

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D591/2009

**CATCHWORDS**

Work and labour – implied term that work to be done in a proper and workmanlike manner using good and sufficient materials – contractor purporting to communicate quote from another tradesman for a particular sum for other work– in fact subcontracting other work to the other tradesmen at a lower figure – no contract between principal and other tradesmen

<b>APPLICANT</b>	Leanne Sharp
<b>FIRST RESPONDENT</b>	Igor Vurmeski t/as I V Preferred Tiling
<b>SECOND RESPONDENT</b>	Classic Ceramics (Importers) Pty Ltd ( ACN 001 009 061)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	11 March 2010 and 4 June 2010
<b>DATE OF ORDER</b>	13 July 2010
<b>CITATION</b>	Sharp v Vurmeski trading as I V Preferred Tiling & Anor (Domestic Building) [2010] VCAT 1201

**ORDER**

1. Order the First respondent, Igor Vurmeski to pay to the Applicant \$11,792.10.
2. The claim against the Second Respondent is dismissed.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	In person and by Video link
For the Respondent	Mr J. Korman of Counsel
For the Second Respondent	Mr Roberts, Director

## REASONS

### Background

1. The Applicant (“the Owner”) is the owner of a two storey Unit in Wells Street, Southbank (“the Unit”). She lives in Brisbane and the Unit is let out to tenants.
2. The First Respondent (“the Tiler”) is and was at all material times a tiling contractor. The Second Respondent (“Classic”) is and was at all materials an importer, wholesaler and retailer of tiles. It does not sell any related tiling products nor does it carry out tiling works.
3. In November 2008 the Unit became vacant. The en suite bathroom in the upper storey had been leaking for some time and the Owner decided to take the opportunity to fix it before the new tenants moved in. It is now clear from the evidence that the leaks from the en suite bathroom had been substantial and had caused a great deal of consequential damage to the ceiling and walls of the bathroom and also on the floor below but the Owner did not know that at the time.
4. The Owner purchased marble tiles from Classic in November 2008 and in December 2008 they were laid by the Tiler. Thereafter the bathroom leaks were more apparent than they had been previously. After the job was found to leak, there was numerous complaints and attempts by the Owner, Miss Bacs and Mr Tseros to get the Tiler back and fix the problem. Despite making appointments to go back and look at the job, he failed to do so.
5. A meeting occurred between the Tiler, Mr Tseros, the Director of Classic, Mr Roberts, and Miss Bacs to discuss the matter. Various allegations were made about what was said, but none of that is to the point.
6. The Owner then took these proceedings seeking redress against the Tiler and also Classic which, she claims, undertook to renovate the bathroom.

### The hearing

7. The proceeding came before me for hearing on 11 March 2010 with one day allocated. The Owner represented herself, the Tiler was represented by Mr Korman of Counsel and Classic was represented by its Director, Mr Roberts.
8. I heard evidence from the Owner, from the Tiler, from Mr Roberts, from Classic’s sales assistant, Sophie Bacs and from Miss Bacs’ boyfriend, Mr Tseros. Mr Tseros is a carpenter who stripped out the old bathroom and repaired the floor and stud walls before the tiles were laid.
9. The time proved inadequate to finish the hearing and it was adjourned part heard until 4 June 2010. On that occasion the owner appeared by video link and the hearing was concluded. I informed the parties that I would provide a written decision.

## **The witnesses**

10. I was most unimpressed by the evidence of the Tiler. I thought that his manner was aggressive and evasive. He claimed to be a qualified Tiler with 16 years experience. Not only was I unimpressed with his demeanour in the witness box I was also astonished to find that he did not know what a bond breaker was and by his statement that he does not seal marble. It is notorious that it is necessary to seal any natural stone or it will immediately become stained. He agreed that he did not inform the Owner that he had not sealed the marble and that he did not advise her that she ought to do so. These matters make me doubt that he has had the experience that he claims to have had.
11. I found Miss Bacs to be somewhat hesitant as a witness but I think that she endeavoured to give truthful evidence. I thought that Mr Tseros was an impressive witness who provided a very detailed account of what occurred that was internally consistent and made sense. Added to that, the photographs of his work indicated, insofar as this can be determined from photographs, that his work was of a good standard, even though, as he acknowledged, he was not a qualified carpenter but had learned the trade through experience. I concluded that he gave truthful evidence. His evidence was assisted by a number of photographs that he took which I found to be of great assistance.
12. In general I thought that the witnesses other than the Tiler endeavoured to give truthful evidence but their recollections were not the same and I have had recourse to some emails that passed between the parties to fill in the gaps in the narrative and correct what I think were probably reconstructions.
13. Expert evidence was also given by Mr Peluso, a building expert who inspected the work and also by Mr Hopkins from Davco, the manufacturer of the membrane the Tiler claims to have used. Mr Peluso took a number of colour photographs which were helpful. A plumber's report was tendered by Classic which confirmed that the shower recess was leaking but did not identify the location of the leak.

