

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP 1361/2015

CATCHWORDS

Major domestic building contract not in writing or signed not effective - s31 *Domestic Building Contracts Act 1995*. Claim not available under the principles of restitution. Misleading or deceptive conduct under s18 of the *Australian Consumer Law (ACL)*. Non disclosure or silence as evidence of misleading conduct: *Miller & Associates Insurance Broking Pty Ltd v BMW Australian Finance Ltd*. Causation and liability for loss s236 of the ACL: *Marks v GIO Australia Holdings Pty Ltd*; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*. Whether loss of a nature entitling recovery under s236 of the ACL: *Gates v City Mutual Life Assurance Society Ltd*.

APPLICANT	Denise Smart
RESPONDENT	Mark Berry
WHERE HELD	Melbourne
BEFORE	Member MJF Sweeney
HEARING TYPE	Hearing
DATES OF HEARING	22 January & 30 March 2016
DATE OF ORDER	22 April 2016
CITATION	Smart v Berry (Building and Property) [2016] VCAT 540

ORDERS

1. The Applicant's application is amended as follows: The Applicant claims damages in the sum of \$9,346.
2. The application is dismissed.

MEMBER MJF SWEENEY

APPEARANCES:

For the Applicant In person

For the Respondent In person

REASONS

INTRODUCTION

- 1 The agreement between the parties was a verbal agreement. It was an agreement to conduct works for renovations to an old bathroom, a separate toilet room and a shower room.
- 2 Some terms of the agreement are in dispute. The disputed terms include the manner of payment, whether a fixed price or hourly rate, and the time for completion of the works.
- 3 Under the agreement, the Respondent was to provide labour to undertake tiling and carpentry works. The Applicant agreed to supply materials. In the actual conduct of the works, the Respondent supplied sundry materials including cement sheeting, glue, grout and water proofing membrane material.
- 4 The works commenced in June 2014. The Respondent substantially completed the works and left the site about 9 July 2014. The Applicant purported to terminate the agreement and, in any event, she did not permit the Respondent to return to the premises. The Applicant said she was unsatisfied as to the standard of works.
- 5 The Respondent rendered his invoice dated 9 July 2014 for labour of \$10,475 and materials of \$2,695, a total of \$13,170. The Respondent has not been paid for the works or materials specified in his invoice and has made no cross claim in these proceedings.
- 6 The Applicant obtained a Building Inspection Building Report dated 15 August 2014 (Building Report) from Robert Paul. The Building Report found regulatory non compliance on several grounds. These were non compliance under the *Building Code of Australia* and non issue of compliance certificates for electrical and plumbing works, no written contract for works being in excess of \$13,000 and undertaking the works without being a registered building practitioner.
- 7 In August, the Applicant engaged several trades to undertake deconstruction works and completely re-do the three rooms. One of the trades was a Mr Slavko, a tiler.
- 8 By her application dated 13 October 2015, the Applicant claims that there was an agreement made between her and the Respondent, that the Respondent failed to properly carry out the works and that as a result she has suffered loss. She seeks damages for breach of contract.
- 9 The Tribunal is not a Tribunal requiring pleadings and must conduct itself with as little formality and technicality as the matters before it permit: S98(1)(d) of the *Victorian Civil And Administrative Act 1998*; *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307 at [90].

- 10 The Applicant has not expressly stated in her points of claim that it arises under the *Domestic Building Contracts Act 1995* (DBC Act). However, the agreement between the Applicant and the Respondent was for building works of a kind usually governed by the DBC Act. The Applicant's claim can be regarded as including a claim under the DBC Act and, if established, the Applicant may be entitled to the benefits of statutory warranties under s8 of the DBC Act. Section 8 contains implied warranties, including failing to conduct works in a proper and workmanlike manner and failing to carry out works with reasonable care and skill.
- 11 The Applicant also claims she was misled by the Respondent due to presenting himself to her as a registered building practitioner when in fact he was not registered. She claims that as a result of this misleading conduct she has suffered loss due to her entering into an agreement for the Respondent to carry out the works, where the Respondent was not covered by insurance, and where the works were not carried out in a workmanlike manner.
- 12 Again, whilst the Applicant is not required by the Tribunal to deliver pleadings, it is clear from her claim, which was put to the Respondent, that she claimed that she was misled and suffered loss as a result. In these circumstances the Applicant's claim can be regarded as relying on the consumer protection provisions of the *Australian Consumer Law and Fair Trading Act 2012*, incorporating the *Australian Consumer Law* (ACL). In particular, s18(1) of the ACL provides that a person must not, in trade of commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- 13 The Applicant amended the amount of her claim in the manner described in paragraph 20. The Applicant claims the difference in cost between what she would have had to pay the Respondent under her agreement with him and the extra works that she alleges had to be done by later trades, which would not have been required if the alleged poor workmanship of the Respondent had not occurred. Her amended claim is for damages of \$9,346.
- 14 In respect of the Applicant's claim for damages, she contends that she does not have to pay the Respondent anything under the agreement because no value can be attributed to the works undertaken by him.
- 15 The issues in the proceeding may be summarised as follows:
- Whether payment under the alleged agreement was for a fixed price or hourly rate
 - Whether the alleged agreement specified 2 weeks as time for completion
 - Whether, the agreement between the parties is covered by the provisions of the DBC Act

- Whether the Respondent misled the Applicant into believing that he was a registered building practitioner, thereby causing the Applicant to enter into an agreement for the works not covered by insurance
- Whether the alleged loss of the Applicant was sustained as a result of the Respondent's misleading conduct and his failure to undertake the works with reasonable care and skill?

