

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D93/2011

**CATCHWORDS**

*Building Act 1993* – ss.137B & 137C – sale of house constructed by owner-builders – implied warranties – liability of vendors for defective Domestic Building work – proof of cost of rectification – expert evidence to be preferred to quotation from rectifying builder – claim for loss of amenity – nature of losses that are compensable

**APPLICANTS:** Clinton Wayne Anderson and Brandi Lee Doughty

**FIRST RESPONDENT:** Stuart James Wilkie

**SECOND RESPONDENT:** Nicole Maria Wilkie

**WHERE HELD** Melbourne

**BEFORE** Senior Member R Walker

**HEARING TYPE** Hearing

**DATE OF HEARING** 19 March 2012

**DATE OF ORDER** 11 April 2012

**CITATION** Anderson & Anor v Wilkie (Domestic Building) [2012] VCAT 432

**ORDER**

1. Order the Respondents to pay to the Applicants \$185,928.00.
2. Costs reserved.

R Walker  
**Senior Member**

**APPEARANCES:**

For Applicant Mr Noble, solicitor

For Second Respondent: Mrs Wilkie in person

## REASONS

### Background

- 1 The applicants (“the Owners”) are the owners of a house in Wodonga (‘the House’) which they purchased from the respondents “the Vendors” in October 2009. The House was constructed by the Vendors as owner-builders.
- 2 It is common ground that sections 137B and 137C of the *Building Act 1993* applied to the sale of the House. Section 137C is in the following terms:

#### “137C Warranties for purposes of homes under section 137B

- (1) The following warranties are part of every contract to which section 137B applies which relates to the sale of a home—
    - (a) the vendor warrants that all domestic building work carried out in relation to the construction by or on behalf of the vendor of the home was carried out in a proper and workmanlike manner; and
    - (b) the vendor warrants that all materials used in that domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract, those materials were new; and
    - (c) the vendor warrants that that domestic building work was carried out in accordance with all laws and legal requirements, including, without limiting the generality of this warranty, this Act and the regulations.
  - (2) In addition to the purchaser under a contract to which section 137B applies, any person who is a successor in title to the purchaser may take proceedings for a breach of the warranties listed in subsection (1) as if that person were a party to the contract.
  - (3) 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 subsection (1) 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.
- 3 The purchase was settled on 27 November 2009 and the Owners moved in immediately afterwards. They found that when they had a shower the shower leaked into the lower floor. They tried the other shower in the ensuite and experienced the same problem. They called the first respondent to

complain about the problem and he came to the House and applied silicone to some areas but the problem was not rectified.

- 4 Thereafter, numerous other defects appeared and reports were obtained from a number of experts but despite complaints, the Vendors did nothing to address them.

### **These proceedings**

- 5 Ultimately, these proceedings were issued on 15 February 2011 seeking damages for the cost of rectifying the defects and for the loss of use and enjoyment of the House, inconvenience and stress. Various directions were given and Points of Claim and Points of Defence were filed and served. In essence, the sole areas of dispute were the existence or otherwise of the defects and the cost of rectifying any defects found to exist.
- 6 A compulsory conference took place on 13 September 2011 but the matter did not resolve. The joinder of other parties was foreshadowed by the Vendors but, in the end, no application for joinder was made. Thereafter the Vendors were unrepresented.
- 7 At a directions hearing on 12 December 2011, the first respondent did not appear and the second respondent appeared by telephone. She indicated that she had no knowledge of the whereabouts of the first respondent, no knowledge of the details of the construction of the House and that she no longer had the financial capacity to conduct the proceedings. She said that she did not intend to participate any further in the conduct of the proceedings.

### **The Hearing**

- 8 The matter was fixed for hearing before me on 19 March 2012. The Owners were represented by their solicitor, Mr Noble and the second respondent, Mrs Wilkie, appeared in person.
- 9 I heard evidence from:
  - (a) the second applicant, Ms Doughty;
  - (b) Mr Green of the Plumbing Commission;
  - (c) a consulting and structural engineer, Mr Tim Gibney; and
  - (d) a building expert, Mr Tony Croucher.
12. Ms Wilkie asked a number of questions of each of the witnesses. The experts' reports were tendered as was a file from the Plumbing Commission prepared by Mr Green, outlining numerous defects the Plumbing Commission had found in the House.
- 10 Two expert reports that were prepared on behalf of the Vendors had been filed and served on the Owners' solicitors before the hearing but neither of the authors was called to give evidence. I asked Mr Gibney whether, having seen the report of the Vendors' engineer, he had changed any of the conclusions that he had reached and he said that he had not. Since neither

of the Vendors' experts were called their reports stand as unsworn statements which cannot be given as much weight as the sworn evidence of Mr Gibney and Mr Croucher. Therefore, where there is any conflict I must accept the evidence of the Owners' experts.

- 11 At the close of the Owners case, Mrs Wilkie indicated that she did not propose to give evidence or call any evidence but she made a number of submissions. The hearing concluded shortly after 4.00pm on the first day of the hearing and I announced that I would provide short written reasons.

