

CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO D1247/13

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Bluestone paving failed to adhere to concrete substrate; whether breach of s 8 of the *Domestic Building Contracts Act 1995*. Damages - whether reasonable to order that the concrete substrate be uplifted where no structural deficiency proven.

APPLICANT	Stephen Merrylees
SECOND APPLICANT	Fiona Merrylees
RESPONDENT	John Guica
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	27 May 2014 (written submissions last filed 17 June 2014)
DATE OF ORDER	15 July 2014
CITATION	Merrylees v Guica (Building and Property) [2014] VCAT 838

ORDER

1. The Respondent must pay the Applicants \$50,259.
2. **Liberty to apply on the question of costs and interest; provided such liberty is exercised on or before 31 August 2014.**

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Ms K Brazenor of counsel
For the Respondent	Mr J Guica in person

REASONS

BACKGROUND

1. The Applicants (**‘the Owners’**) are the owners of a property located in Shepparton (**‘the Property’**). In 2010, they engaged a builder to renovate the residential dwelling located on the Property. In addition, they engaged landscape architects to prepare concept plans for proposed hard and soft landscaping to compliment those renovation works. The proposed landscaping work did not; however, form part of the contracted renovation works and the Owners were left to outsource that work themselves.
2. In or around January 2013, the Owners contacted the Respondent after reading an advertisement he had placed in the Yellow Pages, which described him as a *Landscaping and Paving* contractor. The advertisement described the type of work that the Respondent undertook, which included *driveways, patios, pathways, landscaping, outdoor tiles and concreting*.
3. The parties subsequently arranged to meet at the Property in order to discuss the proposed hard landscaping works, which largely comprised the laying of bluestone pavers on a concrete substrate. At that meeting, the Respondent was given a copy of the concept landscape drawing, following which the parties discussed and agreed upon changes to that design. Based on those discussions, the Respondent prepared a quotation dated 27 January 2013 in the amount of \$19,590. The scope of work contemplated by that quotation included construction of a concrete substrate and the laying of bluestone pavers, together with associated work (**‘the Paving Works’**). The quotation further contemplated that the bluestone pavers would be laid using an adhesive glue compound.
4. The quotation dated 27 January 2013 was accepted by the Owners (**‘the Paving Contract’**) and the Paving Works commenced approximately one month later.
5. The Paving Works were completed on 19 March 2013 and the balance of the Paving Contract price was paid. Some weeks after the Paving Works had been completed, the Owners raised concern that a number of the pavers were loose or drummy and that sections of the Paving Works were allowing water to pond. Over the ensuing two and a half weeks, the Respondent returned to the Property and undertook remedial work. This entailed uplifting approximately 40% of the bluestone pavers in an attempt to address the Owners’ concerns. Regrettably, those concerns were not fully addressed, with the result that the parties fell into dispute, leading to the present litigation.

6. The Owners contend that the Respondent has failed to undertake the Paving Works:
 - (a) in a proper and workmanlike manner;
 - (b) with reasonable due care and skill; or
 - (c) such that the works are reasonably fit the purpose intended.
7. They claim damages in negligence, breach of contract, breach of the supply guarantees imposed under the *Australian Consumer Law and Fair Trading Act 2012* or breach of the warranties given under s 8 of the *Domestic Building Contracts Act 1995*.
8. The Owners contend that the Paving Works are unable to be satisfactorily rectified and that the only reasonable course is to uplift both the bluestone pavers and the concrete substrate and reconstruct the paving works afresh. According to the Owners, the cost to undertake that remedial work is \$61,523. This includes \$550 for the cost of cleaning glue marks from brick walls, which the Owners contend were left by the Respondent. That cost does not, however, include the cost of replacing the bluestone pavers, which initially cost \$9,933 including delivery but now costs \$12,584, excluding delivery. Therefore, the total amount claimed by the Owners is \$74,107.

THE EVIDENCE

Mr Graham

9. Mr Graham, an expert consultant in the tiling industry, was called to give expert evidence on behalf of the Owners. He prepared a report dated 4 September 2013, in which he made a number of observations in respect of the Paving Works performed by the Respondent. He summarised his opinion as follows:
 - 9 a) The installation was found to have approx. 41.1% of drummy, loose and de bonded tiles throughout the various areas of the installation.
 - b) Paver to paver lipping (approx. 20.8%) was found to be excessive with many safety tripping hazards left in all tiled areas.
 - c) Paving grout joint widths vary considerably throughout the installation from approx. 5 mm through to approx. 15 mm.
 - d) Paving set out varied consistently with concrete substrate misalignment with the pavers showing up to 90 mm of uncovered concrete whilst pavers showed with up to at least 40 mm concrete substrate overhangs.

- e) Paved gradients were assessed as poor with much paving sloping towards the residence, finished paver surfaces up to 40 mm lower than adjacent surfaces were noted - potential trip points.
- f) Foam intermediate movement joint fill almost covered with hard sand/cement grout material.
- g) Perimeter joints to residence ranging from 5 mm through to 35mm widths.
- h) Overall generally quite poor paving installation of both concrete substrate and paving workmanship with no other rectification alternatives but to completely remove the existing tiles and concrete substrate, undertake ground preparation and total replacement of the installation using new materials.

