

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.D1086/2012

CATCHWORDS

Domestic building, compliance with Tribunal's earlier order to undertake building work, proof of breach.

APPLICANT	Neerim Property Developments Pty Ltd (ACN: 087 570 045)
FIRST RESPONDENT	Mr Edward Japutra
SECOND RESPONDENT	Brichon Enterprises Pty Ltd (ACN 123 129 555) (proceeding not reinstated against it)
JOINED PARTY	Fine Line Plumbing Services Pty Ltd (ACN 069 861 327)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	29 May 2015 and 17 August 2015
DATE OF ORDER	29 September 2015
CITATION	Neerim Property Developments Pty Ltd v Japutra (Building and Property) [2015] VCAT 1536

ORDERS

- 1 The Applicant, Neerim Property Developments Pty Ltd, must pay Mr Antony Hearnden, the witness summoned by it, \$400 for his attendance at the hearing.
- 2 **I direct the Principal Registrar to send a copy of these orders to Mr Hearnden via email to antony@assuredps.com.au.**
- 3 The proceeding is otherwise dismissed.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr A. Sezenias, director

For Respondent

Mr E. Japutra in person

For the Joined Party

Mr G. Thomaides, director

REASONS

- 1 This proceeding concerns whether orders made by the Tribunal on 7 February 2013 were complied with and if not, how Mr Japutra, the Owner should be compensated. The Owner claims \$14,863.94.

HISTORY

- 2 The house which is the subject of this dispute is tenanted. The date of the Occupancy Permit was about April 2008.
- 3 There were two proceeding commenced in 2012. This proceeding, D1086/2012, was a claim by Neerim Property Developments Pty Ltd (the Builder) against the Owner. The Builder did not seek a monetary amount but sought:
 - ...a hearing to get VCAT to officially dismissed his claims against myself and my building company for alleged building defects.
- 4 The claim by the Owner against the Builder was in file D1097/2012. That file also included a claim against the developer, which was dismissed. That claim and this file were heard together in 2013.
- 5 At the hearing before me Mr Sezenias appeared for the Builder, the Owner appeared in person and Mr Thomaidis appeared for Fine Line Plumbing Services Pty Ltd, the Plumber, which was added to the proceeding on 9 July 2015 as a Joined Party.

Orders

- 6 The relevant orders of 7 February 2013 are:
 2. By 7 May 2013 the First Respondent, Neerim Properties Developments Pty Ltd, must, at the First Respondent's cost, attend to the following rectifications at the subject property, Unit 2, 20 Bettina Street, Clayton:
 - rectification of the water leaks in the upper level bathroom and toilet together with rectification of all consequential damage caused by the water leaks.
 - ...
 3. In the event the First Respondent fails to satisfactorily complete the rectifications as required by order 2 above, the Applicant will be at liberty to seek the reinstatement of the proceeding as against the First Respondent for the purpose of seeking an order for monetary compensation. Any such application must be accompanied by a report and/or quotation/s as to the cost of having an alternative builder satisfactorily complete the rectifications.

Work done by the Builder in 2013

- 7 Mr Sezenias gave evidence that he believed the source of the leak into the wall behind the upper level shower, and then through to the ceiling below, was from a lagged pipe to the air-conditioning unit immediately above the bathroom. The pipe passes through the roof at that point. Mr Sezenias produced a photograph to support his evidence that the lagging has been attacked, apparently by birds, allowing water to enter the house in the space that would normally be occupied by lagging.
- 8 Mr Thomaidis gave evidence supporting Mr Sezenias. He agreed that the Plumber undertook plumbing for the house and he said that once lagging is compromised, water follows the pipe into the roof space.
- 9 Mr Sezenias said that after the orders of 7 May 2013 he had removed the bathroom flooring, re-waterproofed and retiled. He then made good the damage to the plaster and paint on the ceiling below the bathroom. However, he also said that he did not touch the walls or the base of the shower. Later in his evidence that he “strapped and siliconed” the air-conditioning pipes in 2013.
- 10 The Owner said he was not present when the rectification work was done in 2013, Mr Sezenias refused to allow him to inspect and did not tell him what work was done. He agreed that the ceiling below had been made good, but because the house is tenanted he was not immediately aware of any further problems.

