

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP321/2019

CATCHWORDS

Domestic building work – bathroom renovation – warranties under *Domestic Building Contracts Act 1995* – guarantee under *Australian Consumer Law* – defects in the work – how to assess loss and damage where scope of necessary rectification is greater than the originally agreed scope of work

APPLICANT	Niki Vasiliadis
RESPONDENT	Ahmed Saoud t/as Tip Top Trading (ABN: 85 387 793 550)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	19 September 2019
DATE OF ORDER	11 October 2019
CITATION	Vasiliadis v Saoud (Building and Property) [2019] VCAT 1594

ORDER

1. The respondent must pay to the applicant \$7492.50.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Ms N. Vasiliadis in person
For the Respondent	Mr A. Saoud

REASONS

What was the agreement between the parties?

1. The applicant and the respondent entered into a contract when Mrs Vasiliadis accepted Mr Saoud's quote No.8 dated 31 May 2018 (the quote). The work to be carried out was the renovation of the Vasiliadis' bathroom. Mr Saoud had inspected the bathroom before providing the quote.
2. The scope of work set out in the quote was as follows:
 - Install tiles
 - Waterproofing for the bathroom
 - Screed showerbase
 - Repair showerbase
 - Remove toilet, vanity and meter and put back to place
 - Cilicon [sic] for bathroom
 - Floor channel for the shower base
3. A more detailed description of the work was provided in an email from Mr Saoud dated 6 June 2018, as follows:
 - The showerbase will be removed fully removed [sic]
 - Then we support the showerbase with new timber and new chipboard, reinforced timber.
 - Also cilicon [sic] for the corners and waterproof before the screed.
 - Screed the showerbase
 - Waterproof on top of the screed
 - We also make sure the water is running through the floor West [sic].
4. The parties agreed that the quoted price was \$4950, but that in an exchange of text messages, they agreed that the price would be \$4500 if paid in cash, with no GST. That amount has been paid.
5. During the hearing, Mr Saoud said that he had offered the discounted price after the parties had agreed he would remove the vanity but not replace it. However that evidence is not consistent with the contemporaneous text messages and I do not accept it. I prefer Mrs Vasiliadis' evidence and the text messages that the discounted price was due to the removal of GST, not the removal of the vanity from the scope of works.

6. Mr Saoud carried out the work over several days, including working late on the last day, as he said, to make sure Mrs Vasiliadis and her family had a working bathroom. At the conclusion of that day, in August 2018, there were still minor items to be completed, which Mr Saoud said he would return to do at a later date. He did not do so.

What obligations does the law impose on the respondent?

7. The work performed by Mr Saoud was domestic building work as defined in the *Domestic Building Contracts Act 1995* (as it involved more than just tiling). As a result, Mrs Vasiliadis is entitled to the benefit of the implied warranties regarding the work set out in section 8 of that Act, including the warranty created by s8(a) that the work would be carried out in a proper and workmanlike manner.
8. Also, as Mr Saoud was supplying services in trade or commerce to Mrs Vasiliadis as a consumer, she is entitled to the benefit of a guarantee under section 60 of *The Australian Consumer Law* that the services supplied by Mr Saoud would be rendered with due care and skill.

What is the claim?

9. Mrs Vasiliadis' claim is that shortly after she and her husband commenced using the bathroom, the shower began to leak. She also says that the works were not completed to an adequate standard.
10. She obtained an inspection report from a bathroom contractor in October 2018, which identified a number of defects in the works, including the following:
 - a. Rather than creating a fall with a sand/cement screed, Mr Saoud has used pieces of cement sheet around the perimeter of the shower base to try to achieve a fall. There is no screed present.
 - b. Mr Saoud constructed a strip drain in the shower by chiselling out a channel in the chipboard floor, which has compromised the strength of the floor.
 - c. Part of the existing bathroom floor is concrete and part is particleboard. Mr Saoud has installed yellow-tongue chipboard over the concrete area, to build up the height outside the shower base. This is an incorrect use of material, as chipboard should not be glued to a concrete base. Further, the chipboard layer has compromised the finished floor heights between the bathroom and hallway.
 - d. Moisture is evident on the underside of the chipboard floor, which indicates that the waterproof membrane installed by Mr Saoud has failed.

- e. Grout in the shower base is cracking due to movement in the substrate and the smell of mould is present.
 - f. There are other complaints about the type of glue used and inconsistent coverage of glue.
 - g. Incomplete works include the finish around the windows and door and the vanity not having been reinstalled.
11. In his defence, Mr Saoud said that his job was to do tiling and waterproofing, which he did. He was not engaged to do carpentry, electrical or plumbing works. The finish around the windows was not part of his scope of work. Nor was reinstalling the power points. He said that he was not required to reinstall the vanity, and he had allowed a reduction in the contract price to remove this work from the contract. He said that Mr and Mrs Vasiliadis were happy with his work and they checked each evening when he had finished.
12. He said that he had not come back to finish the work as he thought he was still owed \$1000. He said he had carried out extra work for Mr and Mrs Vasiliadis, installing timber supports and cement sheet over the floor, and they had agreed to pay him an extra \$1000 for that work. When I asked him why he had not raised that extra payment in any of his emails or text messages with them between August 2018 and now, he was unable to provide a satisfactory explanation.
13. He agreed that from the photos it appeared that the shower was leaking. He could not explain why that was, and said he had used a primer on the chipboard before applying the waterproofing compound. He said Mr and Mrs Vasiliadis had not asked him to come back and fix the leaks.
14. I accept Mrs Vasiliadis' evidence that the shower is leaking. I also accept the photographs she has provided which show the extent of the incomplete works. I also accept the description of the defects set out in the report provided by the bathroom contractor. On this basis I am satisfied that the works carried out by the respondent are defective.