Specifically:

- Non compliance under the *Building Code of Australia* and failure to provide certificates for electrical and plumbing works; undertaking works in excess of \$13,000.00 without a written contract; undertaking the works without being a registered builder
- Tiling works to the bathroom, shower room and second toilet room
- Plaster works to the same rooms
- Failure to install the "proper" shower base
- Failure to remove rubbish
- Damage caused to
 - (i) bath and
 - (ii) cistern
- Damage caused to shaving cabinet
- Failure to undertake proper plumbing works
 - (i) no 'S' bend under the bathroom basin
 - (ii) shower heads too low and off centre
- Damage caused to side fence
- Damage to bath tap and sink mixer tap in bathroom
- Damage caused to vanity unit

PROCEDURAL BACKGROUND

- 16 This matter was first heard on 22 January 2016 and adjourned, part heard, to 30 March 2016. At the end of the hearing on 22 January 2016 the Applicant had completed her case and the Respondent had completed cross examination.
- 17 The Applicant's original damages claim was for \$11,324 for breach of the warranties under the Act referred to above. The Applicant sought leave to amend her application dated 13 October 2015 at the re-opening of the hearing on 30 March 2016.

- 18 The Applicant wished to amend her claim to seek damages of \$9,346, a reduction of \$1,978. It was not opposed by the Respondent.
- 19 The amended claim as to quantum relied on several calculations¹ not previously exchanged with the Respondent. The Respondent was asked if he required an adjournment. The Respondent said that he wished to get on with the hearing and did not seek an adjournment.
- 20 The Tribunal ordered the amendment of the claim amount to \$9,346 and granted leave to the Applicant to re-open her case. This was not opposed by the Respondent. The Applicant gave evidence on the justification for and calculation of her amended claim amount. The Respondent made a brief cross examination on the further evidence of the Applicant and then opened his case.

ISSUES

Was payment under the alleged agreement for a fixed price or hourly rate?

- 21 The question of whether the agreement provided for payment at an hourly rate or was for a fixed price was argued at some length. I am of the view that the matter is not in issue or relevant to the question of liability of the Respondent or for the assessment of damages for two reasons.
- 22 First, the Applicant said that the verbal agreement was for a price between \$5,000 to \$7,000. She referred to the agreement as being based on an estimate which she also referred to as a fixed estimate. The Respondent said the agreement was for an hourly rate and that rate was \$40/hour.
- 23 Whether or not the Respondent is liable for poor workmanship or failure to take reasonable care and skill does not depend on what were the terms for payment.
- 24 Secondly, a more fundamental reason exists as to why the question of contract price does not arise and is not relevant in the circumstances of these proceedings. This is because of the application of s31(2) of the DBC Act which is discussed below.

Did the alleged agreement specify 2 weeks as the time for completion?

- 25 The question of whether the agreement required completion in 2 weeks or otherwise could have been relevant to the question of liability under s8 of the Act, namely failing to carry out the works with reasonable care and skill and to complete the works within the time specified.

¹ The Applicant's exhibit marked AA2

26 However, for the same reason referred to in paragraph 24, that is, the application of s31(2) of the Act, the question of time for completion does not arise for the reasons given below.

Is the agreement between the parties covered by the provisions of the Domestic Building Contracts Act 1995?

27 The agreement between the parties was verbal. It required payment for labour and some materials. The Respondent invoiced the Applicant for \$13,170.

28 The work undertaken by the Respondent constitutes ‘domestic building work’ as that term is defined under sections 3 and 5 of the DBC Act. In particular, s5 states that the DBC Act applies to work which concerns renovation, alteration, extension, improvement or repair of a home. The works concerned in the present matter were renovations and alterations to the Applicant’s home.

29 Section 31(2) of the Act provides that a ‘major domestic building contract’ is of no effect unless it is signed by the builder and the building owner. There is no dispute that the parties failed to sign any agreement.

30 Section 3 of the Act defines a major domestic building contract as follows:

major domestic building contract means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$5000 (or any higher amount fixed by the regulations);

31 The value of the works carried out under the agreement as evidenced by the Respondent’s invoice exceeded \$5,000. As such, the agreement constitutes a major domestic building contract in respect of works covered by the DBC Act. Accordingly, as the agreement was not signed (or indeed written), under s31(2) of the DBC Act, the agreement between the parties is of no effect.

32 In addition, s136(2) of the *Building Act 1993* prohibits a building practitioner from carrying out domestic building work unless covered by the required insurance. It is not disputed that the Respondent failed to have any insurance.

33 The consequence of the agreement being of no effect between the parties is that the Applicant is unable to enforce any rights that she claims to have arising from the agreement for the works.

