

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP685/2019

CATCHWORDS

Whether concreting services were of an acceptable standard; Australian Consumer Law and Fair-Trading Act 2012 (“FTA”); means and costs of rectification.

APPLICANT	Joshua Gattellaro
RESPONDENT	Gauci Bros Pty Ltd (ACN 125 606 322)
WHERE HELD	Melbourne
BEFORE	Hugh T. Davies, Member
HEARING TYPE	Hearing & onsite inspection
DATE OF HEARINGS	12 November and 6 December 2019
DATE OF ORDER	9 January 2020
CITATION	Gattellaro v Gauci Bros Pty Ltd (Building and Property [2020] VCAT 36

ORDERS

1. The respondent must pay to the applicant \$5800.00.
2. The respondent must reimburse to the applicant the Tribunal filing fee of \$212.50.

Hugh T. Davies
Member

APPEARANCES:

For the Applicant	In person
For the Respondent	In person

REASONS FOR DECISION

The undisputed background to the claim

- 1 In 2018 the respondent agreed to carry out approximately 100^m² of concreting works (“**the works**”) for the applicant at northern, southern and eastern sides of the applicant’s home at 3 Shearer Way Aintree Victoria (“**the premises**”) for the agreed price of \$6000.00.
- 2 The respondent also agreed to carry out other works at the front of the premises; these additional works were only partly completed when the applicant brought the overall agreement to an end because of his dissatisfaction with the respondent’s performance of the works themselves.

The claim

- 3 The applicant seeks compensation as follows: -

Cost of removal of defective concreting and drains which constitute the works \$5665.00.

Refund of the cost of the works as paid to the respondent on the basis that the cost of rectification will exceed what had been paid to the respondent. \$6000.00.

- 4 To support this, claim the applicant relied upon the following quotations:-

L & K Earthworks – removal of existing concrete being the works \$5665.00.

Conclicious Constructions Aust Pty. Ltd - rectification of the works \$12012.00.

- 5 The respondent did not adduce any independent reports, call other witnesses or adduce any evidence as to the cost of rectification of any part of the works; he did produce two (2) invoices for the removal of the existing concrete from

Ricki Spiteri \$2860.00. and

Charlie Farrugia \$3025.00.

- 6 At an onsite inspection, the applicant reluctantly conceded that the Tribunal should reduce any award of compensation by \$2300.00. to take account of the value of the works partly performed by the respondent at the front of the premises.

The hearings

- 7 Initially evidence was taken from the parties on 12 November 2019 when the matter was adjourned for an onsite inspection which took place on 6 December 2019 attended by the parties and Mr McDonald, a building consultant the applicant engaged to report on the quality of the works.
- 8 A report from Mr McDonald was in evidence at the initial hearing.
- 9 There were no other witnesses.
- 10 On 6 December 2019, I reserved my decision for the delivery of written reasons, giving the parties until 20 December 2019 to file and serve any additional quotations for the cost of rectification of the works.
- 11 No additional material was filed; this was unfortunate because the applicant was given the opportunity to file an additional quotation to assist the Tribunal in determining the cost of removal and rectification of various parts of the works in case it concluded that not all of the works were required to be remove and reinstated.

Mr McDonald's report and further evidence.

- 12 This report constituted the basis of the applicant's claim.
- 13 Mr. McDonald estimated the cost of the removal of all of the concrete at not less than \$3500.00. but did not report or comment on other rectification costs. In some instances, he did not recommend how the defects could or should be rectified.
- 14 In summary he concluded as follows: -
- 15 The paving at the southern end of the premises ("**the path**") was defective in that, as required
- a. it did not drain away to the south from the house
 - b. the concrete was not consistently 100mm in thickness
 - c. the reinforcing mesh was not properly laid
 - d. the control joints had not been installed correctly, and
 - e. the finished concrete surface was not less than 75mm below the damp proof courses in the southern adjoining wall of the house.
- 16 At the onsite inspection he was not able to demonstrate conclusively what was the overall thickness of the paving or that the reinforcing issue was consistent throughout the path; nonetheless his view was that, in any event, the overall condition of the path was such that it could only be rectified by being removed and replaced.
- 17 He said that the drainage at the rear of the garage ("**the northern drainage**") was defective because it had not been installed straight so that it sagged and held excess water therefore was not draining properly into the stormwater drain.