## **Findings**

14. In summary, I do not find that Classic undertook the role of builder as the Owner claims. All that it did was sell her the tiles. Miss Bacs introduced the Tiler to the Owner and assisted her afterwards by letting her know how things were progressing but the contractual relationship was between the Owner and the Tiler and did not involve Classic. Mr Tseros did his work as a subcontractor to the Tiler who paid him in cash.
15. I find that the Tiler did not properly seal the bathroom before tiling and that his work was defective in many respects which are detailed below. The Owner will now have to incur the cost of having the tiles replaced and for

the Tiler's work to be redone and she is entitled to an order against the Tiler for the cost of that.

16. The reasons for those conclusions follow.

### **The purchase of the tiles**

17. On 21 November 2008 the Owner visited Classic's showroom in order to select tiles for the en suite. She spoke to Miss Bacs and with her assistance chose some marble tiles.
18. The Owner asked Miss Bacs if she knew anybody who could do the tiling. Miss Bacs informed her that Classic did not do tiling. The Owner said that she had tenants moving in and that it had to be done urgently. Miss Bacs told her that it would be virtually impossible to find a Tiler at that time of year.
19. Some days later, following the Owner's return to Brisbane, Miss Bacs telephoned to tell her that the tiles were available. The Owner again asked her to help her find a Tiler. Miss Bacs said that she would telephone some Tilers and see what she could do. She called a couple of people who were not available and eventually spoke to the Tiler who, after some persuasion, agreed to take the job on.
20. Miss Bacs sent the Owner an email confirming the availability of the tiles and stating:

"I managed to get one of my tilers to do the job for you in time prior to the tenants moving in. This time of year is really hard to get a tradesmen and he kept on reminding me that he is doing me a huge favour as I am really good to him ... he will delay his other job to fit this into his schedule. His name is Igor and his number is [number given]. If you could please give him a call to give him all the details of the agent, keys, timeframes, quote, etc."
21. There followed a telephone conversation between Miss Bacs and the Owner. The Owner says that Miss Bacs told her that the Tiler was very competent and this was not denied by Miss Bacs.
22. Thereafter the Owner telephoned the Tiler and gave him her contact details. She told him that the shower was leaking and that she wanted it pulled out and redone. The Owner said that she received an emailed quote from him.
23. The Owner also said that Miss Bacs telephoned her and told her that there was no membrane but the information to that effect was conveyed to her by the Tiler in an email dated 2 December in which he stated that the price of the job would be \$3,000 including all materials.

### **The engagement of Mr Tseros**

24. The Tiler telephoned, Mr Tseros and asked him to pull out the old tiles and put cement sheet down where it was needed. Mr Tseros is not a qualified carpenter but has done a considerable amount of carpentry work in the past under the supervision of qualified carpenters. He was a friend of the Tiler's

and also the boyfriend of Miss Bacs. There is a dispute as to whether he was engaged to do this work by Miss Bacs or by the Tiler. I prefer the evidence of Miss Bacs and Mr Tseros in this regard and accept that he was engaged by the Tiler.

25. When Mr Tseros removed all the tiles, it was found that the sub-floor had rotted away and required replacement. Both the yellow tongue flooring and the underlying joists had to be replaced. Mr Tseros informed the Tiler who then contacted both Miss Bacs and the Owner. According to the Owner she was told by the Tiler that the carpenter would charge \$2,500 for the carpentry work. Mr Tseros says that he quoted the Tiler \$2,000 and was subsequently paid this sum, less GST, by the Tiler. The Tiler denies that but I prefer Mr Tseros' evidence.
26. Mr Tseros pulled out all the rotten material and replaced all the joists and installed new flooring. Colour photographs were tendered of his work which appears to have been of a good standard.
27. According to Mr Tseros, he was instructed by the Tiler to provide fibro-cement underlay 6 Millimetres thick and to put double thickness either side of where the shower was in order to provide a fall to the waste. He said that he did that. The Tiler denies having given him such an instruction but I prefer Mr Tseros's evidence.

#### **The Tiler's work**

28. Thereafter, the Tiler came and, over several days, tiled the bathroom using the marble tiles supplied. The Owner did not see the completed job but paid the Tiler \$5,500 for the labour, being for both the carpentry and the tiling.
29. As to the capacity in which the Tiler received the \$2,500 for the carpenter, there is an email to the Owner from the Tiler dated 8 December 2008 as follows:-

"I spoke with the carpenter earlier today when I was at your house and he is fine with you putting the money in my account. I will give you a call tomorrow with the account details".
30. The following day, 8 December 2008, the Owner paid the balance of \$4,000 into the Tiler's account.

#### **Did the Tiler also undertake the carpentry work?**

31. The Tiler quoted the Owner \$3,000 for the tiling work. He also purported to convey to the Owner a quote of \$2,500 for the carpentry work which he said was from "the carpenter". To provide the quotes in this way would naturally lead the Owner to believe that she was contracting separately with "the carpenter". However although the Tiler purported to convey a quote from Mr Tseros to the Owner he was in fact providing his own quote because Mr Tseros's quote was only \$2,000. The remaining \$500 was

collected by the Tiler but was not paid to Mr Tseros. It was retained by the Tiler.