34 *I find that the verbal agreement between the parties for the works is unenforceable.*

- 35 In the alternative, in situations where there is an ineffective contract, a claim for reasonable remuneration for works done may be made under the principles applicable in relation to law of restitution.
- 36 Restitution arises in situations where an agreement between parties is ineffective: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256. For the principles of restitution to apply, it needs to be established that the other party has received a benefit and that it would be unjust in all the circumstances for that other party to retain the benefit.
- 37 There are two reasons why the principles of restitution are not applicable in the present case. First, the Applicant is unable to found a claim for restitution of a benefit received by the Respondent on the premises of monies paid by her to the Respondent. The Applicant, it will be recalled, made no payment to the Respondent for the works completed. There is no enrichment, unjust or otherwise, that has been received by the Respondent at the expense of the Applicant.
- 38 Secondly, if it could be argued that the Applicant's alleged cost of rectification constitutes some kind of dis-benefit and that it would be unjust for the Respondent to be enriched in the sense of not having to pay for the cost of rectification, such a claim was not put by the Applicant against the Respondent.
- 39 The Tribunal must decide matters according to law and is accordingly governed by the principles of natural justice. Section 98(1) of the *Victorian Civil and Administrative Tribunal Act 1998* makes this explicit. To the extent that the Applicant may seek restitution, this does not arise from her claim against the Respondent. In any event, the Respondent has been afforded no opportunity to put a defence in this respect.

Did the Respondent mislead the Applicant into believing that he was a registered building practitioner, thereby causing her to enter into an agreement for the works not covered by insurance?

- 40 As referred to in paragraph 11, the Applicant claims that she was misled by the Respondent into believing that he was a registered builder.
- 41 The Applicant said that the Respondent did not disclose to her that he was not a registered building practitioner. She asked the Respondent in cross examination why he didn't tell her this. The Respondent replied saying: 'you never asked'.
- 42 The Respondent strongly denied that he ever held out or said that he was a registered builder. He said that he was initially contacted directly by the Applicant by reason of the Applicant being friends with the Respondent's sister, Jacqui Berry.

- 43 In her written statement, subsequently affirmed before the Tribunal, the Applicant said she was told by her good friend, Jacqui Berry, that the Respondent was a builder. The Applicant did not state that the Respondent told her that he was a registered builder.
- 44 Ms Berry attended as a witness for the Respondent. She denied ever saying to the Applicant that her brother was a registered builder and that she didn't know whether or not he was one.
- 45 At the time of entering into their verbal agreement, the Applicant did ask the Respondent what works he had done previously. The Respondent said he offered to show her some previous works but that the Applicant declined. The Respondent said there was discussion about plumbing and electrical components of the works and that, in his view, the Applicant was keen to avoid where possible having to use electricians and plumbers in the interests of keeping down the cost.
- 46 I am satisfied that the Applicant was focussed on cost minimisation for the renovation and that she was keen to get the project underway. I am also satisfied that, with the Applicant's focus on cost minimisation, she encouraged the Respondent to avoid the use of separate electricians and plumbers. This of course is not to absolve or excuse any breach of regulatory compliance, but it is a finding about the factual context at the time of the parties' entry into the verbal agreement.
- 47 I am not convinced that, at the time of agreeing that the works be undertaken, the Applicant directly asked the Respondent about being a registered builder or if he had insurance. However, this is not to say that she was not entitled in all the circumstances to assume that the Respondent was a registered builder. The Applicant was about to embark on not insignificant renovations to her home, works of a kind that the Parliament of Victoria sought fit to provide protection to owners under the DBC Act.
- 48 Section 18 (1) of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive. It is not controversial that the relationship between the parties was one involving activity engaged in trade or commerce.
- 49 In cases where silence or non disclosure are considerations as to whether there has been misleading or deceptive conduct, the test is an objective test: *Miller & Associates Insurance Broking Pty Ltd v BMW Australian Finance Ltd* [2010] HCA 31; (2010) ALR 204 at [17] to [20].
- 50 I am the view that the apparent silence or non disclosure of the Respondent about not being a registered building practitioner occurred in circumstances, including those described in paragraph 41, which would reasonably give rise to an expectation on the part of the Applicant that the fact of not being registered should have been disclosed.

- 51 I am also satisfied that the Applicant was led into error by this silence of the Respondent to the effect that the Applicant entered into an agreement with the Respondent when she would not otherwise have done so. I am also satisfied that the Applicant considered that possession of appropriate insurance by the builder was an important consideration and that she assumed that a registered builder would be likely to possess the same.
- 52 For these reasons, I find that at the time of their negotiations, the Applicant was led into error concerning the Respondent being a registered building practitioner, in breach of s18(1) of the ACL.
- 53 Given my findings, the question is now whether the Applicant, pursuant to s236 of the ACL, can establish entitlement to recover loss or damage resulting from the breach by the Respondent of s18(1) of the ACL.

Was the alleged loss of the Applicant sustained as a result of the Respondent's misleading conduct and failure to undertake the works with reasonable care and skill?

The legal position

- 54 Two matters must be proved by the Applicant to establish a right to recover loss as claimed by her due to being misled by the Respondent in breach of s18(1) of the ACL. The first matter to be proved is whether the loss was caused by being misled and, second, whether any loss suffered is of a kind recoverable under s236 of the ACL.
- 55 First, to recover loss under s236 of the ACL, the Applicant must prove that she suffered loss and this loss was caused by the misleading or deceptive conduct of the Respondent under s18(1) of the ACL: *Marks v GIO Australia Holdings Pty Ltd* [1998] HCA 69 per Gummow J.
- 56 In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41, in explaining the operation of s82 of the *Competition and Consumer Act 2010* (analogous to s236 of the ACL), the court held that a person who suffers loss by conduct, analogous to a breach of s18 of the ACL, may recover the loss from the contravener where the contravener can be said to have fallen short of a standard of reasonable care as well as contravening the Act.
- 57 Secondly, if a right to recover loss is established as above, the Applicant must then prove the value of her loss. In *Gates v City Mutual Life Assurance Society Ltd* (1986) CLR 1 at 12, the High Court held that the question to ask in cases involving misleading or deceptive conduct is: 'how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter than he would have been if the transaction had not taken place'.

