

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP690/2016

CATCHWORDS

Claim against house builder under sections 8 and 9 *Domestic Building Contracts Act 1995*; defence of caveat emptor; whether defects reasonably observable by purchasers; whether inference to be drawn from failure to make discovery; whether defects caused by prior rectification works; whether the property was a high maintenance house; whether builder enjoyed the protections afforded to the vendors under the contract of sale

FIRST APPLICANT	Nicole Agent
SECOND APPLICANT	Kevin Agent
RESPONDENT	Andrew Zigouras
WHERE HELD	Melbourne
BEFORE	R. Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	3, 4 and 5 July 2017
DATE OF ORDER AND REASONS	12 September 2017
CITATION	Agent v Zigouras (Building and Property) [2017] VCAT 1461

ORDER

1. The respondent must pay \$234,559.69 to the applicants.
2. Costs reserved with liberty to apply. I direct the Principal Registrar to list any application for costs for hearing before Member Buchanan, allowing two hours.

R. Buchanan
Member

APPEARANCES:

For the Applicant	Mr J Heeley of counsel
For the Respondent	In person

REASONS

Introduction

- 1 This is a case about a house in Brighton. Built in 2008, the present owners bought the house in 2012. After they bought the house, they discovered defects in it and in 2016 they issued the present proceeding against the builder.

Background

- 2 The applicants in this case are Nicole and Kevin Agent (“the owners”). The respondent is the builder of the house, Andrew Zigouras (“the builder”).
- 3 By a contract dated 3 March 2008, the builder agreed with a developer, KSK Mortgage Services Pty Ltd, to build the house, one of a pair, on a suburban block in Brighton. The certificate of occupancy for the house was issued on 6 August 2009.
- 4 The owners bought the house, which includes a swimming pool, on 7 December 2012, after a six-month search. A buyers’ advocate assisted them in the search. Settlement was some four months later, on 4 March 2013.
- 5 To begin with, the owners rented out the house to residential tenants and then, on 19 February 2015, moved in with their children and made the house their family home. They are still there.
- 6 After the owners moved into the house, they discovered defects, beginning a process which culminated in their issuing the present proceeding on 19 May 2016.
- 7 The owners carried out rectification works while the house was tenanted. After they moved in, they engaged a builder who did substantial rectification works between May and August 2016.

The owners’ claims

- 8 By their Points of Claim, the owners alleged that there were defects in the works carried out by the builder under the building contract with the developer and that the builder had breached terms implied into the building contract by section 8 of the *Domestic Building Contracts Act 1995*. Those terms warranted the workmanship, materials and compliance of the building works (the “implied warranties”).¹ By virtue of section 9 of that Act, the benefit of the implied warranties passed to the owners. The owners claimed the cost of rectifying the alleged defects, as well as interest and costs.

¹ *Domestic Building Contracts Act 1995* section 8

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

(a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract; ...

The builder's defences

9 The builder denied the owners' claims. The builder's defences went to the causes of and responsibility for the alleged defects. Some of those defences were raised in the builder's Points of Defence, others were only raised in the course of the hearing.

The hearing

10 At the hearing, the owners were represented by counsel and the builder represented himself.

11 Evidence was given for the owners by:

- Ms Agent,
- Mr Agent,
- David McRae, the owners' buyers' advocate,
- Robert McLean, the owners' builder and
- Peter Mackie, a building consultant.

12 For the builder, evidence was only given by Mr Zigouras himself. The builder provided little evidence to challenge either the presence of the alleged defects or the cost of rectification.

The rectifying builder's evidence

13 Robert McLean gave evidence that he was engaged by the owners to carry out rectification works to defects in the house. He said that he had accompanied Peter Mackie, the building consultant retained by the owners, when Mr Mackie had inspected the house. He said that he was with Mr Mackie for at least 70% of the time that Mr Mackie was on site. He had answered questions put to him by Mr Mackie in the course that inspection and he provided Mr Mackie with photographs which he had taken in the course of his rectification works. He said that he had taken the photographs during the course of his works at the house, "because I was alarmed at what I was seeing".

The building consultant's evidence

14 Robert Mackie provided a report about the house and also attended and gave evidence. Mr Mackie said that he had inspected the house on 25 August 2016, in company with Mr McLean. He gave evidence that he had identified a number of defects in the house. He said that he had identified some defects by direct observation and others by a combination of observation, discussion with Mr McLean and examination of photographs provided to him by Mr McLean.