32. There was a great deal of argument as to whether the Tiler took on the whole job or whether he was simply contracting to carry out the tiling work. Since I have found that he had in fact subcontracted the carpentry work and taken a margin of \$500 on it I find that he undertook the whole job. In the end, nothing comes of that because there is no evidence whatsoever that the carpentry work was defective.

### **The defects in the work**

33. Following payment the tenants took one shower in the en suite and water leaked into the lower floor. Mr Peluso identified numerous defects with the tiling itself, including the following:
- (a) Failing to finish the edge of the top tile by bevelling it or fitting some angle to it. Instead it was filled with grout, which Mr Peluso said was not designed for such a purpose;
  - (b) Failing to seal the marble;
  - (c) Failing to install any water stop edge on the tiles in accordance with the Building Code;
  - (d) Failing to fit the shower exhaust fan correctly;
  - (e) Laying the tiles unevenly;
  - (f) Providing uneven joints;
  - (g) Failing to fit the tiles around the waste sufficiently, leaving a triangular gap.
34. Mr Peluso was unable to confirm whether or not there was a membrane underneath the tiles or a puddle flange around the waste but the evidence establishes that there was a puddle flange.
35. During the hearing further defects were identified. They were failing to use a bond breaker to enable the membrane to move easily and failing to use silicon at the joints in the underlay. This latter fault was identified by the evidence of Mr Tseros, which I accept. There was also a failure to provide a sufficient fall to the waste. On the evidence of Mr Hopkins from Davco, the manufacturer of the membrane, it is necessary to provide a silicon bead in the joints and bond breaker. He said that it is also necessary to prime the sheet with a product called Ultraprime and then apply the membrane in two coats.

### **The law**

36. Mr Korman submitted that the agreement between the Owner and the Tiler was not a domestic building contract and that consequently, the implied terms set out in s.8 of the *Domestic Building Contracts Act 1995* did not apply. However quite apart from the implied warranties under the Act, it is an implied term of any contract for work and materials that the work will be

done in a proper and workmanlike manner using good and sufficient materials.

37. That was clearly not the case here. I accept that the work has the defects identified by Mr Peluso and in addition, the Tiler has failed to ensure that the bathroom was watertight. He is therefore in breach of the implied term of the contract and the Owner is entitled to an award of damages. On the balance of probabilities I think that the leaks experienced when the shower was first used following the Tiler's work were due to defective tiling. They cannot be attributed to the work of Mr Tseros because the waterproofing was part of the Tiler's work. That being so, I accept that the tiling has to be redone and consequently, that the tiles need to be replaced.

### **Damages**

38. The evidence as to damages was not particularly satisfactory. Mr Peluso assessed the cost of resealing and retiling the en suite at \$20,197 plus GST. However this figure includes the supply 15mm compressed fibro- cement sheet to the floor and I am not satisfied that the 6mm compressed fibro cement sheet used as a substrate was inadequate. The figure also includes the repair and painting of adjacent walls and consequential damage, yet it is clear from the evidence that this resulted from the earlier leaks not from the single leak that occurred following the Tiler's defective work.
39. Further, I am not satisfied that the scope of the contract included anything other than tiling for the Tiler and the carpentry work for the carpenter. I accept Mr Korman's submission that the Owner should have engaged a builder to undertake responsibility for the whole of the work and not sought to engage individual tradesmen who would only be undertaking parts of the work. I am not criticising her for that because she is a solicitor with possibly no experience at all in the building industry and might have assumed that the Tiler was undertaking not only tiling but also to provide her with a complete bathroom. Despite the emails, I am not satisfied that the Tiler undertook anything beyond the tiling and the carpentry works.
40. The Owner paid \$2,6000 for the tiles, \$2,500 for the carpentry and \$3,000 for the tiling. She has lost the value of the tiles and the tiling work was worthless but she has still the benefit of the carpentry work. The measure of damages however is not the value of the tiles and the amount that she has paid to the Tiler but rather, the cost of removing the tiles and replacing them with new tiles laid on a proper membrane. In the absence of any better evidence I will award \$10,000.

### **Loss of rent**

41. The Owner also claims loss of rent on the basis that she has discounted the rental on the Unit due to the fact that the tenant is unable to use the en suite bathroom. Instead, the tenants only have the use of the main bathroom in the Unit. She says that the abatement of rent was \$75 a week and she claims that until up to the date of the hearing. She ought to have mitigated

her loss by undertaking rectification in a timely way instead of leaving it as it was and allowed her loss to mount up.

42. I think that all should be allowed in terms of abatement of rent is for the period up to which she ought to have rectified the defective workmanship. I will allow a total of 8 weeks which is \$600.

**Interest**

43. The Owner also claims interest. I will allow interest at the Penalty Interest rate of 11% from the date the proceedings were issued up until the date of judgement. That amounts to \$1,192.10

**SENIOR MEMBER R. WALKER**