- 58 To answer this question, it is necessary to determine whether the value of what was acquired is less than what was paid. How is value to be assessed? It is to be assessed objectively. That is, the value is to be assessed by what price a freely contracting party would have offered and accepted for the works. It is only by comparison with the value assessed in this way that there can be an assessment of whether the party that is misled could have, in the circumstances of the present case, incurred less detriment. What is important is what the misled party could have done, not what it might have hoped for or expected: *Marks v GIO Australia Holdings Pty Ltd* (above). The real value to be determined may be assessed by reference to subsequent events: *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281.
- 59 If, determined objectively, the misled party has obtained rights or works having a value at least equal to what it paid for those rights or works, then, the misled party has not suffered a loss.
- 60 In the present case therefore, if, objectively assessed, the value of the works received by the Applicant is at least equal to what she paid for them, then she has not suffered a relevant loss.

Factual analysis and findings

- 61 Turning now to the facts of the present case, in the analysis below, I have considered the two questions, whether the Applicant's loss was caused by being misled and, second, what was the amount of that loss.
- 62 In seeking to establish that the Respondent failed to take reasonable care and skill, the Applicant relied on her testimony, various photos and the Building Report.
- 63 The Applicant tendered photos taken by her. The first lot is numbered 1 to 6. These photos were taken when the works were being conducted by the Respondent in June 2014 and early July. She also tendered a second lot of photos numbered 7 to 37. This second lot was taken well after the Respondent had left the site. They were taken some time later when later trades were in the process of undertaking their works or completing the same. In support of her argument, that the Respondent failed to undertake the works in a proper and workmanlike manner and with reasonable care and skill, the Applicant tendered a Building Report of Robert Paul dated 15 August 2104. The Building Report included several photos of the bathroom, the second toilet room and the shower room. These were taken by Mr Paul on or about 12 August 2014, prior to the later trades entering and undertaking works.
- 64 The Building Report was prepared under instructions from the Applicant to inspect and document the Respondent's ceramic tile work in the bathroom, the toilet room and the shower room.

- 65 The qualifications of Mr Paul as an expert were not provided. The Building Report was not prepared in accordance with VCAT Practice Note 2. Mr Paul did not attend for examination or cross examination. The Tribunal notes that Mr Paul, on his letterhead, holds himself out as, amongst other matters, providing building inspection services in respect of VCAT dispute resolution.
- 66 The Building Report is made subject to express limitations. Limitation number 7 at page 10 states that the inspection was based on a visual inspection only without moving or removing anything. Further, limitation number 8 states that no inspection of woodwork or parts of the structure which are covered, unexposed or inaccessible has been undertaken and, to that extent, the Building Report cannot be relied on as an assessment that such part of the structure is free from defect.
- 67 Despite these significant shortcomings, given that the Tribunal is not bound by the strict rules of evidence², I am of the view that the Building Report can provide some evidence of opinion of an independent person with apparent experience as a Registered Building Inspector. I have taken into account the relative weight to be given to the findings of the Building Report given its limitations when discussing the specific claims of the Applicant below.
- 68 The Building Report summary on page 2 is quite brief. It advised that the works failed in terms of compliance. That is, the tiling work did not comply with the Building Code or relevant Australian Standards, including no plumbing or electrical certificates of compliance, the Respondent was not a registered building practitioner and an absence of a signed contract for works which were in excess of \$13,000.
- 69 In respect of workmanship, the Building Report summary advised that it was less than satisfactory, specifically, rough trimming of tiles, drummy tiles, tiles not flush and some identified works incomplete.
- 70 In respect of material used, the Building Report summary advised that standard tiles were used to external corners instead of bull nose tiles or quad trim. It also states that there was no evidence of water resistant plasterboard or compliant water proofing being in place.
- 71 The following specific issues raised by the claim are considered as to whether they constitute a failure to conduct the works in a proper and workmanlike manner or without reasonable care and skill in light of all the evidence and, subject to the important observations made above, the inspection and comment made in the Building Report.

² S98(1)(b) *Victorian Civil and Administrative Tribunal Act 1998*.

(a) *Misleading conduct in not being a registered building practitioner; non compliance by failing to issue electrical and plumbing certificates*

- 72 Non compliance issues, referred in the Building Report, were to varying degrees put by the Applicant as evidence of the Respondent failing to undertake the works with reasonable care and skill.
- 73 As discussed in paragraph 55, to recover loss, the Applicant must first prove that she suffered loss which was caused by the misleading or deceptive conduct of the Respondent.
- 74 Concerning non compliance for non issue of electrical and plumbing certificates, neither the Building Report nor the Applicant's evidence point to a connection between that fact and any need to undertake remedial works. The Building Report findings are concerned with specified parts of the tiling work and their non compliance with stated Australian Standards.
- 75 The Applicant's evidence has not established that electrical and plumbing works require rectification due to the lack of compliance. For example, it could have been put that the removal of the plaster board walls and tiling was due to a need to access plumbing and wiring throughout the three rooms to rectify unqualified and non compliant works. However, the evidence of the Applicant in this area was that the walls had to be removed because of the damage caused to the plaster board when all the tiles were removed, not because of a need to rectify plumbing or electrical works.
- 76 The invoice of Joniec Plumbing dated 22 June 2015 describes works associated with removal of all fittings, vanity unit, basins, taps and cisterns followed by re-installation after re-tiling. It does state work done to 'alter all pipe work in walls to suit client fixtures'. In this regard, it is notable that some client fixtures were changed when the rooms were redone by the later trades, such as a new bath, new design for shower grate instead of base and new taps.
- 77 Evidence was given of a leaking tap under the basin in the vanity unit referred to in the witness statement at the top of page 4. It appears that this occurred due to a loose connection under the vanity unit. According to the Respondent, it required tightening to fix and this was done by him. No evidence was led that it was due to some other cause such as the pipe work behind the walls.
- 78 I find that the necessary connection between absences of compliance about the issue of electrical and plumbing certificates and loss suffered has not been established.
- 79 Concerning not being a registered building practitioner, the Building Report reported on poor workmanship in several areas of the tiling. It is reasonable to infer that the Respondent's failure to be registered may