15 The defects identified by Mr Mackie were as follows:

- (1) front door damage

- (2) laundry water ingress
- (3) no window trims
- (4) gaps in window and door sealants
- (5) rain head not sealed
- (6) damage and decay to balcony structures
- (7) no window sub sills
- (8) ponding water in the subfloor
- (9) no render and articulation joints (sic)
- (10) live, unsupported and unclipped electrical wiring
- (11) defects in the ensuite shower in bedroom 2
- (12) faulty installation of internal tiling
- (13) overflow in the swimming pool's balance tank.

16 Mr Mackie also provided estimates of the cost of rectifying those defects.

The builder's defences: *caveat emptor*

- 17 As well as raising defences to individual defects, the builder raised a number of general defences, which applied to more than one defect. I will deal, first, with those general defences, then with the defences to individual defects.
- 18 By his Points of Defence the builder alleged that the principle of *caveat emptor* applied to some of the defects alleged by the owners. In other words, that the defects ought to have been observed by a reasonably prudent buyer and if there had been a breach of warranty by the builder, the owners had suffered no loss.
- 19 Those defects which the builder said the owners ought to have observed were:
 - front door damage
 - damage by water ingress
 - damage and decay to balcony structure
 - no window sub sills.
- 20 The builder adduced no evidence in support of his claim, other than to assert that the owners ought to have been aware of the defects prior to purchasing the house. Evidence on the subject was, however, given by the owners and by their buyers' advocate, David McRae.

Caveat emptor. Ms Agent's evidence

- 21 Ms Agent gave the following evidence about the owners' discovery of the alleged defects and the course of events leading up to the commencement of the present proceeding.
- 22 In 2012 the owners engaged Mr McRae, of a firm of buyers' advocates, McRae Property, to help them find and buy a house. They wanted a house, initially for renting, but ultimately to be the owners' home. In December 2012, while the owners were away on holiday, Mr McRae advise them that the house was available for purchase. The owners authorised Mr McRae to inspect the house and then to negotiate for its purchase. This Mr McRae and his colleague, John Summers, did successfully; on 7 December 2012 Mr McRae, who held a power of attorney from the owners, executed a contract of sale on their behalf.
- 23 Mr McRae had not reported any defects in the house to the owners and when the owners visited the house before settlement, they noticed no defects. After settlement on 4 March 2013, the owners camped in the house during the following weekend, inviting friends over for a barbecue. They went through the property and saw no defects. They then put the house on the rental market, in the hands of a managing agent. The house was let to tenants until the owners and their family took up residence on 19 February 2015.
- 24 The house was rented from 5 May 2013. The original tenants made a number of complaints about defects, including mould, water ingress and water around the air-conditioning unit. The first tenants moved out and new tenants rented the house for 12 months from 31 January 2014. The new tenants also complained about water ingress.
- 25 Whenever the managing agents told the owners about defects, the owners instructed the agents to arrange repairs. While the house was let, the owners carried out the following works:
- tiles
 - water proofing
 - seal ensuite and tiling
 - investigate pool water loss.
- 26 On the day the owners took possession of the house, they noticed a number of defects:
- The front door was buckling and the paintwork was blistering.
 - The front balcony, which formed a porch over the front door, showed signs of water ingress: stained render around the front door, rust and water stains on the supporting columns and rotting skirting boards near the balcony door.

- 27 Mr Agent also gave evidence about these matters which, though less detailed, in broad terms confirmed that of Ms Agent.

Caveat emptor: evidence of the owners' buyers' advocate

- 28 Mr McRae gave the following evidence. He qualified as a valuer in 1978 and as a real estate agent in 1984. He has been a buyers' advocate since 2001. His firm had been engaged by the owners to help them find a house. On 7 December 2012 he had signed a contract of sale for the house, signing under a power of attorney from the owners.
- 29 Some two or three days before signing the contract, Mr McRae had inspected the house, together with his partner, John Summers. The inspection was lengthy, some three quarters of an hour. The house was in really good condition and, as a result, he advised the owners against arranging an inspection by a building professional. The price paid by the owners was a proper, commercial price, in line with property values at the time.

Caveat emptor: findings

- 30 The builder submitted that the owners had failed to properly inspect the house before purchase, either through their own inspection or by arranging inspection by a building professional. I do not accept that submission.
- 31 The issue of observing (or not) defects prior to purchase is well-travelled territory. Thus, in *Meier v Balbin*² Member Farrelly (as he then was) commented:

It is reasonable, in my view, to presume that a purchaser of a home makes allowance for known or patent defects when negotiating the purchase price and, as such, the purchaser can have no "loss" arising from a breach of the warranties in respect of such defects. By "patent" I mean a defect which ought reasonably have been observable on inspection and the significance of which, in terms of a likely need for rectifications, ought reasonably have been appreciated.

