

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D379/2014

CATCHWORDS

Domestic building – *Building Act* 1993 – s.137B and s.137C – meaning of “construct” includes repair – whether work done by previous owner amounts to a repair – evidence of defects – claim under warranties implied into Contract of Sale by s.137C - *Domestic Building Contracts Regulations* 2007- Reg 6(a) – work must be done pursuant to a contract for the exemption to apply

APPLICANTS	Peter Bernard Carey and Kim Michelle Carey
FIRST RESPONDENT	MK Building Group Pty Ltd (ACN: 098 226 003)
SECOND RESPONDENT	William John Naughton Bradley
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	16 December 2014. Submissions received by 26 February 2015.
DATE OF ORDER	28 April 2015
CITATION	Carey v MK Building Group Pty Ltd (Building and Property) [2015] VCAT 541

ORDER

1. Order the First Respondent pay to the Applicants \$8,651.50
2. Order the Second Respondent to pay to the Applicants \$8,4523.11
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr J. Cotton, Solicitor
For the Respondents	Miss A. Mapp of Counsel

REASONS

Background

- 1 The Applicants (“the Owners”) are the owners of a House in Mount Martha (“the House”).
- 2 The House was constructed by the First Respondent (“the Builder”) pursuant to a major domestic building contract dated 11 January 2011 between the Builder and the Second Respondent (“Mr Bradley”). Mr Bradley is an employee of the Builder.
- 3 By a contract of sale dated 26 March 2013 Mr Bradley sold the House to the Owners who took possession of it on 26 September 2013.
- 4 Since taking possession the Owners have complained about a number of defects, some of which have been rectified by the Builder and others are in dispute.
- 5 This proceeding was brought by the Owners in April last year claiming damages of \$21,702.86 with respect to the unresolved claims.
- 6 The Builder defended the proceeding claiming that some of the defects related to work done by Mr Bradley after the House was completed. These related to some landscaping work, three penetrations in the roof and a wire balustrade. As a result of these allegations Mr Bradley was joined as a party to the proceeding on the application of the Owners.

Hearing

- 7 The matter came before me for hearing on 16 December 2014. Mr J. Cotton, Solicitor, represented the Owners and Miss A. Mapp of Counsel represented the two Respondents.
- 8 Lay evidence was given by the First Applicant, Mr Carey, by Mr Bradley and also by Mr Cassap, who was the construction administrator of the Builder. Brief evidence was also given by the next door neighbour, Mr Kelleher as to some observations that he made.
- 9 Expert evidence was given on behalf of the Owners by Mr Peter Mackie, a building consultant and on behalf of the Respondents by Mr Ian Forrest, an architect. The expert evidence was given concurrently.
- 10 When the evidence concluded, counsel said that they wished to file and serve written submissions and so I gave directions for the filing and service of submissions by 27 January 2015 and reserved my decision.
- 11 Extensions of time were sought by the parties and submissions were finally received by 26 February 2015.

The claims

- 12 The basis of the claim against Mr Bradley was that, in regard to the limited amount of work that he and his wife did to the House, he was an owner-builder and as such he was bound by the warranties implied into the

contract by s137C of the *Building Act* 1993 (“the Building Act”). That section provides as follows (where relevant):

“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.

.....
13. For these warranties to apply, the Contract of Sale must be one to which section 13B applies. That section, where relevant, is as follows:

“137B Offence for owner-builder to sell building without report or insurance

(1) This section does not apply to—

(a) the construction of a building (other than a home) by—

(i) a registered building practitioner; or

(ii) an architect registered under the Architects Act 1991 ; or

(b) except as provided in subsection (5), the construction of a home under a major domestic building contract; or

.....
(2) A person who constructs a building must not enter into a contract to sell the building under which the purchaser will become entitled to possess the building (or to receive the rent and profits from the building) within the prescribed period unless—

(a) in the case of a person other than a registered building practitioner—

(i) the person has obtained a report on the building from a prescribed building practitioner that contains the matters that are required by the Minister by notice published in the Government Gazette; and

(ii) the person obtained the report not more than 6 months before the person enters into the contract to sell the building; and

(iii) the person has given a copy of the report to the intending purchaser; and

- (b) the person is covered by the required insurance (if any); and
- (c) the person has given the purchaser a certificate evidencing the existence of that insurance; and
- (d) in the case of a contract for the sale of a home, the contract sets out the warranties implied into the contract by section 137C.

Penalty: 100 penalty units.”