reflect a lack of skill or organisational abilities to cause tiling and related works to be carried out to a reasonable standard.

80 Whether that may be the case, the consequent failure of the Respondent to hold insurance required of a registered building practitioner under s136 of the *Building Act 1993* left the Applicant exposed to loss for poor workmanship, if that eventuated.

81 In my view, the Applicant has demonstrated the necessary connection between potential loss suffered by her for poor workmanship and the misleading conduct of the Respondent as found above.

82 The question of whether there was any loss was suffered by the Applicant for respective works is now considered.

83 It is important to recall however the considerations referred to in paragraphs 57 to 60 concerning what may be regarded as a recoverable loss under s236 of the ACL. One important consideration is how much worse off the Applicant is as a result of entering into the transaction, which the misleading conduct induced her to enter, than she would have been if the transaction had not taken place.

84 Whilst I have identified and found that notional losses have been suffered by the Applicant as detailed below, for the reasons given from paragraph 148, the notional losses are not recoverable.

(b) Tiling works to bathroom, second toilet room and shower room

85 Tiling is addressed in the Building Report for both floor tiles and wall tiles.

Wall tiles

86 In respect of the wall tiles of the bathroom, two defects were noted. The first defect was failure to use bull nose tiles on external edges with the remedy being to ‘install bull nose or quad to external corners’. That is, if quad was the mode employed, there would be no reason to remove any of the bathroom wall tiles. The Respondent said he was not permitted to complete this aspect of the job as he was not allowed back on the premises after leaving the site on 9 July 2104.

87 The second defect of the wall tiles in the bathroom was rough trimming of corner tiles with the remedy being to ‘re-install cut tiles to AS 3958.1-2007’. That is, the Building Report recognises that the defect can be remedied by removal of offending tiles, and possibly immediately surrounding tiles to enable the repair, but not wholesale demolition of the tiles and walls in the bathroom.

88 For the toilet room, the wall tiles defect is noted as ‘wall tiles not flush’. The remedy is to ‘reinstall new matching wall tiles flush to AS 3958.1-2007. That is, for the relevant area concerned, new matching tiles

without the need to demolish and replace the entire walls of the toilet room. As the Building Report was issued on 15 August 2014, only about 1 month after the Respondent left the site, matching tiles ought reasonably to be available.

89 Not noted as a defect, but as a matter requiring completion was ‘wall tiles to window’. The Respondent had proposed putting in an architrave, but whether tiles or an architrave, he was unable to complete due to not being allowed back on site.

90 Similarly for the wall tiles in the shower room, the Building Report notes the defect as ‘some wall tiles are not flush’. The remedy is to ‘reinstall new matching wall tiles flush to AS 3958.1-2007’. Also, not noted as a defect but as a matter requiring completion was ‘wall tiles to rear of shower’. This area was left due to there being insufficient tiles available to complete the task.

91 In my view, the Building Report’s description of works referred to in paragraphs 85 to 89 evidences that the works were defective and required rectification as recommended. I find that works fell short of a reasonable standard of care.

92 The Applicant arranged for and executed the total demolition and gutting of all wall (and floor) tiles. Removal of plaster board walls, according to the Applicant, had to be done due to damage caused by the removal of the wall tiles.

93 The Applicant, in cross examination on the first day of the hearing, said that the bath had to be removed because the tiles were over the lip of the bath. The Building Report makes no mention of poor workmanship in respect of tiling around or over the bath. It does not suggest that any remedying of defects identified involved removal and reinstatement of the bath.

94 The actions taken by the Applicant in removing all wall tiles and, as a consequence, removing all the plaster board does not appear to be reasonably required as part of rectification of the wall tiling. In my view, the actions of the Applicant in removing all wall tiling and plaster board walls, does not represent a measured response or an appropriate remediation and is not consistent with the remedies recommended in the Building Report.

95 The cost of wall tiling has been provided by the Applicant in document number 3, Tile Importer Pty Ltd’s invoice of 16 June 2014. It shows the cost of wall tiles as \$602.88. Whilst it is difficult to assess what percentage of the tiles needed to be removed to remedy the defects I have found above, a reasonable assessment given the description of the Building Report would not exceed 20%.

96 *Subject to the qualification made in paragraph 57, which is further addressed below, the Applicant’s notional loss is \$120.58.*

97 In addition, the Applicant claims the cost of labour caused by the alleged need to remove all the wall tiles. In this respect, I find that there was no additional loss suffered by the Applicant. The Applicant did not pay the Respondent for his original labour costs in the first place. The cost of labour in the subsequent replacement works done by Mr Slavko represent no additional cost caused by the Respondent in circumstances where all three rooms were deconstructed at the election of the Applicant and not in accordance with the remedies recommended in the Building Report.