- 32 The builder gave evidence that the price paid for the house by the owners had been significantly lower than the price paid to the developer by the original buyers. From that, he argued, the owners should have been on notice that there was something wrong with the house. He adduced no evidence to show that the price paid by the owners was not a market price. Relevantly, the evidence given by the owners' buyers' advocate, Mr McRae, was that the price paid by the owners had been a proper, commercial price in line with property values at the time. I therefore find that the price paid by the owners for the house, neither put them on notice that there was something wrong with the house, nor indicated that they offered to buy the house at a price reduced by reason of their knowledge of the presence of defects in the house.

² [2013] VCAT 57 at paragraph 91

- 33 The only other evidence relevant to this issue which was adduced by the builder, was his testimony that in 2012, when called to the premises by the developer, KSK Mortgage Services Pty Ltd, to inspect the front balcony, a defect in the front door was also identified. The builder gave no evidence about whether the defect in the door was subsequently rectified, but he did give evidence that the then owner had later called him to the home on three occasions. On two of those occasions, the call had been to help the owner, who was having trouble operating the C-Bus system and on the other occasion, the call was to assist with the vacuum cleaner system.
- 34 If, after the builder's 2012 visit to the premises, there had remained a reasonably observable defect in the front door, it seems to me improbable that the then owner would not have mentioned that defect to the builder on one of the builder's three visits. I therefore find that if there had been a defect in the front door in 2012, that defect had either been rectified or was not reasonably observable at the time of the owners' purchase of the premises in 2012.
- 35 The builder criticised the owners for not having engaged a building professional to inspect the house before purchase. The house was only four years old, relatively new and there was no legal obligation on the purchasers to arrange a pre-purchase inspection.
- 36 Finally, the evidence of the owners, which I accept, was that they did not observe any defect prior to purchase.
- 37 Accordingly, I find that there was no evidence to show that before purchase, there was any defect in the house which was reasonably observable by the owners.

The builder's defences: swimming pool - not built by the builder

- 38 By their Points of Claim the owners alleged that two defects relating to the swimming pool were the responsibility of the builder, a) ponding water in the subfloor and b) overflow in the swimming pool's balance tank.
- 39 Mr Mackie gave evidence that a defect in the swimming pool had directed large amounts of water from the pool into the subfloor of the house. The defect was the use of an undersized balance tank, which was not capable of holding the volume of water required to run the pool's negative edge feature.
- 40 The builder denied liability for the alleged defect and by his Points of Defence alleged that "the pool was not in his scope of works". In evidence, the builder said that he had not built the pool or been responsible for its construction.
- 41 The owners adduced no evidence to show who had built or been responsible for building the swimming pool.
- 42 Construction of the pool was, indeed, not part of the scope of works in the 3 March 2008 contract between the builder and the developer. The scope of

works was bereft of any reference to the pool. The only reference to the pool in the contract was found in two architectural drawings which formed part of the contract.

- 43 The owners submitted that the Tribunal should infer that there had been a subcontracting relationship between the builder and whoever was the constructor of the pool. That inference, they said, should be drawn from the architectural drawings. Those drawing showed an outline of the pool, with the words “Pool by others” across the pool outline. From those words, the owners said, the Tribunal should infer the existence of such a subcontracting relationship. That is, indeed, one inference which might be drawn from those words. But other inferences are equally likely, such as, that the “others” would contract directly with the developer.
- 44 I note that when, in cross-examination, counsel for the owners was taking the builder through the building contract, he was asked: “The reference to ‘by others’ is there because those works were subcontracted out?”, the builder replied: “I’d assume yes”.
- 45 I do not think that a great deal turns on the builder’s answer; the drawings about which he was being questioned described things to be done in the future, not what was actually done. In any event, later in cross-examination the builder made it abundantly clear that his evidence was that he had not built the pool, had not arranged for its construction, had not subcontracted the construction of the pool and had not been in any way responsible for the pool’s construction.
- 46 The owners also submitted that there was another basis on which the Tribunal should infer that the pool had, in fact, been constructed by the builder or his subcontractor. The Tribunal should so infer, the owners argued, because of the builder’s failure to adduce evidence to show that the pool was built by someone other than the builder. The failure to which the owners pointed was the builder’s failure to make discovery.³
- 47 The owners submitted that, had the builder made discovery, it might reasonable have been expected that such discovery would have revealed whether or not the builder was responsible for the pool’s construction. While discovery by the builder may have made that revelation, it is beside the point. The owners alleged that the builder was responsible for the defects in the pool. This the builder denied, in sworn testimony. It was then up to the owners to adduce evidence showing that the builder had been responsible for the pool. This they failed to do.⁴
- 48 It was the owners who carried the burden of proof, not the builder. The builder having denied in evidence responsibility for the pool’s construction, there was no burden on the builder to provide further evidence that he had

³ The builder had not made any discovery, despite an early order to do so and a direction to do so, given on the first day of the hearing.