What is the respondent's liability?

15. I am satisfied that in performing the works defectively and in failing to complete the works, Mr Saoud has breached the implied warranty created by s8(a) of the *Domestic Building Contracts Act 1995* that the work would be carried out in a proper and workmanlike manner.
16. I am also satisfied that Mr Saoud has breached the guarantee created by s60 of *The Australian Consumer Law*, that the services supplied by Mr Saoud would be rendered with due care and skill.

17. The consequences of breaching the *Domestic Building Contracts Act* warranty and the *Australian Consumer Law* guarantee are that Mr Saoud is liable to pay damages to Mrs Vasiliadis.

What is the applicant's loss and damage?

18. Mrs Vasiliadis provided five quotes for the rectification of the bathroom, ranging between \$15,450 and \$19,910. Each of the quoting contractors have provided an opinion that it is not possible to rectify the existing bathroom, but that the work done by Mr Saoud must be pulled out and redone, in order to provide a screeded shower base and appropriate waterproofing. The cost to Mrs Vasiliadis of purchasing new tiles must be added to this figure, which the parties agreed was between 25 and 30m² of tiles at \$40 per square metre, or \$1000 - \$1200. Mrs Vasiliadis seeks an order for \$15,450, plus \$1200, plus reimbursement of the fee paid to the Tribunal.
19. The law provides for a method of assessing a person's loss and damage when there is a breach by a builder of a warranty or guarantee given by, or implied into, a building contract. In simple terms, this test is as follows¹:
- a. Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract².
 - b. The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt³.
 - c. Reasonableness is a question of fact and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position⁴.
 - d. In considering whether it would be unreasonable to award the cost of rectification, the Tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole. For example, there might be circumstances in which it could be argued that an award of

¹ Set out by SM Walker in *Clarendon Homes Vic Pty Ltd v Zalega* [2010] VCAT 1202 at [165]

² *Belgrove v Eldridge* [1954] 90 CLR 613

³ *Belgrove v Eldridge*

⁴ *Tabcorp Holdings Limited v Bowen Investments Pty Ltd* [2009] HCA 8; (2009) 253 ALR 1

rectification cost would give the innocent party an uncovenanted profit⁵.

20. In the present case, Mrs Vasiliadis contracted for a basic bathroom renovation from a contractor who was neither a licensed plumber nor a registered domestic builder. She now seeks the cost of a comprehensive bathroom renovation. This can be seen by the discrepancy in what was quoted. Mr Saoud offered to provide only those items set out at paragraphs 2 and 3 above, for \$4500. On the other hand, the five quotes provided by the applicant include the cost of using registered and licensed contractors, who will provide certificates of compliance, home owners warranty insurance, other insurance, compliance with the Australian Standards and payment of GST.
21. Had Mr Saoud performed his scope of works completely and without defects, Mrs Vasiliadis would have had a basic bathroom, without any of the benefits allowed for in the recent quotes (i.e. licensed trades, certificates of compliance, insurance, tax compliance etc). In awarding Mrs Vasiliadis an amount of money to put her in the position she would be in had Mr Saoud's contract been performed, I do not accept that the recent quotes are an appropriate comparator. As an example, it is as if Mrs Vasiliadis had bought a basic model car and now claims a top of the range car. While she is entitled to a car that works, Mr Saoud is not required to provide her with a car with leather seats and a sunroof. That would be a betterment.
22. Taking into consideration the terms of the bargain the parties had, I consider that it would be unreasonable to award the cost of rectification, which is nearly four times the amount Mrs Vasiliadis originally paid for the works. In the circumstances of this case, this would give her an uncovenanted profit. That is not to say that there would not be cases where this would be a reasonable order to make. However in the present case, I am not satisfied it is reasonable.
23. As I have no quotes before me of the cost of providing the same limited scope of work as Mr Saoud, I must assess Mrs Vasiliadis' loss and damage doing the best I can on the material I have. Instead of the amounts quoted for rectification, I think it is fair and reasonable to allow her an amount of money which will put her in a position whereby she can choose what standard of new bathroom she wants to install and how much she wants to spend on it. Continuing the analogy of the car, it is as if I am allowing her a refund of the cost of the basic model car plus the removal costs, which she can then choose to spend on a similar car or put towards an upgrade.
24. I calculate this amount as \$7280, made up as follows:
 - a. Refund of amount paid to respondent: \$4500

⁵ *Radford v De Froberville* [1977] 1 WLR 1262

- b. Cost to demolish and remove the work carried out by Mr Saoud and remove the rubbish from site. As the new quotes are not itemised, I do not have a figure for this work. One quote provides \$580 for rubbish removal (Bathroom Pro). I will allow that amount plus \$1000 for labour, which is based on my own knowledge and experience in this Tribunal⁶, that \$45 per hour for a labourer for two days plus sundries is reasonable. The total allowed is \$1580.
 - c. Cost to purchase new tiles (as the original tiles will be destroyed and unable to be used again): \$1200
25. Further, as Mrs Vasiliadis has been substantially successful in her claim, she is entitled under s115B of the *Victorian Civil and Administrative Tribunal Act 1998* to an order that she be reimbursed by Mr Saoud the filing fee she paid, in the sum of \$212.50.
26. I will make an order that the respondent must pay to the applicant damages in the sum of \$7280 and, in addition, reimburse to the applicant the filing fee of \$212.50.

SENIOR MEMBER S. KIRTON

⁶ Which I am allowed to do under s98(1)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* and see *VJV Pty Ltd v Sniach* [2015] VCAT 408 at [18]-[22]