- 18 At the onsite inspection he concluded that the issue could only be resolved by the replacement of the drain which would involve the removal of an extended area of paving, although he did not state that all the paving extending to the east of that drain necessarily required removal.
- 19 He stated that the paving to the east of the house and adjoining wall and the alfresco area (**“the rear paving”**) was dipping up to 10mm within the middle area.
- 20 He concluded that at least part of this paving had to be removed and replaced.
- 21 In addition, he stated that:
 - a. some of the paving was poorly finished, and
 - b. some control joints to the east of the northern drain were not correctly cut, **(“the incidental works”)**.
- 22 The applicant basically relied upon Mr Donald’s report and added concerns that, if only part of the concrete was removed from the rear paving and the area surrounding the northern drainage, there might be problems in matching old with new.

The respondent’s reply

- 23 The respondent denied that the path was defective. He claimed that, because there was no drainage at the boundary of the premises adjacent to that path, he had to improvise with levels to provide for drainage within the boundaries of the path which, in his opinion, drained effectively.
- 24 He denied that the concrete was not 100mm thick or that the reinforcing was not installed on accordance with required standards. The respondent did not suggest a solution to the problem but rather denied there was serious issue.
- 25 He conceded that there was an issue with the northern drainage where the paved surface did not drain effectively and stated that he had previously agreed to rectify the problem.
- 26 He also conceded that there was a problem with the water not draining effectively from the rear paving but had little to say as to how that issue might be addressed or at what cost. He contended that the problem could be addressed by removing and replacing part of that paving.
- 27 He had little to say as to the incidental items of work.

Observations at the onsite inspection

- 28 The defects of which the applicant complains had not been rectified.
- 29 The matters observed supported overall Mr McDonald’s view as to the state of the works.

- 30 The respondent made open admissions as to defects in the northern drain, the rear paving and some of the incidental works.

The issues for the Tribunal to determine

- 31 Do the works amount to the supply of services in trade or commerce?
32 To what extent, if any, are the works defective?
33 If the works are defective, is it necessary to remove them and have them reinstated or can any defects be remedied by partial repair?
34 What is the reasonable cost of rectifying any defects?
35 Whether the respondent has breached a duty owed to the applicant under FTA.¹

Findings as to fact

- 36 There is no room for doubt from the evidence that the works are by and large defective to the extent Mr McDonald concluded; his opinions are challenged only by the respondent's verbal evidence which itself contained a number of admissions.
37 It was unwise for the respondent to install the path in the way he did because of the circumstances he faced; this gave him a very difficult task and one he did not carry out effectively.
38 There was not enough evidence to satisfy the Tribunal that the thickness of the concrete in the path is necessarily insufficient or that the methodology the respondent adopted in siting the reinforcing in the concrete was incorrect, although doubt remains; only further intrusive and extensive testing would provide a definite answer.
39 However, there was clear evidence that water has ponded on the path which is not draining properly and that the concrete has been laid to a height which does not allow for adequate separation from the damp proof courses in the southern wall of the premises.
40 In my view both these latter issues require rectification and, there being no evidence as to how these defects could be remedied short of removing the path, I find that the path removal and repaving is a reasonable course for the applicant to adopt.
41 As the respondent concedes the northern drain must be removed, together with an area of adjoining paving and replaced. The same applies to the rear paving where, in my view, partial removal and replacement is justified.

¹ Section 60 - If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

42 I estimate the combined total of works to be performed in these two (2) areas is approximately 30^{m2}.

The area of the path is approximately 30^{m2}. The total area of paving to be removed is approximately 60% of the works

Conclusions and Orders

43 Based on the above findings the works constituted a supply of services in trade or commerce and were not rendered with due care and skill as FTA requires.

44 Having regard to the extent of the defects, the doubts surrounding the underlying strength and depth of the path, the difficulty the applicant may encounter in engaging tradespersons to partially remove and rectify the works, and the likelihood that the cost of the rectification works will exceed that monies paid to the respondent it is the view of the Tribunal that it is reasonable for the applicant to have part of the works removed and then reinstated.

45 That being the conclusion reached the respondent must pay to the applicant the following

Cost of partial removal of the works	\$2100.00.
Refunds of monies paid to respondent	\$6000.00.
Less monies owing for the additional works	\$2300.00.
Balance	\$5800.00.

Hugh T Davies
Member

9 January 2020