### **Findings**

- 12 I find the following defects identified in Mr Gibney's report to be proven:
- (a) Insufficient negative reinforcement over the top of the bondeck slab.
  - (b) The popping of tiles on the suspended concrete slab.
  - (c) Failure to adequately prop the bondeck during concrete placement as a result of which the tray has distorted.
  - (d) Failing to paint the beam supporting the bondeck slab.
  - (e) The glass balustrade panel is of inadequate strength and the glass requires replacement.
  - (f) The stainless steel wire hand-rails are inadequate.
  - (g) A barrier fence is required to the retaining wall as it is over 1 metre in height.
  - (h) There is a lack of articulation joints in the render.

### **Replacement of the slab**

- 13 The issue that is not established is that the slab requires replacement. I accept that there is a 6 mm deflection over a 3 metre straight edge in the suspended concrete slab, which I am told is within the normal scale, albeit at the outer limit of it. The concern is whether that deflection is the result of inadequate support beneath the slab.
- 14 Mr Gibney did not say that this deflection was, in itself, a defect. His concern that there may be inadequate support under the concrete slab was really in the nature of speculation, in that he could not see how adequate support could have been obtained because of the difficulty of compacting the soil underneath the slab against a dwarf wall. He did not say that adequate compaction was not possible; merely that it was difficult. I cannot speculate and since it has not been demonstrated that there was inadequate support beneath the slab, I cannot find a defect.
- 15 I therefore do not allow the cost of injecting 'Uretek' under the slab. Mr Gibney recommended it as a precautionary measure, saying it was worthwhile to do so since the tiles had to be replaced in any event. Although it may be wise, I can only order the Vendors to do it in order to rectify a defect and I cannot find a defect on this state of the evidence.

## Costings

- 16 Costings were provided in Mr Croucher's reports and I find the following loss has been suffered as identified in those reports:
- (a) Water ingress from the bathrooms on the first floor causing consequential damage to the living areas below. Mr Croucher's costing is \$12,537.00 for the main bathroom and \$9,268.00 for the ensuite.
  - (b) There was considerable water ingress into bedroom three from the balcony causing substantial damage to interior linings. Mr Croucher has set out a scope of works for rectification of the bedroom at \$17,623.00.
  - (c) Water has penetrated the garage from the balcony causing internal damage to the ceiling of the garage. Mr Croucher has costed that defect at \$1,786.00.
  - (d) The step from the House into the garage is above the maximum height permitted for a riser and needs to be reconstructed at a cost assessed by Mr Croucher of \$351.00.
  - (e) Water damage has occurred to various elements throughout the House and to repair that Mr Croucher has assessed a cost of \$8,788.00.
  - (f) There is lippage in the tile floors and it appears that all of the floors need to be replaced. Mr Croucher has costed that at \$20,001.00.
  - (g) Replace glass balustrade panels that are over stressed will cost \$6,459.00.
  - (h) The balcony was constructed of a suspended concrete slab with a screed over the top and no waterproof membrane. There was insufficient provision for drainage and no overflow relief points. There was also inadequate fall. It appears that the floor of bedroom 3 is below the finished level of the balcony. The balcony requires substantial reconstruction at a cost assessed by Mr Croucher of \$18,262.00.
  - (i) Cleaning and rubbish removal will cost \$2,296.00.
- 17 I find that there are numerous defects to the roofs and plumbing in the property, set out in great detail in the report of Mr Green from the Plumbing Commission. Mr Green has spoken to both plumbers involved, but neither has returned to repair the defective work. Neither was joined as a respondent or third party to the proceeding. In any case, the respondents are liable for their defective workmanship. Mr Croucher has assessed the cost of rectifying these numerous defects as follows:
- (a) Stormwater system \$10,976.00
  - (b) Installation of stainless steel roofs \$10,739.00.
  - (c) Rectification of problems with the main roof \$46,587.00

- 18 Evidence was led on behalf of the Owners that the actual costs that they would incur in rectifying the defects are more than what was assessed by Mr Croucher. At Mr Croucher's suggestion, the Owners attempted to obtain quotes from local builders but were unable to do so. Estimates were obtained from two builders as follows:
- (a) From Scott James, an estimate in the range of \$257,000 to \$360,000.
  - (b) From Modem Constructions, an estimated range of \$295,000 to \$376,000, although the author of the estimate said that he believed that rectification could be done at the lower figure. It would appear from an affidavit prepared by this builder that he could not provide a quote due to the risk of further underlying defects and because the final scope of works had not been finalised.
- 19 Mr Noble submitted, correctly, that the Owners are entitled to recover the reasonable cost of rectifying the defects. He further submitted that I should find that the cost of rectification works would be \$315,000.00, being the lower estimate from Modem Builders. I cannot make such a finding on the evidence.
- 20 The reasonable cost to rectify defective building work is a matter that requires expert assessment. An expert will take into account reasonable charge-out rates, cost of materials, the likely time to be taken and so forth. That is an exercise only an expert can undertake, save in the most simple of cases, and this is not such a case. I have the advantage of the expert evidence of Mr Croucher, who has gone into detail as to the assessment of the reasonable cost of rectification of each defect that I have found. As against that, I have estimates provided by rectifying builders as to what they estimate they will charge. Even ignoring the fact that these are estimates, not assessments, what a rectifying Builder will charge is not necessarily the same as what the reasonable cost of rectification will be. Rather, it is an indication of what that particular Builder wants to do the work. Not every estimate or quotation is reasonable in the abstract sense.
- 21 Mr Noble asked Mr Croucher about these estimates, on the assumption that they were the only estimates that Ms Doughty was able to obtain. He said that, assuming that the two builders had all the information, you can only assume that they are a fair market estimate. He said that it was difficult work and that one will always get variances. There are unknown factors for which Builders will always want to cover themselves. Notwithstanding that evidence, Mr Croucher did not say that these figures should be substituted for those that he had calculated.
- 22 I think Mrs Wilkie is correct when she said that the figures provided by the builders were only estimates and were very different from Mr Croucher's figures which were calculated. She said that it was not reasonable to accept these estimates from builders when there was an actual calculation of the reasonable cost by a building expert.