Mr Preston

10. Mr Preston gave evidence that he was contacted by the First Applicant in September 2013 and asked to provide a quotation to clean off the glue marks, uplift the existing paving and concrete base, dispose of the waste, and then install a new concrete base and lay new pavers. He prepared a quotation, which stated that he would be prepared to undertake that work for the following amounts (excluding GST):
- (a) Clean glue marks of wall: \$500. In that respect, he said that that was the standard charge for engaging a brick cleaner for the day.
 - (b) Demolish and remove existing paving and concrete base and dispose of material at the Shepparton Transfer Station: \$8,640. He said this was based on a square metre cost of \$45 per square metre.
 - (c) Install 100 mm concrete base with F72 reinforcing mesh and using 25 mpa concrete: \$15,360. He said that this cost was calculated also using a square metre rate of \$80 per square metre.
 - (d) Laying of the bluestone paving slabs (supplied by the Owners) in accordance with the manufacturer's recommendation using the correct mortar glue and finish: \$28,800. This amount was also calculated based on a square metre rate of \$150 per square metre. Mr Preston said that the rate was higher than the rates usually charged for the laying of paving stone because the large size of the pavers required two people to position them. Therefore the cost of laying was higher than what would otherwise be the case for a smaller paver.

- (e) Sealing the entire area with a stain proof sealer: \$3,800.
11. During cross-examination, Mr Preston was asked whether it was appropriate to use a glue adhesive to lay the pavers. He said that he was not qualified to answer that question. However, he said that had based his quotation on advice he had received from a supplier of the bluestone pavers as to what substance was to be used to bed the pavers. He said he could not recall whether the bedding material was a cement based mortar or whether it was an adhesive glue but in either case, he said his quotation reflected whatever the recommended bedding material was.

The Respondent

12. The Respondent adduced no expert evidence or any other witness to give evidence apart from his own evidence. His recollection of the background facts surrounding the dispute did not differ largely from the evidence of the Owners.
13. He said that he and his workers returned to the Property over a period of two and a half weeks following completion of the Paving Works and attempted to rectify complaints raised by the Owners. He said that he was at a loss to understand why the pavers had lost adhesion and suggested that one possibility may have been that the pavers were porous and therefore absorbed much of the moisture in the adhesive, rendering the adhesive ineffective.
14. He conceded that the Paving Works was the first occasion that he had ever used or laid bluestone pavers. He said that the adhesive that he used was a tile adhesive generally used in the industry for external tiling works. He said that he had buttered the back of each paver and notch trowelled the concrete substrate before laying the paver.
15. In relation to the evidence of Mr Graham, he said under-hanging substrate was of no great concern because soft landscaping would usually cover any exposed substrate concrete. He also rejected the opinion expressed by Mr Graham that the expansion joints were either not installed or rendered inoperative by reason of the joints being filled with mortar. He also rejected the notion that the substrate needed to be demolished and suggested that any deficiency in paving levels or grading could be remedied by the application of screed or bedding material (if new tiles were re-laid).
16. The Respondent offered little or no evidence in response to the quantum claimed by the Owners, apart from saying that the sealing of the bluestone pavers was not part of the Paving Contract.

FINDING

17. It is regrettable that the Respondent has failed to adduce any expert opinion evidence to offer any counterbalancing viewpoint to that expressed by Mr Graham (apart from his own evidence). That being the case, the only expert evidence before me is that of Mr Graham. Despite cross-examination and questioning by me, Mr Graham was adamant that the whole of the Paving Works needed to be uplifted and reinstated. In that respect, I suggested to Mr Graham whether it was possible to uplift only the pavers and leave the concrete substrate. He referred me to various sections in his report to support his contention that the concrete substrate contained too many deficiencies to justify retaining it. In particular:

49. As the paving contractor was given the job of completing both the concrete substrate as well as the paving fixing, this contractor therefore had the authority to do the job adequately and I would have expected that the set out should have been well programmed, measured and prepared so that the concrete substrate was laid and that the following paving installation would have totally covered all concrete substrate and without any pavers left with hangovers - natural stone is quite strong when supported but where overhanging the base, pavers can crack and break with point loading.
50. The central pathway varying by approx. 120 mm from the pathway to the carport driveway resulting with an approx. 40 mm cut piece on the first crossover and approx. 160 mm cut piece on the second is difficult to imagine and then to have these unsightly small cut pieces next to the central pathway rather than the driveway side is simply incorrect paver placement.
51. The west front residence pathway that starts at the west side brick pier but then angles away by approx. 60 mm at the sixth pier (wall) was simply poor workmanship.
52. The west side pathway concrete showing up to approx. 90 mm most likely means an approx. 90 mm hangover next to the residence wall means that cracking breakage could occur and any owners thoughts of a neat garden bed has been taken away.
53. The courtyard paving has been set out without consideration to both front and rear pathways set out and the resulting non matching grout joints are inappropriate and with poor aesthetic appearance.
55. In general, the various gradients and levels had not been completed very well and have created many safety concerns with lippage and potential tripping joints.