⁴ No building certificate for the pool was tendered by the owners and no evidence was given by the owners about any attempt to obtain that certificate. From which I infer that no such attempt was made.

not built the pool. Accordingly, there is no inference to be drawn from the fact that the builder failed to produce some other evidence.

Swimming pool, finding

- 49 Accordingly, I find that the builder was not responsible for construction of the swimming pool and the owners have failed to make out their claim that the builder was responsible for the defect of overflow in the swimming pool's balance tank.
- 50 As for the claimed defect of ponding water in the sub floor, I find that the builder was not responsible for the pool defect which directed water into the subfloor. I will deal further with this claim below.

The builder's defences: not responsible for water ingress caused by pool flooding

- 51 A number of the defects alleged by the owners related to water ingress to the house. The builder claimed that he was not responsible for that water ingress; the water ingress had occurred, he argued, because of damage to the fabric of the house, caused by soil movement. That soil movement, the builder said, was a result of flooding from the swimming pool, for which he was not responsible.⁵
- 52 The evidence of Mr McLean, the owners' rectifying builder, made it clear that the defective pool had directed a great deal of water into the subfloor, water which ponded around the house's footings, wooden stumps and steel support posts. Photographs taken by Mr McLean showed saturated soil and large amounts of ponding water in the sub floor.
- 53 The builder claimed that the effect of the water from the pool would have been to cause soil movement and consequent movement of the stumps and building footings. Mr Mackie agreed that such movement would occur.
- 54 The builder further argued that such movement would, in turn, have caused damage to the fabric of the house, allowing ingress of water with attendant damage. Mr Mackie also agreed that building movement could have contributed to water ingress.
- 55 As I have found above, the owners have not proved that the builder was responsible for the construction of the swimming pool and therefore the owners have not proved that the builder was responsible for the pool defect which directed water into the subfloor.
- 56 Although I am satisfied that the builder is not responsible for the pool water entering the subfloor area of the home, I am also satisfied, accepting Mr Mackie's evidence to which I refer below, that the builder retains responsibility in respect of any movement damage and water ingress into the home.

⁵ The claim was first made by the builder during the hearing and was not raised in the builder's Points of Defence.

- 57 Mr Mackie had two things to say on this point. First, Mr Mackie's evidence showed that if the builder had properly prepared the subfloor, water entering from the defective swimming pool would have drained out of the subfloor and would not have settled there to pond around footings, stumps and supports. Mr Mackie's evidence was that the standard which applied to the subfloor, BCA part 3.1.2, required preparation of the subfloor which would have prevented ponding.
- 58 BCA part 3.1.2 provides as follows:
- BCA part 3.1.2
- 3.1.2.3 Surface Water Drainage
- Surface water must be diverted away from a class 1 building as follows ...
- (c) The ground beneath suspended floors must grade so that the area beneath the building is above the adjacent external finished ground level and surface water is prevented from ponding under the building.
- 59 The builder did not adduce any evidence to rebut Mr Mackie's evidence about the preparation or condition of the subfloor. Mr McLean's photographs and evidence made it abundantly clear that when Mr McLean took the photographs of the subfloor in 2016, the subfloor surface was not graded so as to prevent water from ponding under the building. Rather, the subfloor surface was uneven, with numerous hollows, hollows which were full of extensive, ponding water. I therefore find that the preparation of the subfloor was defective and, as such, in breach of the implied warranties (implied by section 8 of the *Domestic Building Contracts Act 1995*). I further find that as a result of that defect, water ponded in the subfloor, causing movement of stumps and footings.
- 60 The second point which emerged from Mr Mackie's evidence was that, while building movement could have contributed to water ingress, that movement, Mr Mackie said, would not have caused water ingress - if the builder had done as he should have done and installed articulation joints where they should have been installed. Thus, Mr Mackie said that cracking had occurred in render on each side of windows which had been installed with no articulation joints. Further, there was cracking in render where abutting faces had been built without articulation joints.
- 61 The builder's claim about movement was not supported by any expert evidence. By contrast, Mr Mackie was clear in his evidence that, if there had been water penetration because of building movement:
- a) that building movement had occurred because of the builder's failure to properly grade the subfloor and
 - b) such building movement would not have caused water ingress if the builder had installed articulation joints where they should have been installed.