.....
 "construct" in relation to a building, means—

- (a) build, rebuild, erect or re-erect the building; or
- (b) make alterations to the building; or
- (c) enlarge or extend the building; or
- (d) cause any other person to do anything referred to in paragraph (a), (b) or (c) in relation to the building; or
- (e) manage or arrange the doing of anything referred to in paragraph (a), (b) or (c) in relation to the building;

"home" has the same meaning as it has in the *Domestic Building Contracts Act 1995* ;

prescribed period means—

- (a) in relation to a contract for the sale of a building on which domestic building work has been carried out—
 - (i) 6 years and 6 months (or such longer period (not exceeding 10 years) as is prescribed) after the completion date for the construction of the building; or

-
- (b) in relation to a contract for the sale of any other building—10 years after the completion date for the construction of that building;

.....”

14. It was alleged on behalf of the Owners that work carried out by Mr Bradley to the roof of the House, the landscaping work next to the garage wall and the balustrade were works to which s.137C applied.
15. Miss Mapp referred to the definition of “Building” in s.3 of the Building Act and submitted that the term “Building” did not apply to landscaping works. It will be apparent that I do not need to decide that question because it is alleged that the work said to have been done by or on behalf of Mr Bradley amounted to alterations to the House. The House is certainly a building and so if the works done are alterations then they fall within the definition of “construct” in s.137B.

Roof leak

13. The House is of a very modern design with a ribbed metal roof having a fall of only one degree. At the time of construction there was only one penetration in the roof which was for a flue.
14. After taking possession of the House Mr Bradley engaged a contractor to fix three cable connection points through the trays in the roof at three evenly spaced points. These were to anchor cables which were to support the parapet of the House above the master bedroom to which there was attached an aluminium awning. The purpose of these cables was to provide extra support because Mr Bradley was concerned about the wind loading on the awning and the effect that this might have on the parapet of the House. The work was carried out by the same contractor who supplied the aluminium awning.
15. Shortly after moving into the House the Owners noticed a dripping sound when lying in bed. Mrs Carey believed it to be coming from the roof space but Mr Carey thought that it was from outside.
16. On 14 November 2013 there was a build up of water over the bed which caused the ceiling over the bed to collapse causing damage to the bed. Mr Cassap attended the site and removed a section of damaged plaster and some other material and investigated the cause. According to his evidence, he found that the cause of the leak was the anchoring points for one of the cables supporting the parapet was directly above the part of the ceiling that suffered the water leak. Since the roof penetration was not part of the Builder's work the Builder denied liability.
17. The ceiling and roof space have been rectified by tradesmen engaged and paid for by the Owners. The Owners have also had a contractor remove the fixing points for the supporting cables and replaced them with a proprietary sealing system known as "Dektite".
18. The Owners' expert, Mr Mackie, said that he believed that the cause of the ceiling collapse was water entering from the penetration referred to by Mr Cassap and that it was bad building practice to mount such a fitting in the tray of the roof and not use a Dektite type system to seal it.
19. Mr Mackie pointed out that there are only four penetrations through the roof and that three of these related to the fixing points of the cables that Mr Bradley installed to support to the front parapet wall. According to the evidence, the fixing bolt closest to where the leak above the bed occurred was bent backwards by one or two millimetres. Since the tension on the point would act in the opposite direction, it is not apparent to me how it could have been bent backwards as described.
20. Mr Bradley acknowledged that his contractor had made the roof penetrations above the bedroom and installed the fixing points but said that they had been sealed with seals on the screws that went through like rubber grommets. He denied that they were sealed with silicone.

21. At the time of Mr Mackie's inspection the fixing bolts had been replaced with the "Dektites". He said that these should have been used in the first instance because they provided appropriate waterproofing.
22. Mr Forrest said that, due to roof works being carried out by others, he was unable to identify any defective works that may have caused the bedroom ceiling damage. He noted however that bird wire had been fixed by the Owner to the capping which he said has caused deflection of the capping and may cause water ponding.
23. This wire is strung across the roof between the fixing bolts of the parapet capping. These fixing bolts were installed by the Builder but in each case Mr Carey slackened the bolt off, wrapped wire around it and tightened it up again. He installed these wires to prevent birds from landing and disturbing the occupants of the House.
24. Mr Forrest suggested that these screws could pull down the flashing in the area where they were located causing water to pond around them, resulting in a leak. Mr Carey, who is a plumber by trade, has said that the screws, known as "tek-screws" are those originally installed by the Builder's roof plumber. They have a rubber washer underneath to prevent leakage which he did not disturb. Added to that, there is a box gutter separating the roof from the parapet which is at a lower level. The mechanism by which water penetrating the parapet through one or more of the tek-screws would have reached the area over the bed has not been explained to me and I am not satisfied that that is a possibility. It seems to me after discussing the matter with the experts that any water that entered passed the rubber seals on these bolts would enter the parapet and front wall, and not the area where the leak over the bed occurred.
25. Another suggestion raised was from the evidence of Mr Kelleher, who observed Mr Carey on the roof on three occasions shortly after he took possession of the House. According to Mr Kelleher, he saw Mr Carey lift what he believed to be a section of the roof flashing and replace it, all within about an hour. He also saw him on the roof with what he thought was a silicone gun which he appeared to be using in the box gutter. On a third occasion he saw him putting the bird wire up. Although I accept this evidence there is nothing to suggest that this might have caused a roof leak. The flashing was over the bedroom window and the box gutter is towards the edge of the roof. Both of them are some distance away from the site of the ceiling leak. No likely connection between the bird wire and the leak complained of was demonstrated.
26. The final suggestion was that Mr Carey might have stood on one of the cables attached to one of the fixing points causing the screw to pull in one direction and create a gap between the upper face of the tray and the underside of the screw. There is no evidence that he did that and insufficient evidence that there was any damage to the screw identified by Mr Cassap which would be consistent with such an event. Mr Cassap