Floor tiles

98 Concerning the floor tiles, the Building Report states that the tiles in the bathroom, toilet room and shower room are drummy. The remedy is to ‘install new matching floor tiles with full cover adhesive to AS 3958.1-2007’. That is, all the floors in the three rooms would require replacement. This evidence was not contested by the Respondent.

99 The Applicant has claimed the replacement cost of all floor tiles as well as additional labour cost for the three rooms caused by the defective works of the Respondent.

100 For the floor tiles, the Building Report must be taken to mean that the entire floor tiling of all three rooms requires removal and replacement. It states the floor tiles are drummy and is not suggestive of remedy by selective replacement of floor tiles. The evidence supports the need to remove the floor tiling in all three rooms.

101 Any loss suffered by the Applicant would be limited to the additional cost she has been put to because of the defective works of the Respondent. For the floor tiles this would be the cost of new floor tiles for the three rooms.

102 *Subject to the qualification made in paragraph 57, which is further addressed below*, the Applicant’s notional loss for replacement of the floor tiles referred to in Document number 3 is \$149.88 and delivery of \$90.00, being \$239.88.

103 In addition, the Applicant claims the cost of labour caused by the need to remove all the floor tiles. The labour costs will not be significant given that the Applicant would have had to pay for (but did not pay for) the removal of the original floor tiling or covering from the three rooms. As she has not paid the Respondent for any of his labour for removal of the flooring, her claim is only allowable to the extent that removal of the floor tiling done by the Respondent was of added difficulty and therefore added cost.

104 In respect of additional labour for removal of floor tiles from three rooms, in accordance with the evidence of the Applicant, there is an additional cost for labour due to a greater difficulty in removing the new but drummy floor tiles as recommended in the Building Report. Whilst

it is difficult to be precise, from the evidence presented, including as to areas of tiling, additional labour cost would not reasonably be expected to exceed 20% of total demolition cost purely associated with removal of floor tiles, that is, excluding labour cost percentage attributable to removal of wall tiles.

- 105 The invoice of 'Jast Tiling', document number 14, for demolition and removal of all wall and floor tiles and plaster board walls is \$2500.00. The Applicant did not pay the Respondent for any labour for the original demolition or rubbish to be removed.
- 106 The cost attributable to floor tile removal in comparison to wall tile removal is unlikely to exceed 25% of the total cost of Jast Tiling, giving consideration to the scale of the wall demolition works undertaken in a manner not consistent with the findings of the Building Report. Of the 25% attributable to the removal of floor tiles, additional difficulty for removal might reasonably be expected to not exceed 20% (of the 25% attributable to the floors).
- 107 *Subject to the qualification made in paragraph 57, which is further addressed below*, the Applicant's notional loss for cost of additional labour is \$125.00.

(c) Plaster works to bathroom, second toilet room and shower room

- 108 For the reasons discussed above, removal of plaster board walls was not reasonably necessary, given the remedies stated in the Building Report. The Building Report did not point to a need to remove all the wall tiles thereby damaging the plaster walls beyond repair. The integrity of the plaster board walls would not be adversely impacted if the wall tiles were replaced in the manner contemplated as achievable in the Building Report.
- 109 However, the Building Report does refer in its summary section on page 2 to 'Materials Used'. It states that 'there is no evidence of Water Resistant plasterboard or compliant waterproofing being in place'. There is no other mention or detail about the plaster board. From this single line statement, despite the express limitation in the Building Report that only a visual inspection was made with removing anything, I am being asked to accept that none of the walls were composed of water resistant plaster board.
- 110 It could be speculated that, perhaps from exposed plaster board behind the incompletely tiled shower wall, the walls were in fact not constructed of water resistant plaster board. But that is the problem. It would be speculation in circumstances where the expertise of the Building Report has not been properly established and where Mr Paul did not attend for examination. There is insufficient evidence for me to

infer that the walls required demolition due to non use of water resistant plaster board.

111 Finally, I have referred above to possible argument that all walls may have needed replacement due to a need to uncover walls so as to rework plumbing piping work or wiring. I have already given reasons as to the insufficiency of the evidence in support of this proposition.

112 The Applicant has not demonstrated on the balance of probabilities the necessity to remove the plaster board walls and thereby substantiate a claim for damages in respect of additional materials and a possible labour component.

(d) Installation of 'proper' shower base

113 Document numbered 4, being the rough notes made by the Applicant around the time of the agreement to undertake the works, describe the required shower base as '900 sq with lip on three sides'. The cost of the base is stated in the invoice under document number 3 is \$95.00. This is consistent with the Respondent's evidence that a 90cm x 90cm was agreed to be installed by him with the Applicant to purchase it.

114 The Building Report does not refer to any defect or requirement for the shower base to be removed. The Building Report does state at page 2, under a general comment on materials used, that there is no evidence of water resistant plaster board or water proofing being in place. I have referred above to the express limitations of the Building Report including visual inspection only without removing anything. It is difficult to see how the Building Report could be referring to the shower base without having made any inspection of the under side. Further, the reference in the Building Report to plaster board and water proofing appears to be a reference to the walls, which is discussed above. Apart from the summary, there is no reference to a concern with the shower base.

115 I note the evidence that the shower base design was abandoned by the Applicant when the bathroom was demolished and reconstructed in favour of what may be regarded as a more elaborate design for a grate style shower recess.