62 I accept Mr Mackie's evidence and find that, to the extent that water ingress to the home has been caused or partly caused by movement in the home, the builder bears responsibility for that movement by reason of his failure to adequately grade the subfloor area and his failure to install suitable articulation joints. The builder's failures in this regard amount to breach of the implied warranties.

The builder's defences: defects caused by rectification works

63 The builder asserted that leaks in the balconies (the house has three) and consequent water damage were the result of defective rectification works carried out after the house was built.⁶

64 Rectification works (other than those of the owners' rectifying builder, Mr McLean) had been carried out to the balconies prior to Mr Mackie's inspection of the house.

65 The builder gave evidence about works in 2012. He said that in 2012 he had been asked to go to the house by the developer's Jim Konidaris and the then owner, Bernadette Durkan, to look at water leaks and damage to the front door. At the house, the builder had seen five or six broken tiles in the front balcony and had observed that underneath those tiles, the waterproofing membrane was damaged. As well, the balustrade was missing. Mr Konidaris and Ms Durkan told the builder that they would repair the broken tiles and he believed that they had done so.

66 Subsequently, rectification works on the other two of the house's three balconies were done by the owners, when the house was tenanted.

67 The works which the builder said were done by the developer or Ms Durkan in 2012 would, on the builder's evidence, have been restricted to the front balcony and would have consisted of replacement of tiles, repair of the membrane and replacement of the balustrade. The works are unlikely to have been substantial, as Mr McLean, (who had done rectification works on all three balconies) said in his evidence that, "the front balcony wasn't, to my knowledge, wasn't even touched". The builder adduced no evidence to show that there had been defects in works done in 2012.

68 The works done by the owners were described in contractors' quotations and invoices tendered by the owners. The works described were waterproofing, tiling and sealing. No evidence was given to show that any of those works were defective.

69 Mr Mackie gave evidence about the state of the three balconies revealed when Mr McLean carried out rectification works in 2016. His evidence was based on Mr McLean's photographs and his discussion with Mr McLean during his inspection on 25 August 2016.

⁶ The claim was first made by the builder during the hearing and was not raised in the builder's Points of Defence.

70 He said that in his opinion, the owners' earlier works on the balconies would not have rectified the problems of water ingress from the balconies. In his words, "I believe it [the earlier works] would just be a band aid approach". He gave evidence that there were a number of problems with the balconies which would not have been rectified by the works carried out by the owners. Those problems were:

- lack of flashings. Mr Mackie said that he had found no flashings on the balconies. He said that installing flashings should have been part of the structural works for the balconies. He noted no reference to flashings in the description of works carried out by the owners and was of the view that flashings had never been installed.
- unsuitable plastic channel used as balcony drains, not fit for purpose
- unsupported and incorrectly supported floor sheets
- unsupported joints in floor sheets.

71 Mr Mackie's evidence only dealt with the works done by the owners to the side and rear balconies. The works done to the front balcony by the developer or Ms Durkin in 2012 were not put to Mr Mackie and were raised for the first time by the builder in his evidence in chief. Nevertheless, it was clear from Mr Mackie's evidence that the structural defects which he identified, existed in all three balconies and I conclude that, if it had been put to him, Mr Mackie's evidence would have been that any works done to the front balcony in 2012 would have been, "just be a band aid approach". I am fortified in that conclusion by Mr McLean's evidence that "the front balcony wasn't, to my knowledge, wasn't even touched".

72 In the absence of any evidence (as opposed to supposition) the builder has failed to establish that rectification works in 2012 or the rectification works subsequently carried out by the owners had been the cause of any of the defects alleged by the owners. On the basis of the evidence presented, I am satisfied that such rectification works as may have been carried out by others did not address the primary underlying defects which were causing water ingress from the balconies and accordingly, I find that responsibility for those defects rests with the builder.

The builder's defences: lack of maintenance in a high maintenance house

73 The builder argued that the house was a high maintenance house and that water ingress had been caused by lack of maintenance, specifically, failure to maintain gutters and caulking. No evidence was induced by the builder to show that the gutters were not maintained, or that, as the builder asserted, with some caulking, "the house would still be sound". Mr Mackie's evidence was that this was not a high maintenance house and water ingress had not been caused by lack of maintenance. I accept Mr Mackie's evidence on this point. Accordingly, I find that the water ingress complained of by the owners was not caused by a lack of maintenance.

