

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP 489/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Breach of implied warranties; Australian Consumer Law and Fair Trading Act 2012; floor works; measure of damages.

APPLICANT	Esquiline Pty Ltd (ACN 060 335 784)
RESPONDENT	Mr Mevludin Voloder
WHERE HELD	Melbourne
BEFORE	Member H. Davies
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	21 January 2015
DATE OF ORDER	12 February 2015
CITATION	Esquiline Pty Ltd v Voloder (Building and Property) [2015] VCAT 135

ORDERS

- 1 The respondent must pay to the applicant \$4,171.20, the Tribunal filing fee of \$158.90, a total of \$4,330.10.
- 2 No other order as to costs.
- 3 All other claims are dismissed.

MEMBER H. DAVIES

APPEARANCES:

For the Applicant	Mr Capuana - Director
For the Respondent	Mr M. Voloder in person

REASONS

- 1 This application was heard on 21 January 2015 when the Tribunal reserved its decision to deliver written reasons, at the same time requiring the applicant to file documents to substantiate the claim for compensation.
- 2 The applicant was represented by Mr Capuana, its director. The respondent appeared in person. Both gave sworn evidence. There were no other witnesses.
- 3 Subsequent to the hearing the applicant, by correspondence and documents received 2 February 2015, complied with the requirement of paragraph 1 above.
- 4 The applicant claims is for \$7873.20 calculated as follows

\$2,675.00	legal costs
\$1,027.00	fee for expert's report
\$4,171.20	damages paid to Ms. Baldassarre ("the owner") the owner of premises situate at 4A Balfour Street Doncaster ("the premises") where, on behalf of the applicant as builder, the respondent, as subcontractor, carried out floor sanding and coating works ("the works") in September 2013.
- 5 The owner claimed that the works were not of an acceptable standard. The sum of \$4,171.20 is the cost the owner paid to a third party to have the floor at the premises re-sanded and re-coated to rectify what she claimed were defects in the works ("the rectification works"). The applicant has paid that amount to the owner and seeks to recover it from the respondent.
- 6 In addition to the oral evidence at the hearing, the following documents were put in evidence:-
 - A report from Mr. Stringer of Australian Timber Flooring Association ("ATFA") filed on behalf of the applicant;
 - A report from Mr Scarpella of LOBA filed on behalf of the respondent; (Mr Stringer had inspected the works, Mr Scarpella had not.);
 - A folder of photographs of the works taken by Mr Capuana; and
 - A series of photographs taken by Mr Voloder, the respondent, and shown to the Tribunal from his mobile telephone.
- 7 The documents filed by the applicant on 2 February 2015 satisfy the Tribunal that the applicant has suffered loss and damage because of the works.
- 8 From the evidence, the Tribunal further finds that:-
 1. The applicant engaged the respondent to carry out the works at about the same time as the respondent was to perform other works for the

applicant at premises the applicant was building adjoining the premises.

2. Because of the type of timber floor at the premises, the respondent recommended that the floor, when sanded, be coated with a water based 2Pack finish matt satin finish coating (“the recommendation”). The owner did not accept the recommendation because of what would have been the resultant appearance of the floor and, despite the respondents strong recommendations to the contrary, in conjunction with the application, instructed the respondent to use a high gloss coating.
3. The recommendation was made because of the oily nature of the flooring materials and the respondent’s view that the flooring would reject the coating insisted upon.
4. The works were carried out and the applicant paid the respondent \$6,490.00 without complaint, according to the respondent on about 18 September 2013, although Mr Capuana did not agree that he had inspected the works prior to making payment. The evidence left the Tribunal unclear as to what had occurred in this regard.
5. Some weeks later, the owner complained about the state of the works, alleging that the floor had not been properly sanded. Mr Capuana agreed that this complaint was justified.
6. The respondent inspected the works, did not accept that they were in any way defective and, albeit in a negotiation with applicant he agreed to do some further works, refused to re-sand and re-coat the floor as the owner required.
7. The respondent stated in evidence that, at the time of his inspection, the floor at the premises had been damaged by the owner, a claim the applicant did not deny. He also stated that the floor had not been maintained as required and as he had recommended when the works were finished.
8. More significantly, the respondent claimed that, although there were some sanding marks and chatter marks visible below the coated surface, these would not have been visible, and therefore not a significant defect, if the floor had been coated in accordance with the recommendation and his maintenance instructions given to the owner when the works were completed.
9. In his report, Mr. Stringer stated that:

The floor exhibits a high level of chatter and sanding marks making it look uneven in appearance. As such it is considered to be in need of remedial work.