suggested that the screw appeared to have been bent backwards by one or two millimetres, not forwards. Had anyone stood on the cable one would have expected the screw to bend forwards.

27. A photograph was tendered showing the fixing point and I cannot see any evidence of any rubber grommet or any other material around it which would indicate that it was sealed. That is not, of course, to say that there is not some material that I cannot see but the expert evidence is that the points should not have been installed in the trays of the roofing material and without Dektites.
28. Weighing up all of this evidence, I am satisfied on the balance of probabilities that the leaking into the roof space above the master bedroom was due to the penetration of the roof by one of these three fixing screws installed by Mr Bradley's tradesman. I am also satisfied on Mr Mackie's evidence that the use of these screws without a Dektite or equivalent system in the tray of the roof was bad building practice.
29. As to liability, the Owners seek damages from Mr Bradley pursuant to s.137C. Miss Mapp submitted that the work done to the roof by Mr Bradley's tradesman was in the nature of a repair and was not an alteration. She said that the legislation should be interpreted in a manner consistent with its apparent object that is, to provide a regime of consumer protection, that it would be manifestly absurd or unreasonable to construe insignificant work as an alteration.
30. Whether or not that is right, I do not think that what was done in this instance could be regarded as insignificant. A large metal brace was bolted to the wall and it was attached by cables to the roof structure. Its purpose was structural and it clearly altered the House.
31. Miss Mapp further submitted that the work in attaching this brace and these cables was not "domestic building work" within the meaning of s.137C.
32. By s.3 of the Building Act, the term "domestic building work" has the same meaning as it has in the *Domestic Building Contracts Act 1995* ("the Domestic Building Contracts Act"). Section 5 of the latter Act provides (inter alia):

“Building work to which this Act applies

(1) This Act applies to the following work—

(a) the erection or construction of a home, including—

(i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and

(ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;

(b) the renovation, alteration, extension, improvement or repair of a home;”

33. Miss Mapp referred me to Regulation 6(a) of the *Domestic Building Contracts Regulations 2007*, which provides, *inert alia*, the following exemption:

“For the purposes of section 6(a) of the Act, work is not building work to which the Act applies if the work is to be carried out under a contract in relation to one only of the following types of work—

(a) attaching external fixtures (including awnings, security screens, insect screens and balustrades);”

34. For the exemption to apply, the work would have to be done under a contract falling within one of the descriptions given. There is no evidence about the contract under which this work was carried out, but even if it was only for the work on the roof described in the evidence its purpose was not merely to attach a fixture but to make a structural alteration to the House.
35. That being so, this is domestic building work, the warranties implied by s.137C of the Building Act apply to it and, since I have found that the work was defective in the respects already referred to, the warranty in s.137C was broken.
36. Since I have found the claim for breach of warranty proven I do not have to consider the alternative claim for negligence.
37. The Owners, who prepared their own submissions, said that the Builder was also responsible for the damage because it was negligent for installing the awning on a parapet incapable of holding it. There is insufficient evidence that the supports that Mr Bradley installed were required because the original construction was deficient. Even if there was, any loss from that would have been the cost of rectifying the defective construction. The losses claimed here are from defective workmanship performed by Mr Bradley’s tradesman and he is vicariously liable for that. It has nothing to do with the Builder.
38. The claim with respect to the incident is \$10,702.86, calculated as follows:
- | | |
|---|--------------------|
| Installation of Dektites | \$660.00 |
| Repair and paint ceiling | \$2,092.86 |
| Accommodation while repairs were affected | \$2,000.00 |
| Replacement bedding | <u>\$5,950.00</u> |
| Total | <u>\$10,702.86</u> |
39. In cross-examination it was suggested to Mr Carey that the two weeks of alternate accommodation referred to in the invoice was for a holiday for his family in Rye. He denied that and I see no reason to disbelieve him. If someone lives in Mount Martha it seems unlikely that he would take his

family on holiday to Rye which is just a little further down the Mornington peninsular and in the same general area.