23 I accept that submission. I find that the amounts to which the Owners are entitled are those calculated by Mr Croucher, which are as follows.

(a) Main bathroom:	\$12,537.00
(b) Ensuite:	\$ 9,268.00
(c) Rectification of bedroom three:	\$17,623.00
(d) Rectification of the ceiling of the garage:	\$ 1,786.00
(e) Reconstruct step into the garage:	\$ 351.00
(f) Other water damage:	\$ 8,788.00
(g) Replacement of tile floors:	\$20,001.00
(h) Reconstruction of the balcony:	\$18,262.00
(i) Replace glass balustrade panels	\$ 6,459.00
(j) Cleaning and rubbish removal	\$ 2,296.00
(i) Stormwater system	\$10,976.00
(j) Installation of stainless steel roofs	\$10,739.00.
(k) Rectification of problems with the main roof	<u>\$46,587.00</u>
Total	<u>\$164,953.00</u>

#### **Alternate accommodation**

24 The Owners also claim the cost of having to move out of the House for a period of six months while the work is undertaken. The need to move out for the work to be done and the period of six months were both supported by Mr Croucher's evidence.

25 Evidence was given as to removal costs and accommodation costs and I accept that alternate accommodation for a period of six months will cost \$11,440.00, being the rental of an equivalent 3 bedroom property in the area at \$440 a week. The quotation for a removalist, including insurance, came to \$4,265.00. Both of those figures will be allowed.

#### **Other claims**

26 The Owners also claim loss of use and enjoyment and amenity and inconvenience.

27 Where there is a breach of contract, the party in breach is only responsible for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result in his breach, or of which there was a serious possibility or a real danger (see *Halsbury Laws of England*, 4<sup>th</sup> edition, Vol 9, para 1174).

28 It has been held that substantial physical inconvenience and discomfort caused by a breach of contract will entitle the party to damages (see *Burke v Lunn* [1976] VR 276 at 285-286; *Clarke v Housing Guarantee Fund Limited* (1998) 13 VAR 19 at p. 21-22.) Loss of amenity generally is also

recognised as a head of damages (see for example *Ruxley Electronics and Construction Limited v Forsyth* [1995] 3 All ER 268. I was also referred to *Wilshee v Westcourt Limited* [2009] WASCA 87 to a similar effect.

- 29 However, damages for personal injury are not recoverable (*Domestic Building Contracts Act* 1995 s. 54(2)) nor are damages for disappointment, hurt feelings or damage of any other kind that was not reasonably foreseeable at the time the contract was made.
- 30 In the present case, the Owners claim damages for having lived in a wet house for 2 ½ years. That is a loss of amenity which is compensable. They will also face the inconvenience of having to move out while repairs are effected. However, Ms Doughty’s claims for headaches said to have been caused by having to work long hours to pay for the House and lack of sleep and stress resulting from both the defects themselves and this dispute are not compensable. Insofar as any such claim amounts to damages for personal injury, it is barred by s 54(2). Otherwise, I do not believe that it is reasonably foreseeable.
- 31 Mr Noble submitted that an appropriate award for general damages was \$50,000. I think that is far too much. Where there has been a breach of contract there is commonly disappointment on the part of the innocent party and some inconvenience arising from the litigation and the need to pursue compensation. These are not generally reflected in an award of damages. It is usually a loss of amenity that is compensated and that must be something that is reasonably foreseeable at the time the contract is made. In this case I think that it is appropriate to award \$5,000 by way of general damages for loss of amenity.
- 32 In addition to that, there will be an award of \$270 for an amount paid by the Owners to clear the stormwater drain that was blocked by concrete.

### **Orders to be made**

- 33 There will be an order that the Respondents pay to the Applicants \$185,928.00, calculated as follows:

(i) Cost to rectify defects:	\$164,953.00
(j) Cost of alternate accommodation	\$ 11,440.00
(k) Removalist cost	\$ 4,265.00
(l) General damages	\$ 5,000.00
(m) Clear blocked drain	<u>\$ 270.00</u>
Total:	<u>\$185,928.00</u>

- 34 Costs will be reserved.

R Walker

**Senior Member**