The builder's defences: the contract of sale

74 The builder argued that one of the conditions in the contract by which the owners bought the house, prevented them from making claims against him in relation to any of the alleged defects in the house. The condition, special condition 3, said that:

“The purchaser accepts the land sold (including all improvements thereon) in its present state of repair and condition and the purchaser shall not make any objection requisition or claim for compensation in respect of the condition or state of repair of the land (including improvements) or any defect (whether latent or patent).

75 The builder was not a party to the contract and, accordingly, the term cited by him can offer him no protection from claims made by the owners in the present proceeding. In any event, section 10 of the *Domestic Building Contracts Act 1995* provides that the mandatory warranties under section 8 of that Act cannot be avoided.⁷

Individual defects

Front door

76 Mr Mackie gave the following evidence. The front door was damaged by water leaking from the balcony above. The door had not been sealed at the top, as was required by the installation instructions from the door's manufacturer.

77 The builder did not dispute the existence of the defect, only relying on the general defences dealt with above. I find that the defect is proved and that the builder is in breach of the warranties implied by section 8 of the *Domestic Building Contracts Act 1995* (“the implied warranties”).

Laundry water ingress

78 Mr Mackie gave the following evidence. Water ingress to the laundry occurred in two ways. First, failure to seal the frame of the external hot water unit, leading to moisture damage to MDF skirting and structural floor joists; “the builder's poor workmanship and disregard for the manufacturer's installation instructions”, in Mr Mackie's words. The effect of that failure was exacerbated by the builder's failure to install sub-floor ventilation in the area as was required by the Building Code of Australia (“BCA”).⁸

⁷ *Domestic Building Contracts Act 1995* section 10

A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in section 8 is void to the extent that it applies to a breach other than a breach that was known, or ought reasonably to have been known, to the person to exist at the time the agreement or instrument was executed.

⁸ National Construction Code Series 2007, Volume 2

- 79 Secondly, gaps in the laundry door opening, caused by the absence of a top flashing required by the BCA and by over-use of flexible sealant, leading to water ingress and subsequent damage to laundry skirtings and cabinetry.
- 80 The builder did not dispute the existence of the defects, only relying on the general defences dealt with above. I find that the defects are proved and that the builder is in breach of the implied warranties.

Window trims

- 81 No side cavity flashing or side external aluminium trim to prevent water ingress, in breach of BCA and Building Commission Guide to Standards and Tolerances 2007 (“GST”).
- 82 The builder did not dispute the existence of the defects, only relying on the general defences dealt with above. I find that the defect is proved and that the builder is in breach of the implied warranties.

Window and door sealants

- 83 Mr Mackie described cracking and a number of gaps around or near aluminium door and window frames around the house, which were allowing water ingress to the building. In bedroom 1 there was water damage to plaster and skirtings. Mr Mackie identified the main cause of the cracking and gaps as being the use of different external claddings, Blue Board and Foam Board Mesh, without mesh under the joints, causing the mismatched materials to crack. He also identified lack of articulation and caulking of gaps.
- 84 The builder did not dispute the existence of the defects, only relying on the general defences dealt with above. I find that the defects are proved and that the builder is in breach of the implied warranties.

Rain heads

- 85 Mr Mackie gave the following evidence. The rain heads were not sealed to the box guttering outlet, allowing water to enter the house.
- 86 The builder pointed out that the photograph of a rain head, reproduced in Mr Mackie’s report, showed the rain head being pulled away from the building, presumably by the photographer. That may be so, but if so, has no relevance to the alleged defects. I find that the defects are proved and that the builder is in breach of the implied warranties.

Balconies – front, side and rear

- 87 Mr Mackie gave evidence that there were numerous defects in all three balconies:
- extensive water damage
 - lack of angle flashing
 - unsuitable plastic channel used as balcony drains

- unsupported and incorrectly supported floor sheets
- incorrect set out sequence, with steel packers and set outs to timber beams, sheet flooring packing on timber beams.
- joist brackets without fixing nails installed
- contract drawings, not followed
- compressed sheet installation instructions on supporting and on flashings to walls and windows, not followed.

88 In addition, Mr Mackie found that those defects had resulted in water ingress into the house, causing water damage to ceilings and cabinetry.

89 Other than the general defences set out above, the builder did not dispute the presence of the defects and I find that the defects are proved and that the builder is in breach of the implied warranties.