- 56 Pathway to garage clearly showed that the paving was completed with and step up of approx. 20 mm to the concrete path to the carport - a safety hazard.
- 57 The rear pathway had been completed with considerable step up to the pebble mix covered concrete slabs - from approx. 20 mm through to approx. 40 mm height differences.
18. At one point, I suggested that a levelling compound might be used in order to rectify inadequate levels or dips in the concrete substrate. In response, Mr Graham opined that the cost of undertaking the work would be significant and ultimately offer little or no cost saving in the long run. For the reasons that follow, I do not accept that contention.
19. The crux of the argument raised by the Respondent in defence to the claim made against him is that he used an adhesive which he believed was appropriate for the application, given that it was commonly used to fix outdoor pavers to a concrete substrate. He speculated that, with the benefit of hindsight, a cement mortar based adhesive may have been a more appropriate product. However, the Respondent conceded that he had not visited or inspected the Paving Works since approximately three weeks after completion and was therefore somewhat at a loss to understand why adhesion had failed to such a large extent. He suggested that the problems with lipping may be the result of the remedial work which occurred in the weeks that followed completion of the Paving Works, where tiles were lifted and relaid. He further said that after the Paving Works were completed, the Owners were satisfied with the quality of work undertaken by him and no issues were raised regarding lipping or paving layouts.
20. I accept that the quality of work undertaken by the Respondent upon completion was, in all likelihood, reasonably satisfactory. Had there been serious issues with the quality of work upon completion, one would expect those to have been raised at that time. Nevertheless, it is an uncontested fact that the adhesive used to bond the pavers to the substrate has, to a large extent, failed. This will require uplifting the existing bluestone pavers and replacing them with new bluestone pavers, presumably to be laid on cement and mortar base. In this regard, I find that the Respondent has breached the warranties set out under s 8 of the *Domestic Building Contracts Act 1995*. In particular, the Respondent warranted that all materials to be supplied by him for use in the Paving Works would be good and suitable for the purpose for which they were used.¹ Therefore, the Respondent bore the risk of ensuring

¹ Section 8(b) of the *Domestic Building Contracts Act 1995*.

that the adhesive used by him adequately bonded the pavers to the concrete substrate. This has not occurred.

21. However, I am not satisfied that the concrete substrate is so deficient that it requires demolition and relaying. It has not been suggested by any witness that there is any structural deficiency in the concrete substrate. The criticisms raised by Mr Graham focus on some areas of the paving being proud of adjoining surfaces, misalignment and some areas not being adequately graded.
22. In my view, these deficiencies can be repaired without the need to completely demolish the concrete substrate. In this regard, I prefer the evidence of the Respondent to that of Mr Graham. As indicated by the Respondent, levelling or grading can be achieved through the bedding material used to lay the tiles. This methodology can also minimise or eliminate any potential tripping hazards between old and new surfaces. Where the substrate is proud of the paving tiles, it can either be cut or covered by soft landscaping. Similarly, support can be provided to those small sections where pavers overhang or alternatively, the pavers can be cut to suit the substrate.

DAMAGES

23. In assessing what amount is to be allowed for the cost of uplifting the existing pavers, I consider that it would be fair to allow half the square metre rate quoted by Mr Preston, which equates to \$22.50 per square metre (excluding GST), given that his demolition costing was based upon also demolishing the concrete substrate, which I do not consider to be reasonably necessary. Accordingly, I find that the Owners are entitled to \$4,320 (excluding GST) in respect of this aspect of their claim.
24. In relation to the delivery of the bluestone pavers, I accept the uncontested evidence of the First Applicant that the delivery and cartage cost of the new pavers is \$693, as evidenced by the invoice from *Lopril Pty Ltd* dated 21 February 2013.
25. In relation to the purchase of new pavers, I accept the uncontested evidence of the First Applicant that the cost is \$12,584, as evidenced by the quotation from *Premium Pavers Pty Ltd*.
26. In relation to the claim for cleaning glue marks from existing brickwork, I accept that in all likelihood, those marks occurred either during the Paving Works or during the remedial work that followed. I further accept the evidence of Mr Preston that the minimum cost of engaging a brick cleaner is \$500 (excluding GST).

27. In relation to the relaying the bluestone pavers, I accept the uncontested evidence of Mr Preston that the reasonable cost to undertake this work, given the size of the pavers, is \$28,800 (excluding GST).
28. I do not allow the cost of sealing the bluestone pavers as that quantity of work was not part of the original Paving Contract.
29. Accordingly, I find that the reasonable cost of remedying the Paving Works is:

Cleaning brickwork of glue marks	\$550
Uplifting existing bluestone pavers (50% of original quoted price to uplift pavers and subs to the will and will be a year in me will be in the trate)	\$4,752
Supplying new bluestone pavers	\$12,584
Delivery of new bluestone pavers	\$693
Laying of new bluestone pavers	\$31,680
TOTAL	\$50,259

30. Having regard to my findings set out above, I will order that the Respondent pay the Applicants \$50,259, with liberty given to the parties to apply on the question of costs and interest. In that regard, I draw the parties' attention to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

SENIOR MEMBER E. RIEGLER