Reinstatement application and orders

- 11 On 18 February 2015 the Owner wrote to the Tribunal seeking reinstatement. The application was listed for hearing on 8 April 2015, but was adjourned for hearing to 29 May 2015, to enable the Owner to file and serve details of the actual cost of rectification, and for the Builder to serve all reports upon which it wished to rely.
- 12 I heard the matter on 29 May 2015 and reinstated the proceeding as between the Builder and the Owner. The Builder had filed a “Preliminary Building Defects Investigation Report” by “Ardcon” on 22 April 2015 and also a letter by Mr Thomaidis of the Plumber (which was not then a party) but neither the author of the report nor Mr Thomaidis appeared at the hearing. I adjourned it to 17 August 2015 before myself.

Plumber joined

- 13 The Tribunal received an application from the Builder to join the Plumber to the proceeding. Orders to that effect were made on 9 July 2015.

Hearing of 17 August 2015

- 14 Mr Sezenias said that he had a sub-contractor undertake the external air-conditioning. He produced photographs that were consistent with birds attacking the lagging. He also said that he had raised this problem in the

hearing before another member, in 2013. I responded that if he was saying that the findings of 2013 were wrong, a review hearing before the Tribunal is not the place to do it.

CURRENT ISSUES

- 15 The Owner relied on a report from Assured Property Solutions (“APS”) dated “16/2/14”, but as it was accompanied by a quotation for certain works dated “18/2/15” and “further photographs” were sent on “24/2/15”, it appears that the report was written in February 2015.
- 16 Mr Antony Hearnden of APS gave evidence. He appeared because he was summoned to do so by the Builder. The report of 16 February is not in accordance with PNVCAT2: Expert Evidence in that it does not name the author or provide the necessary declaration. Mr Hearnden’s evidence was of limited value because he did not undertake the inspection, does not have building qualifications and appeared unaware that the repair contract undertaken by APS was subject to the *Domestic Building Contracts Act 1995* (“DBC Act) Mr Hearnden gave evidence that the inspection was by Mr Nathan Groves, a contractor to APS.
- 17 Mr Sezenias made the point APS has both reported and undertaken repair work, for which it has been paid. The report is of some value as evidence of what Mr Groves is alleged to have seen, particularly as Mr Groves also gave evidence.
- 18 Mr Hearnden said that the nature of APS’s business is to maintain and repair rental properties. He said that APS had been paid the full amount invoiced of \$14,863.94.
- 19 Mr Groves said that he has a certificate 3 in carpentry. Under cross-examination he agreed that works of \$5,000 or more are governed by the DBC Act and should be undertaken by a builder with relevant DBU registration. He agreed that the work undertaken by APS might have been undertaken in breach of the DBC Act.
- 20 The report states in part:

Upon arrival to this site we noticed the inspection hole the plumbers had cut.

The area in the meals/kitchen room [ground floor] has approximately 4m² of plaster that requires replacing due to the water damage. After inspecting inside the ceiling cavity the damage is extensive to the yellow [tongue] chipboard flooring. It looks as though there will be about 3m² of this that need to be removed and replaced. The leaks are from the three points.

1. The shower waste [first floor – above meals/kitchen] has broken and it is leaking through the flange. This means the base needs to be replaced.

2. The waterproof membrane has failed or lack there of and is seeping through the plasterboard.

3. Leaks through valve body penetrations in plaster and tiles. Not silicon or tanked.

Between the toilet and shower is sitting in between two floor joists upon the yellow tongue which has rotten along the length of the wall making it a potential structural issue usually wall frames are placed above a floor truss so as to carry the load adequately. [sic]

- 21 Further demolition had been undertaken before the photographs dated 24 February 2015 were sent to the Owner.
- 22 The photographs are not numbered. I refer to them in the order they are in the bundle filed at the Tribunal.
- 23 The first photograph shows the structure of the wall where the shower taps are placed. It is marked "wall clearly not waterproofed see remaining piece of plaster". Nevertheless, there is no sign of the dampness, stain or mould on that particular wall.
- 24 The second photograph is of the wall at 90° to the one on which the taps are mounted. It is marked "Mould into external wall studs and slight damage to studs." The photograph indeed shows extensive areas of mould, from the base plate all the way up to almost ceiling height. I emphasise that this is not the wall upon which the taps were mounted.
- 25 The third photograph shows a seriously compromised bottom plate.
- 26 The fourth photograph is marked "Floor not entirely covered with yellow tongue and rotten." Black mould is apparent on that floor and is also shown on the following photograph. There is a photograph of the toilet floor which shows mould under the tiles and a rotten base plate.
- 27 There has, without question, been extensive water in this area. The questions are:
 - a What was the source of the water? and
 - b Did a fault for which the Builder is responsible allow this water damage to occur?
- 28 In evidence in chief, Mr Groves said that when he turned on the shower he observed that after a while the leak started. He concluded that the leak was in direct response to turning on the shower.
- 29 Mr Groves said that the problem was the shower recess. He said that it had not been waterproofed. He said the walls were found to be wet when the shower was demolished and the shower base was laid directly onto the yellow tongue flooring. He said that he "didn't recall" seeing any waterproofing membrane on the walls or floor, but added that his unnamed carpenter did most of the demolition.
- 30 Mr Groves said that the walls were wet behind the shower head, saturated both sides and around the taps.