Window sub sills

90 Mr Mackie gave evidence that the builder had not installed sub sills on the aluminium window frames, as required by the manufacturer's installation instructions. This allowed water to enter the frames on the joints and leak out under the windows, causing decay of under window timbers and water ingress to the interior.

91 The builder argued that sub sills were not required by the manufacturer of the windows installed. The cause of decay of under window timbers, he said, was entry of water at the top of the windows, as a result of failure of the caulking. Mr Mackie was firm in his evidence that the water which caused the decay in question had not entered from the tops of the windows, but had entered as a result of the absence of window sub sills.

92 I accept Mr Mackie's evidence and find that the defects are proved and that the builder is in breach of the implied warranties.

Water ponding under house

93 As I described above, Mr McLean's photographs showed extensive areas of flooding and ponding, standing water in the sub-floor of the house. Mr Mackie gave evidence that, as a result of excessive flooding and ground moisture in the sub-floor, timber floor members had decayed and galvanised steel used in the subfloor had corroded to a point where timbers might have to be replaced and structural steel to be re-treated.

94 Mr Mackie's evidence about ponding water in the subfloor included criticism of the builder in not providing adequate subfloor ventilation. Mr Mackie's evidence was that the builder had not complied with the BCA, as ventilation had only been installed on one side of the house. In this, the builder had failed to comply with the objectives and the function and performance requirements of the BCA and with the BCA's subfloor ventilation requirements, which latter provide:

3.4.1.2 Sub- floor ventilation

The sub- floor space between a suspended floor of a building and the ground must be in accordance with following:

- (a) The sub- floor space must – ...
- (ii) be cross-ventilated by means of openings ...
- (f) Where ventilation is obstructed by patios, paving or the like, additional ventilation must be provided to ensure that the overall level of ventilation is maintained.

- 95 Mr Mackie said that poor ventilation in the sub-floor had contributed to the decay of timber floor members and corrosion of galvanised structural steel, suffering by reason of water ponding under the house.
- 96 The builder argued that it had not been possible to provide ventilation to the side of the house which was lacking in ventilation provision. That was so, he said, because on that side of the house, the swimming pool had been built with a paved apron. I do not accept that argument. Clause 3.4.1.2(f) of the BCA, quoted above, makes it clear that ventilation is required, regardless of the presence of paving and the like.
- 97 In addition to the finding which I made above, in relation to the builder's responsibility for ponding water in the sub floor, I find that the builder also failed to provide adequate subfloor ventilation, in breach of the implied warranties.

Articulation joints

- 98 Mr Mackie gave the following evidence. The builder had not installed a number of articulation joints in accordance with the contract documents. The window manufacturer's installation instructions had not been followed by the builder and the builder failed to ensure the satisfactory long-term performance of the windows in such a way that water did not penetrate from the outer skin to the building envelope.
- 99 Other than the general defences referred to above, the builder gave no evidence to dispute the evidence of Mr Mackie. I find that this defect is proved and that the builder is in breach of the implied warranties.

Electrical

- 100 Mr McLean gave evidence that, while working on the home, both he and one of his workers received electrical shocks from an aluminium frame. Upon inspection, 140 volts were found to be running through the frame, as a result of an electrical wire (part of a lighting circuit) being crushed between an aluminium door sill and flooring.
- 101 Mr Mackie gave evidence of the following defects:
- The stainless steel lighting switching throughout the home was not connected to the earth circuit.

- A live, unconnected wire was found in the front balcony.
- In the subfloor, there were a number of unsupported electrical cables. They included a large electrical cable, which was not clipped to timbers and which was suspended in ponding water.
- In the subfloor, a transformer was left lying on the ground adjacent to electrical cables. Mr Mackie gave evidence that transformer units are usually vertically mounted, away from any threat of water.

102 Mr Mackie's conclusion was that the builder's electrician had not followed wiring rules and had left the home's wiring unsafe for the occupants.

103 The builder asserted that the live, unconnected wire in the front balcony had been caused by the developer, KSK Mortgage Services Pty Ltd, when it repaired the front balcony, but adduced no evidence to support that assertion.

104 The builder adduced no evidence to rebut the evidence of Mr McLean and Mr Mackie and I find that the defects are proved and that the builder is in breach of the implied warranties.

Ensuite shower, bedroom 2

105 Mr Mackie gave evidence that the construction of the floor of the ensuite shower in bedroom 2 was defective. One floor joist had been cut out, so that only a third of the joist rested on the steel support beam, splitting the joist. The joist was not attached to the steel support beam. Further the steel support beam was not bolted to the steel post on which it rested.