116 The Applicant has not proven that it was necessary to demolish and remove the shower base. In any event, the Applicant has not paid the Respondent for his labour in installing the base and, as such, no additional cost has been incurred in terms of labour cost.

(e) Removal of tile rubbish

117 There was a dispute as to whether removal of rubbish was to be undertaken by the Respondent. His evidence is that he did not charge for it and did not remove anything. He believed it was for the Applicant to arrange.

118 Again, the Applicant did not pay the Respondent for rubbish removal, so no loss is established unless the cost of removal of rubbish had increased due to remedying the defects caused by the Respondent.

119 In my view there is an insignificant volume of additional rubbish arising out of works associated with the remedies stated in the Building Report, apart from the additional floor tiling removed. In terms of relatively large demolition and associated rubbish actually undertaken by the Applicant, it is not likely that the floor tiling would greatly add to cost of waste removal. It could be reasonably expected that the additional cost of disposing of removed floor tiles would not exceed \$100.

120 *Subject to the qualification made in paragraph 57, which is further addressed below*, the Applicant's notional loss for loss for removal of tile rubbish is \$100.00.

(f) Damage to bath and to cistern

121 The Applicant gave evidence that the bath sustained scratch marks when removed due to having to remove all wall tiles and remove the bath. The Building Report, whilst concerned primarily with the state of the ceramic wall tiles, did not point to plumbing problems necessitating removal of the bath.

122 The Building Report recommendations as to remedying wall tile defects did not necessitate or recommend removal of all wall tiles. On the evidence of the Applicant it was the removal of all the wall tiles that necessitated the removal of the plaster board. Had the plaster board not been damaged then it is open to find that the bath would not need to have been removed.

123 There is insufficient evidence to prove on the balance of probabilities that the bath was damaged due to the consequences of the failure of the Respondent to undertake the works in a proper and workmanlike manner.

124 A similar position applies in respect of the claim for damages for the damaged toilet cistern. The evidence of the Applicant was that the toilet was irreparably damaged by falling tiles from the wall above the cistern when Mr Slavko and his trades were demolishing the tiles and plaster board walls. The Applicant said that Mr Slavko or his trades had used protective measures to avoid damaging the cistern. However, in my view, had appropriate measures been employed by these trades, there is no reason as to why the cistern would become damaged. Such damage is not causally connected to alleged lack of proper workmanship of the Respondent, especially in circumstances where it was not necessary to remove all the wall tiles.

(g) Damage to shaving cabinet

125 Any damage to the cabinet is beyond the matters addressed in the Building Report. The Applicant said that the cabinet was damaged

during its removal by the Respondent in preparation for the works when it was not necessary to remove it in the first place. She said that the Respondent apologised at the time for the damage. The Respondent did not give particular evidence in respect of the shaving cabinet.

126 I find that the Respondent damaged the cabinet. The cost of replacement is shown in exhibit AA3, the invoice of Tile Importers Pty Ltd, as \$97.00.

127 *Subject to the qualification made in paragraph 57, which is further addressed below, the Applicant's notional loss is \$97.00.*

(h) Plumbing of basin and location of shower heads

128 The Applicant claims plumbing cost for rectification of works and to make them compliant. The invoice of Joniec Plumbing Pty Ltd, in document number 19, for \$1,014.20 including GST is claimed.

129 The evidence of the Applicant for these damages was not clear. The Applicant said that the faulty works included a failure to install an 'S' bend for the basin. The Respondent said that the 'S' bend was in place and was below floor level. The location of shower heads is also claimed. However, some design changes were made to the shower arrangement, including a grate style shower, following demolition and new works being undertaken by the later trades.

130 The claim represented by the invoice for \$1,014.20, apart from the above two matters, relates to general removal and reinstallation works to enable the other works to be undertaken. Again, the Respondent was not paid for his original removal and installation costs. It is not clear what the additional costs for labour are, which have resulted from alleged poor plumbing workmanship of the Respondent.

131 Further, I note from the invoice that it includes labour to 'alter all pipe work to suit client fixtures'. This suggests works were required to be altered to meet changed configurations in some areas of the plumbing rather than being changes due to poor workmanship.

132 The only part of the invoice related to poor workmanship of the Respondent, which was admitted by him, was for removal of an incorrect plug and washer from the basin, removal of silicone and supply and installation of a new plug.

133 The Applicant has not provided sufficient evidence that the plumbing works represented in the invoice had to be redone as a result of poor workmanship. I disallow the claim for damages for plumbing, except for the cost associated with the plug and silicone removal.

134 Given the description of the plug and associated costs in the invoice, it is clear that they constitute a very small part of the total plumbing invoice. An allowance of 5% of the cost of \$1,014.20, including GST, would be reasonable.

135 *Subject to the qualification made in paragraph 57, which is further addressed below, the Applicant's notional loss is \$50.71.*

(i) *Damage to side fence*

136 The Applicant claims \$400 for repairs to a side fence alleged to have been damaged by the Respondent when storing waste material following demolition works. The Respondent denies that he damaged the side fence. On examining the Applicant's photos numbered 5 and 6, the fence presents as a post, rail, plinth board and paling standard fence. For its apparent age, it appears in reasonable condition. The fence leans slightly in and slightly out in a number of places along the visible alignment giving a slightly wavy appearance, but only moderately so. The photo of the Respondent in exhibit R1 is consistent with this description. The wavy appearance of the fence is along the alignment and not limited to where waste material was stored.

137 I find that the waste material has not contributed to any deterioration of the condition of the fence. The Applicant's claim is disallowed.

