

BETWEEN

EC
APPLICANT

AND

ECE
SECOND APPLICANT

AND

UX LTD
RESPONDENT

Date of Order:

12 February 2016

Referee:

Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that UX Ltd is to pay the sum of \$600.00 directly to EC on or before 2 March 2016.

Facts

[1] EC and ECE engaged UX Ltd to replace the existing grout in their shower with stain-resistant grout. A total price of \$250.00 cash was agreed and the work was carried out. In the process, Mr A of UX Ltd agreed that one of his workers accidentally scratched the nickel shower drain in the base of the applicants' shower while removing the existing grout with a hand tool.

[2] In addition, the first grout failed and UX Ltd returned to remove it and replace it with a different product. UX Ltd agreed to pay \$92.74 which was the price for a new shower drain sent to them by EC, but saying that they believed this was for the shower drain to be replaced (including labour). In fact, removing the shower drain is a difficult and expensive job because it is cemented in to the shower base and removing it poses a risk of damage to the tiles and the shower waterproofing. Because of this, initially, EC and ECE, in spite of being upset about the scratch to the pristine shower drain in their new house, did not intend to incur the cost of replacement but were treating the \$92.74 as compensation effectively for the scratch and were happy to leave it at that. UX Ltd did pay that amount to the couple before undertaking the remedial work.

[3] However, when the remedial grouting was done by UX Ltd a second scratch was made. UX Ltd denied that this was their fault, saying that they taped around the drain the second time round.

[4] EC and ECE maintain that it was UX Ltd that caused the second scratch, and claim \$600.00, being partially for a contribution towards the full replacement of the shower drain, a job for which they have been unable to obtain a quotation, and partially \$250.00 for regrouting after the replacement has been carried out. They also claim that the remedial job has been inadequate, with resin left on the surface of the tiles and staining to the supposedly stain-resistant grouting.

[5] The relevant law is the Consumer Guarantees Act 1993 ('CGA'), specifically section 28 of the CGA which provides a guarantee that services will be carried out with reasonable care and skill.

Issues

[6] **The issues to determine are:**

- A. Were both scratches caused by UX Ltd?
- B. Does scratching the shower drain constitute a failure of reasonable care and skill on the part of UX Ltd?
- C. Aside from the scratching, is the finished job of acceptable quality?
- D. What remedies, if any, are available and appropriate?

Were both scratches caused by UX Ltd?

[7] I find that the second scratch was caused by UX Ltd and note that the first scratch was acknowledged by UX Ltd as their mistake. UX Ltd says that its worker used tape on the drain the second time round. EC disputes this and says, from what she could observe tape was only applied part way through the removal of the faulty grouting second time round, and she believes that was done in response to the second scratch being made. She points out that such a scratch with a sharp hand-tool could also have been made through any tape applied.

[8] It is very likely UX Ltd caused the second scratch because it is almost identical to the first scratch, which UX Ltd acknowledge causing, both in appearance and in position, that is, perfectly in line with the grouting angling from the drain to the corner of the shower. Given the position of the grouting in a bathroom, I consider it very unlikely any other sharp object would have been present in the location at any point to cause the second scratch (if the grouting was in a kitchen for example, where other sharp objects are used, some other cause may have been more of a possibility).

Does scratching the shower drain constitute a failure of reasonable care and skill on the part of UX Ltd?

[9] I find that, although accepting UX Ltd's worker made the scratch accidentally, the action still constitutes a failure of reasonable care and skill. Mr A says removing the existing grout was difficult because the gap was not wide enough for their usual multi-tool to be used so a hand tool had to be used.

[10] However, it would have been possible, and more reasonable, for the worker to start at the edge of the shower drain and cut in a direction away from the drain – the existence of

the scratch in the position it appears means he must have been applying the tool in the direction of the drain. He could also have used a solid barrier where the drain started so that the tool could not have come into contact with the metal surface. Tape was, predictably, inadequate protection against a sharp tool

Aside from the scratching, is the finished job of acceptable quality?

[11] I find that there is insufficient evidence to show that the grouting job itself is not of acceptable quality. UX Ltd contends that the resin would wash off and this is a disputed point, but not proven. UX Ltd also says that the grouting applied second time round is stain-resistant but not maintenance-free, it still needs to be cleaned and they contend that the applicants are not adequately maintaining the shower. The applicants dispute that too, but it is a similarly unproven point, as neither the claimed roughness of the surfaces nor the cause of the slight tinge to the current grouting are evident from the photographs. The remedies considered below will be therefore considered only in relation to the scratches.

What remedies, if any, are available and appropriate?

[12] Section 32(c) of the CGA says that the applicants are entitled to obtain damages for any loss that is reasonably foreseeable as liable to result from the failure. The only available remedy for the scratches is replacing the shower drain as the surface is not one from which scratches can be removed. This is reasonably foreseeable as is the difficulty of removal given the nature of a shower base. It is appropriate that another supplier carry out the work, as it work of a consequential nature rather than direct remedial work and likely requires different skills to the original job.

[13] I accept that another grouting job will be needed after the shower drain is replaced, and deem that value to be \$250.00, the same price charged by UX Ltd. Although no award can be made for problems that have not yet occurred (such as damage to tiles and/or waterproofing), I accept that there is a risk of that and find that the balance of the claim, being \$350.00, is a conservative estimate for the labour and materials involved in removing the existing shower drain and replacing it. I note that the part itself already been paid for by UX Ltd. Therefore I accept that \$350.00 is a reasonable cost for the replacement, even in the absence of a quotation.