

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D124/2011

CATCHWORDS

Domestic building work – defective work – claim on insurer rejected – defective roof – suggested that it would last for period of guarantee – not an answer to claim – owners entitled to cost of providing a roof in accordance with the contract

APPLICANTS	Samantha Woods, James Woods
RESPONDENT	Contractors Bonding Limited, Contractors Bonding Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING/ ORDER	30 January 2012
DATE OF WRITTEN REASONS	20 April 2012
CITATION	Woods v Contractors Bonding Ltd (Domestic Building) [2012] VCAT 500

WRITTEN REASONS FOR DECISION PROVIDED AT THE REQUEST OF THE REPONDENT

The following is an edited version of the reasons for decision given at the hearing of this matter on 30 January 2012 given pursuant to a request by the Respondent for written reasons in March 2012

APPEARANCES:

For the Applicants	Mr S. Wilmoth of counsel
For the Respondents	Mr Iliov, representative

REASONS

Background

1. This proceeding concerned two claims by the Applicants (“the Owners”) under a domestic building insurance policy against the Respondent insurer (“the Insurer”) in respect of defective domestic building work. The work related to renovations carried out on the Owners’ house in Toorak by Montalto Homes Pty Ltd (“the Builder”). The Builder has since gone into liquidation.
2. The Respondent accepted part of the claim but refused indemnity for most of it and the Owners have brought this application seeking indemnity under the policy.

The hearing

3. The matter came before me for hearing on 30 January 2012. Mr Wilmoth of counsel appeared on behalf of the Owners and the Insurer was represented by its local agent, Mr Iliov.
4. I received evidence from a number of expert witnesses, Dr Eilenberg, Mr Borg and Mr Grant on behalf of the Owners and Mr Campbell on behalf of the Insurer. There was also an Archicentre report filed by the Owners prepared by a Mr Carter, an architect.
5. At the conclusion of the evidence I ordered the Insurer to pay to the Owners \$64,630.00 together with their costs to be assessed.
6. No request for written reasons was made at the time but such a request was received by the Registrar by email on 2 March 2012. The following is an edited and enlarged version of the oral reasons for decision given at the time.

The building work

7. The building work was carried out in 2006. According to the evidence of Mr Woods this was the second major project the Builder had undertaken and, although not overly critical of the Builder, Mr Woods said that there was some problems relating to the co-ordination of the work. There were many variations.
8. The work was to be done pursuant to architectural drawings provided to the Builder by the Owners. The architect, Mr McIntyre, did not supervise the work. The defects related to the construction of the roofs and the installation of the bath and consequential damage arising from water penetration from both of those sources.

The roofs

9. The design involved several roofs at different levels. The plans did not detail how these were to be drained but the Builder constructed them so that one drains onto another. The experts seemed to agree that the system

adopted was a very odd arrangement. Dr Eilenberg described it as very messy with the water running off each roof dropping onto the roof below. He said that there was insufficient provision for overflow and adequate discharge of the drains.

10. Mr Campbell agreed that it was an arrangement which really did not make a great deal of sense. He said there was no need for a box gutter that is shown in the drawings and that the roof could be replaced altogether, the water could be run into an ordinary gutter and into a down pipe so as to discharge the water from the higher roof onto the much larger roof below.
11. There was agreement that there were design problems but I am not concerned with any deficiencies there might have been in design. They are not the responsibility of the Builder but the architect. The Builder's contract was to construct what Mr McIntyre had designed and if it had done that in a proper and workmanlike manner then there would have been no claim against either the Builder or the Insurer under the policy.
12. However it was quite clear that the work was not done in a proper and workmanlike manner.

The drainage defects

13. According to Dr Eilenberg the drainage of the roof was not dealt with by the plans and the solution was left to the Builder and its plumber. He said that it has not been undertaken by a competent artisan. He said that the roof as constructed does not comply with the Building Code of Australia in a number of respects. In particular:
 - (a) the internal box gutter has not been properly constructed;
 - (b) there is no overflow facility;
 - (c) the rainwater head had no overflow cut into it;
 - (d) various spreaders from the roofs did not have some required caps and water is running onto the roof without being properly spread;
 - (e) the ground floor roof downpipe should have been taken to a sump at the southern end and not discharge into the box gutter;
 - (f) the down pipe at the northern end has to be relocated off the wall, half blocks inserted and the load spread over more sheets. A lot of the water is spread over the apron flashing which all of the experts agree should not have been done.
14. A builder, Mr Borg and a roof plumber, Mr Grant inspected the roof on behalf of the Owners. They attributed the flattening of roofing sheets and a lack of fall in the roofs to the spacing of the battens supporting the roofing sheets saying that they were too far apart. It does not appear to have been within the brief of either Dr Eilenberg or Mr Campbell to investigate the spacing of the battens and they did not measure them.