- 31 Mr Groves said his work included replacing the bottom plate and parts of the studs of the wall adjacent to the shower, the yellow tongue flooring, the plaster, and the previous fibreglass shower bases with a moulded plastic base.
- 32 I discuss the three items raised in the APS report and Mr Sezenias's attribution of the damage to bird attack.

Broken shower waste

- 33 The photographs of the shower base are consistent with Mr Groves' evidence that it was fibreglass. The crack was immediately adjacent to the shower waste, on the wall side.
- 34 It is not unusual for shower bases of this nature to break because they have not been adequately supported. Such a break is because of a building defect. However, no evidence to this effect was given for the Owner. Under cross-examination by Mr Thomaidis, Mr Groves agreed that he does not know what caused the crack.
- 35 Further, it is possible that the waste has broken because something heavy has been dropped in the shower. The Owner was not able to give positive evidence that nothing has been dropped in the shower because this is a rented house. I note his evidence that he was not aware that there was a crack in the shower base until late 2014.
- 36 I cannot be satisfied that the broken shower waste is attributable to a building fault. No evidence was given linking a building defects to the waste breaking.
- 37 I am satisfied that a significant amount of water has entered the space beneath the shower base from the crack and on the evidence before me I cannot attribute any responsibility to the Builder for this leak.

Waterproof membrane and tap valve penetrations

- 38 Under cross examination by Mr Sezenias, Mr Groves repeated his opinion that the cause of the water damage was failure to seal the walls behind the shower and to silicon seal the shower rose backing plate, the tap spindles and the soap dish. He then admitted that the wall displaying black mould is at 90° to the wall where the shower rose and tap spindles are located.
- 39 Mr Groves then said that the mould on the wall at right angles to the wall upon which the shower head is located could be caused by water from the shower rose striking that wall. However, as Mr Sezenias said during cross-examination, the mould extends high up the wall, and it would be surprising if the tenants have the rose adjusted so that water hits the adjacent wall higher than the rose is placed.
- 40 As I said at paragraph 24 above, there is no sign of any mould on the wall on which the taps are mounted.

- 41 Mr Thomaidis also cross-examined Mr Groves. He said that tap washers are replaced approximately every two years and therefore asked how the plumber from 2008 could still be responsible for a failure to re-seal. Mr Groves responded that he is not a plumber. Mr Thomaides then said that the shower rose appeared to have been replaced because the flange did not match the rose. Mr Groves agreed that it looked odd.
- 42 I am not satisfied that I can rely on Mr Groves' evidence as to the cause of the water damage and in particular I am not satisfied that it is attributable to lack of waterproof membrane (if any) or failure to seal around the taps, shower head plate and soap dish (if any).

Bird attack to air-conditioning pipes?

- 43 If water was entering via the air-conditioning pipes in 2013, the Builder should have rectified it. Builders remain responsible for the sub-contractors they engage. The Builder was obliged to rectify "water leaks in the upper level bathroom" regardless of their source.
- 44 As mentioned above, Mr Sezenias gave evidence that the Builder "strapped and siliconed" the air-conditioning pipes in 2013. I cannot be satisfied that the current water ingress is from these pipes.

CONCLUSION AS TO LIABILITY

- 45 Because I cannot be sure of the source of the water on the evidence before me, I cannot be satisfied that it is due to a failure by the Builder. The proceeding is therefore dismissed and it is not necessary to consider whether the Owner should have invited the Builder to rectify, the cost to rectify and where liability should lie, as between the Builder and the Plumber.

WITNESS SUMMONS

- 46 The Builder summoned Mr Antony Hearnden to attend and give evidence, even though it was aware before the hearing that Mr Hearnden had not inspected the site and prepared the report. As ordered at the hearing, the Builder must pay Mr Hearnden's reasonable cost of attendance for four hours at \$100 per hour, being \$400.

SENIOR MEMBER M. LOTHIAN