing as intended*.
22. Mr Love noted that *the majority of the cracked tiles are firmly secure with no Drummy sound other than one tile in the main hallway* and opines that *after viewing the chips that are on the floor, the floor has been the subject of what I consider to be impact loads, the result of the dropping of a pot or the like onto the tile*.
23. Included in Mr Love's report are a number of photographs. However, no explanation accompanied any of the photographs and it was not possible to comprehend how they supported his opinion.
24. The balance of Mr Love's report simply amounted to simply an attack on Mr Graham's qualifications and credibility, which demonstrated on Mr Love's part, a misunderstanding of his obligations as an expert under Practice Note PNVCAT 2: Expert Evidence.
25. Therefore, I do not accept the opinions and conclusions of Mr Love.

What rectifications works are necessary and reasonable?

The owner claims that all the tiles need to be removed and replaced.

26. Mr Graham considers that:

- As the number of cracked/drummy tiles constitute approximately 12.5% of the total number of tiles, replacement of individual tiles is not an option;
- It is most unlikely that replacement tiles of a similar size and colour could be sourced;
- As there are de-bonding concerns, the existing tiles surface could not be tiled over in order to obtain a durable floor surface; and
- The only suitable rectification method is to remove all the existing tiles, adhesive and substrate, prepare a new substrate and lay new tiling.

27. Mr Love considers that if it is found that any rectification is warranted, it should simply be replacement of tiles in the main hallway, the kitchen and dining room with a tile of a similar colour. However, despite referring to costing methods in his report, he has not provided any estimate of the cost to carry out this work.

28. In support of her claim, Mrs Dwell has provided:

- a quotation from All Stripped Aust Pty Ltd dated 10 November 2014 for the removal only of the tiles, adhesive and substrate for \$3998.50; and
- a quotation from Amazing Tiling Victoria Pty Ltd dated 3 September 2014 for the total rectification works including removal and replacement of the existing tiles for \$9691.00.

29. Amazing Tiling Victoria Pty Ltd estimate that the works will take 7-10 days. It will therefore be necessary for Mrs Dwell to find alternative accommodation for her family whilst the works are being carried out. In addition therefore, Mrs Dwell has provided two quotations for alternative accommodation from Quest Serviced Apartments for 7 and 10 days for \$2310.00 and \$3,300.00 respectively.

The expert evidence

30. The outcome of this proceeding is determined by the evidence of the respective experts called by each party.

31. I prefer the evidence of Mr Graham to that of Mr Love for the following reasons:

- Mr Graham has had 48 years' experience in the tiling industry, 30 of which were in the employ of a major tiling company and subsequently as a private consultant to the tiling industry;

- Although he does not have any formal academic qualifications, he has accreditation under AS/ISO 9001 (Quality Management Systems) achieved in 1987, and upgraded in 1994;
- He has held a number of senior positions in the tile and stone, and construction industries and I find that he is qualified to offer an opinion on the quality of the tiling works.
- Before compiling his report, Mr Graham inspected the tiling at the subject property;
- His report complies with Practice Note PNVCAT 2: Expert Evidence;
- His report and evidence demonstrates a detailed knowledge of the causes of defective tiling works.

32. On the other hand Mr Love:

- Has academic qualifications in building surveying only;
- Claims to be qualified to teach Australian Standard 3958.1 – Tile Installation, but his report does not identify the institution from where he has obtained this qualification;
- Has no qualifications as an engineer although I note that he criticises Mr Graham for a similar lack of engineering qualifications;
- Has practical experience as a carpenter, an owner-builder and a site manager on residential and commercial projects;
- Does not have specific experience in the practical aspects of tiling;
- Responded to Mr Graham’s report before he inspected the tiling; and
- In his report in reply to Mr Graham’s report, failed to adequately respond to Mr Graham’s opinion as to the causes of the defective tiling works.

33. I therefore have not had any regard Mr Love’s report and evidence..

Discussion

34. I accept Mr Graham’s evidence that:

- replacement of the cracked or drummy tiles is not an option as it is more than three years since the tiles were laid, there almost no possibility of locating replacement tiles of a similar size and colour; and
- the complete tiling system is under stress and will continue to worsen when thermal variation conditions occur, resulting in

further de-bonding and loosening of tiles and mass “pop up/tenting” of tiles.

35. In the absence of any evidence from the builder to the contrary, I accept the quotation of Amazing Tiling Victoria Pty Ltd is a reasonable cost for carrying out the rectification work.
36. I accept that the rectification works will take 7 – 10 days to complete and that it will be necessary for Mrs Dwell and her family to vacate the house whilst those works are being carried.
37. I therefore accept the Quest Apartments quotation for 10 days at \$3,300.00.

Findings

38. The tiling works carried out by the Respondent are defective and/or non-compliant.
39. The works do not comply with AS 3956.1 – 2007 or the Guide to Standard and Tolerances 2007 and good tiling practice.
40. The reasonable cost of rectification of the works is \$12,991.00.

MEMBER B THOMAS