15. Both Dr Eilenberg and Mr Campbell observed that there was some flattening out and damage throughout the roof which Mr Campbell attributed to heavy foot traffic due to the position of the damage he observed relative to the balcony where the roof was easy of access. He referred to the possibility that children and other people unfamiliar with the methods one should adopt when walking on roofs of this nature might have gained access and walked on the roof and the damage that might have resulted from that.
16. It does appear why anyone would want to climb up onto the roof with any frequency. I imagine the Owners might have been up there occasionally to clean the gutters and perhaps a child might have gone up there once in a while to retrieve a ball but I think it is unlikely to have had regular pedestrian traffic.
17. The builder, Mr Borg, who was called upon to quote on the rectification work and the roof plumber, Mr Grant, whose particular field of expertise this is looked further than the other experts and went to the extent of tapping the sheets to find out just what these battens were. Dr Eilenberg had said that the spacing was in accordance with manufacturer's recommendations but that was because his understanding was that they were spaced at 1200 centres. According to the investigation of Mr Grant and Mr Borg that was not the case. They were further apart than that. Both of them said that 1200 was the maximum and that as a matter of practice they would space them more closely. The closer they are together the better the roofing sheets are supported and the less they are likely to distort under load.
18. What has happened is a flattening and distortion that was observed by those experts. Mr Grant and Mr Borg also observed a ridge where there was a change in the pitch albeit not very great.
19. There was a dispute between Mr Campbell on the one hand and the other experts in the other as to whether the roof had the required fall. Where there is a change in the pitch, the fall that you measure will depend on where you take the measurement. I am not altogether sure I can finally decide precisely what the fall is, although the weight of evidence seems to be in favour of the opinion of Mr Borg, Mr Grant and Dr Eilenberg that there was not the required fall. The first two of those gentlemen gave evidence as to the fall in quite considerable detail, and so did Mr Campbell but they might have measured it at different positions. Obviously, it does not help to have a fall on one part of the roof if there is no fall on the rest of it and I am satisfied that there is no fall in at least a substantial part of the roof.
20. According to the expert material there are a lot of things wrong with the roof apart from the things I have already mentioned. There are also questions of flashing, the way the sheets have been lapped and put on, all referred to in the evidence, raising very serious questions in the opinion of the experts as to the competence of whoever built this roof.

21. Mr Campbell said that there was a warranty on the roof and that it will last for the period of that warranty. That is not the point. The question is whether this roof has been built in a proper and workmanlike manner. If it has not, liability arises from the warranty implied by s.8 of the *Domestic Building Contracts Act 1995*. The plans did not tell the Builder how to space the battens, lay the sheets and construct the drainage, spreaders, downpipes and so forth. That was left to the expertise of the Builder. It had to do it in accordance with good building practice and it is quite clear that it did not do that.
22. What the Owners now have is a loss, being the cost to provide a roof in a proper and workmanlike manner. It is not sufficient to say that they can put up with a defective roof because it will last the length of the guarantee. As the High Court said in *Tabcorp Holdings v Bowen Investments* [2009] HCA 8, their measure of damages is what it would cost to put them into the position they would have been in of the contract had been complied with; that is, the cost of having a properly constructed roof. I think this roof will have to be reconstructed.

The bath

23. That brings me to the problem with the bath. The Builder knew where the bath was to go and that it was to be recessed into the wall. It had the bath on site for some considerable time. The Builder knew at least prior to installing the bath that it was to be on a hob and that to do so required the installation of a special angle that was described by Dr Eilenberg and Mr Campbell. If it had been put on, that would have stopped the flow of water into the bedroom. The other issue was that the bath was installed with a narrow gap around it from which water falling from the shower could never be effectively drained.
24. The bath needs to be taken out and these problems addressed and the cost of that again is a loss the Owners have suffered by the failure of the Builder to carry out the work in a proper and workmanlike manner.

Consequential damage

25. These defects have led to considerable damage to the ceiling and in the rear hallway and the collapse of a ceiling and damage to other internal linings referred to in the reports. The workshop ceiling has also been damaged and both ceilings will need to be reconstructed. Dr Eilenberg set out a comprehensive scope of works to deal with these problems. Mr Campbell has prepared a lesser scope of works but the most comprehensive is that of Mr Borg.

Order to be made

26. I have had regard to the costings of the experts but I think that Mr Campbell's costing does not address all the issues. The most up to date quantification of the loss that I have is that of Mr Borg, which is a quotation of \$65,380.00 to carry out all of the work.

27. There will be an order for the full amount of the loss less the excess payable under the policy.

SENIOR MEMBER R. WALKER