106 The builder adduced no evidence to rebut the evidence of Mr Mackie and I find that the defects are proved and that the builder is in breach of the implied warranties.

Internal tiling

107 Mr Mackie gave evidence that the tiling to most internal walls was drummy, constituting a danger to occupants, as the tiling is full height. He said that his conclusion was that the tile adhesive had failed to bond with the tiles or substrate, causing the defect.

108 The builder argued that the defect could have been caused by movement in the house or by misuse, such as "people jumping and banging and crashing in the showers". Mr Mackie gave evidence that tile adhesive should be capable of resisting the pressures from misuse described by the builder. As for movement in the house, Mr Mackie accepted that movement could cause tiles to become loose. But, as I have found above, any such movement would not have occurred if the builder had properly graded the subfloor.

109 Accordingly, I accept Mr Mackie's evidence on this point and find that the defect is proved and that the builder is in breach of the implied warranties.

Defects: findings

110 For the reasons set out above, I find that, with the exception of the swimming pool balance tank, all of the items of defective work, as alleged by the owners, are proven.

Quantum

111 Mr Mackie gave evidence about the cost of rectifying the alleged defects. He provided estimates of works to be done, as well as his opinion about the cost of works already carried out by the owners. He gave detailed evidence of the methodology which he used and the sources which he consulted. He said that his calculations were based on average rates for a small to medium builder. The labour rates which he used included the cost of usual tools to carry out the task at hand and the cost of the labour. In his calculations, he applied a builder's margin, intended to cover preliminaries, permit fees, warranties, overheads, supervision and profit. The builder's margin which Mr Mackie allowed was 25% plus GST and he applied 10% plus GST for contingencies.

112 Explaining his adoption of the rate of 25%, Mr Mackie said, "I used that because it's a very difficult task for a builder to come in and fix somebody else's works. It's certainly a high supervision job, rectification works, it is. It requires constant supervision, really." He said that in his experience, builders ordinarily charge more for taking over works from others and, while he was aware that some builders charged a margin of as much as 30%, he was of the opinion that 25% was reasonable.

113 As for the rate of 10% for contingencies, he said that he had adopted that rate because, "It's very hard to predict the extent of the damage, or I might need an extra man for doing larger windows. Sometimes they might need deglazing".

114 In preparing his estimates, he had used a standard industry reference work, Cordell's Guide (which is a building price book & cost estimating guide). That, he said, was a tool used by persons such as quantity surveyors.

115 The builder appeared to criticise Mr Mackie for using Cordell's Guide, rather than relying on Mr Mackie's own knowledge. The builder said, in what I took to be a criticism of Mr Mackie, that the builder himself owned a copy of Cordell's Guide. But to my mind, the apparent ubiquity of Cordell's Guide only goes to show the reasonableness of Mr Mackie's use of that resource.

116 Mr Mackie gave evidence about the costs charged to the owners for the works done while the house was tenanted and the subsequent works done by Mr McLean. He said that he thought the former costs were reasonable and that Mr McLean's charges were either reasonable or very reasonable.

117 The builder provided no material evidence in relation to the cost of rectifying the defects in the house. I accept the evidence of Mr Mackie in

relation to the cost of rectifying defects and his opinion about the reasonableness of the cost of the works done on the house by the owners.

118 The owners did not seek to recover all of the costs of rectification identified by Mr Mackie. Thus, they sought no order in relation to the cost of rectifying the rain heads, as that work had been carried out by Mr McLean without charge.

119 I therefore find that the cost of rectifying those defects proved by the owners and for which they seek relief, is as follows:

a) Defects identified by Mr Mackie:

front door	\$4,356.00
laundry water ingress	\$3,652.00
window trims	\$847.00
window and door sealants	\$2,223.00
balconies	\$91,412.70
window sub sills	\$56,567.00
ponding water in subfloor	\$962.00
render and articulation joints	\$23,842.20
electrical wiring	\$2,263.00
ensuite shower	\$7,758.79
internal tiling	\$37,411.00
preliminaries and incidental costs	\$3,265.00

b) works to upstairs bathroom/ensuite \$2,509.54

Total \$234,559.69

120 I do not allow the sum of \$841.50 claimed in relation to Mr McLean's "attendance at/facilitation of inspections", as that is a matter to be raised in any application for costs.

121 Although in their points of claim the owners had included a claim for interest, that claim was not pressed at the hearing and, accordingly, I make no order in relation to interest.

Order

122 I will order that the builder pay to the owners the sum of \$234,559.69 and I will reserve liberty to make application on the question of costs.

R. Buchanan
Member