(j) *Scratched bath tap and sink mixer tap*

138 The evidence of the Applicant, including her photos showing some scratches to both taps, does not prove on the balance of probabilities that the scratches to the taps were caused by the Respondent during installation. The Applicant said that she had no idea how or when the taps became scratched. The Respondent surmised that any scratching did not occur when he was on site and that it must have occurred later on.

139 I find that the taps were most likely damaged during substantial demolition works conducted in the three rooms, which included the removal of the tap fittings. I also note that the taps remain in use by the Applicant according to her written statement at page 9. The claim for the taps is not allowed.

(k) *Damage to vanity unit by water leak and chipping*

140 The Applicant claims damages of \$486.00 for replacement of the bathroom vanity unit, according to the invoice in document number 3 (and exhibit AA3). The Respondent admits that there was a leak from a loose connection to the pipe under the unit. The Applicant tendered photos showing a distorted shape to the unit.

141 The Respondent said the unit was not warped as the result of water leakage. He said that the photo appeared to show warping simply because the unit had been disconnected from the wall and not yet been properly readjusted. He further denied causing chipping to the drawers, saying this would have happened during the substantial demolition done by the later trades.

- 142 I am of the view that the escape of water into such units, constructed of particle board according to the Applicant, is likely to cause significant damage, damage consistent with the evidence shown in the photo showing a warping effect. I find the notional loss suffered by the Applicant in purchasing a replacement vanity unit is \$486.00.
- 143 Document numbered 21 is the invoice of Joniec Plumbing dated 4 October 2015 for labour. The invoice includes labour works for removal of several taps and the vanity unit plus reinstallation of the same. The removal cost is not claimable as the original removal done by the Respondent has not been paid for. The need to reinstall the vanity unit is an additional cost. A reasonable allowance for the vanity unit proportion of the labour cost for reinstalling is unlikely to exceed 20% of the total cost of the Joniec Plumbing invoice, being \$149.60 including GST.
- 144 *Subject to the qualification made in paragraph 57, which is further addressed below*, the Applicant's notional loss for damage to the vanity unit and labour is \$635.60.

(l) Early superannuation claim fee

- 145 The Applicant claims the early draw down fee paid by her for the need to make early draw down of funds from her superannuation in order to pay for additional materials to undertake rectification works. She claims that this fee would not be payable but for the poor workmanship of the Respondent. She did not address the fact of how she intended to fund the payment of the Respondent for his works without making an early drawing on her superannuation.
- 146 No evidence was presented of the Applicant's overall financial state or that the cost of replacement tiles was such as to require her to make an early draw down due solely to the rectification works. I note that the Applicant's purchases included a new bath, a new cistern and a new shower grate for a new shower design. These expenses, for the reasons above stated, did not result through any fault on the part of the Respondent.
- 147 If the Applicant is entitled to claim damages for this indirect loss, it has not been proven on the balance of probabilities that the payment of the fee was a consequence of fault on the part of the Respondent. This part of the claim is disallowed.

(m) Building inspector's Building Report

- 148 The cost of the Building Report was \$525.00. Whether this is an allowable cost depends on my final finding as to whether the Applicant has proved that she has suffered a recoverable loss as described in paragraph 57. My finding below is that the Applicant has failed to prove a loss under s236 of the ACL. The cost of the Building Report is not recoverable.

Has a loss been proven giving a right to recovery?

- 149 I have found that the Applicant has suffered certain notional losses under the heads of claim described above. The notional losses total \$1,893.77. These losses are notional in the sense that, for the Applicant to be entitled to recover this amount in a case of misleading or deceptive conduct, she must prove that she is worse off as a result of the misleading conduct than she would have been if the transaction had not taken place.
- 150 A discussed in paragraphs 57 to 60, objectively assessed, if the Applicant has obtained the works having a value at least equal to what she paid for those works, then, even though she was misled, she has not suffered a relevant loss. The question is what was the value of the works that the Applicant obtained from the Respondent?
- 151 The Applicant's evidence was that all the works were of no value. She brought in other trades and attended to the complete demolition of the Respondent's works. I have made findings about the lack of a reasonable basis that justified the Applicant taking this action in paragraphs 90 to 93.
- 152 In my view, the actions of the Applicant in removing all wall tiling and plaster board walls, was not a measured response or an appropriate remediation. The action of the Applicant was not consistent with the remediation recommendations made in the Building Report. The Building Report might have been expected to comment on the need for drastic demolition as the only way to effect necessary remediation of poor workmanship. It did not do so. Indeed, the remediation works in the context of the total cost invoiced by the Respondent of approximately \$13,000 can be considered a relatively small percentage.
- 153 The Applicant did not pay anything to the Respondent for the works. The Building Report's recommendation was for limited remediation works. The Applicant received renovation works substantially complete for no cost to her. The value she received in July 2014 was substantially in excess of what she paid for them. It was the Applicant's election to totally deconstruct the works and thereby destroy any value received by her from the Respondent. Such actions are beyond the control of the Respondent.
- 154 The Applicant has failed to prove that she was worse off (before undertaking her own deconstruction works), in respect of the value of works that she received but did not pay for, as a result of the misleading conduct of the Respondent
- 155 The Applicant has failed to prove entitlement to loss under s236 of the ACL, as that section is construed, including the authorities discussed above.

CONCLUSION

156 For the above reasons, the Applicant has failed to establish a loss giving a right to recovery.

MEMBER MJF SWEENEY