Due to the colour being different and the floor having a large amount of chatter marks it is considered that the only option now is to fully re-sand the floor. It will be important that the tradesperson charged with

the re-sanding spend adequate time cross sanding the floor on a slight angle to remove the chatter. If the floor is re-sanded following the same sanding path as last time then it will not remove the chatter. Once the sanding has been done then the exact same coating system used at the Tait Timbers showroom should be used here to given an appearance that should be more similar to the sample.

10. Mr Capuana, an experienced builder, agreed with Mr Stringer's opinions and conclusions.

11. The report of Mr Scarpella stated:

Lower sheen finishes may not appear to discolour but they will appear to get "flatter" or more opaque as the timber surface darkens. This is part of why we recommend window furnishings for protection and longevity of the floor appearance.

These comments were general in nature, limited to being a response to what the respondent had told Mr Scarpella as to the issues, and did not address the specific complaints made by owner or the opinions of Mr Capuana or Mr Stringer. Mr Scarpella had not inspected the works nor had he seen Mr Stringer's report.

Mr Scarpella's remarks related to types of coatings and maintenance procedures but not to the alleged defects in particular (sanding marks and chatter) and, although he did comment about how a floor might appear if not correctly coated or maintained, his comments were not in the context of nor did they address the specific issues upon which the Tribunal is to decide.

12. The respondent was adamant in his defence of his workmanship despite the views of the owner, Mr Capuana and Mr Stringer.

13. The respondent's claim was that, because the recommendation had been rejected and the floor not maintained in accordance with the advice he gave, sanding and capping problems, if any, were exaggerated in appearance in a way that would not have been so if his advice had been followed. He also claimed that the floor surface had been damaged by the owner after being coated by him.

14. The photographs presented by the respondent did little to assist the Tribunal as they were not taken close up and were quite small, being on a mobile telephone.

15. The applicant's photographs were taken as close ups and at a distance and in the view of the Tribunal clearly displayed sanding marks and chatter marks.

16. Mr Capuana stated that, despite the respondent's contentions, he had never, as builder, come across a sealing or floor maintenance program that would in effect hide the type of defect of which the owner

complained and that the recommendation, if adopted, would not have addressed this issue.

17. Whatever view the Tribunal might take of the respondent's claims about the advice he gave, the respondent did not deny that the sanding marks and capping were present or that he had caused them.
18. The Tribunal concludes, from the weight of the evidence, having regard to the independence of Mr Stringer, the applicant's photographs and the evidence of the applicant, that it is more likely than not that the works were not carried out to an acceptable standard initially and that the owner was justified in having the rectification works carried out.
19. The only evidence that a different coating would have in effect have hidden or disguised the sanding marks and the chatter is that the respondent; the weight of all of the evidence persuades the Tribunal otherwise. Despite the respondent's contention that proper floor maintenance also would have improved the appearance of the floor, there was persuasive evidence that the floor had not been properly maintained.
20. The applicant, in paying the owner the cost of the rectification works has acted reasonably and done all required to mitigate its damages. There was no evidence to suggest that the cost of the rectification works was not fair and reasonable.
21. There was no evidence to suggest that the damage the owner caused to the floor, being surface scratches and some indentations, in any way added to the cost of the rectification works, which included re-sanding the floor.
22. The additional claims made by the applicant are not allowed because they are in the nature of costs. This application, in the view of the Tribunal is not one to which the circumstances in Section 109 (3) of the *Victorian Civil and Administrative Tribunal Act 1998* apply; therefore the normal rule, as set out in Section 109(1) of that Act, ought apply and, except in relation to the filing fee on the application, as Section 115B of the Act allows and provides, each party is to bear its own costs of the application.

MEMBER H. DAVIES

12 February 2015