40. Mr Carey was also challenged on the cost of the bedding which he said he had purchased from his own company. The majority of the cost was a king size mattress that he made for himself for which he produced an invoice for \$4,500.00. He said that that was “the normal price.” He said that the damaged mattress that it replaced was a Sealey posturepedic which cost \$6,500.
41. The description of the mattress in the invoice tendered to support the claim fro the mattress described it as a “Guardian Opulence King” and stated the price at \$4,500. Miss Mapp produced a copy of the web site of Mr Carey’s company that offered the “Guardian Opulence King” mattress for sale at a price of \$1,570. Mr Carey said that the mattress was a “Grand Opulence” and that he had made it specially to match a Sealy mattress. When asked whether had had paid this amount to his company he did not say that he did. He just said that that was a hard question. Given the description of the mattress in the invoice that has been tendered I will allow \$1,570 for it, which reduces the claim to \$7,772.86.

Hand rail and wire balustrade

42. This is a hand rail and balustrade that Mr Bradley installed for a deck and some steps attached to a corrugated iron wall. It has come loose and needs refixing and adjustment of the cables. There was no dispute as to the scope of this item although liability was not accepted. The Owners claim \$475 for the necessary work, as assessed by Mr Mackie, plus 30% margin plus 10% GST, making a total of \$679.25.
43. I do not accept Miss Mapp’s submission that this is not a repair. From the description and the photographs it is work of some substance that Mr Bradley undertook. It was done defectively and he is responsible under the warranty implied into the Contract of Sale by s.137C of the Building Act.

Leaking in the garage

44. When the property was completed by the Builder the garden area was sloped and battered down towards the garage wall. Mr Bradley did not like the appearance and so tanked the wall with bitumen and built the ground level up with scoria and installed an agricultural drain at the bottom.
45. When the Owners took possession of the House they notice that water was entering the garage under the skirting board to the right of a passenger door that led up an internal flight of steps to the living area of the House. From the photographs and the evidence it does not appear that the leak is coming through the wall that was tanked by Mr Bradley. Rather, it appears to be coming through the wall in the stairwell. Mr Carey said during evidence that neither Mr Cassap nor Mr Forrest had been under the House. He said that both he and Mr Mackie had been under the House and that Mr Mackie had found that the water was coming from under the House.

46. Mr Mackie examined the sub-floor of the House and concluded that the ground water is travelling along the stormwater pipe trench and ending up at the retaining wall around the lower stairs from the garage. He said that it might also be entering from the garden area located on the northern side of the garage. He said that the waterproofing and drains to the retaining wall are allowing moisture to enter the building around the stair causing damage to structural members that may require replacement.
47. In his scope of works he suggested that all aggregate and the slotted drain behind the retaining walls to the House be removed and that the trench be excavated to fall out outwards towards the west below slab height. He said that the damage to the bitumen waterproofing be repaired, that a new slotted drain be installed to exit at a point of discharge, that aggregate be installed to the required height, that moisture damaged timbers to the garage stair entry be replaced and the affected areas painted and that the cut off to the high side of the House be lowered to ensure that any water runoff does not flow under the subfloor area. He assessed \$2,900 for this scope of works plus builder's margin and GST, making a total of \$4,147.00.
48. Of this work the only part of it relates to Mr Bradley would appear to be the external tanking of the wall and the back filling of the scoria against it. However it does not seem to me from the evidence that this is where the leak is occurring. Although Mr Mackie said that it might also be coming from there he did not say positively that it was. However he did blame the internal drains under the House which were constructed by the Builder.
38. Mr Forrest said that the BCA did not require agricultural drains to be below the slab level and he noted that the garden works had been carried out by Mr Bradley. He added that the garage was a non habitable class 10A occupancy which was not required to be watertight. He did not inspect under the House as did Mr Mackie.
39. Although I accept that a garage is a non-habitable area, the drainage system under the House should nonetheless be properly constructed. On this issue I prefer Mr Mackie's evidence and will allow the amount claimed against the Builder.

Lower level window

40. Apart from water entering the ceiling space through the hole in the roof referred to Mr Mackie identified water penetration around the window. He produced photographs taken with a thermal camera showing dark areas around the windows that had high moisture readings when tested. He said there were no sill flashings expelling water to the outside and so he would expect this water to extend to the living room below.
41. Upon inspecting the stacker door frame (W16) he found that the window head flashing was falling back to the external cladding and that there was no gap between the underside of the cladding and the flashing as required by the manufacturer's instructions. In addition, the H flashing intersection

to the window head flashing had been cut away allowing water to enter at those points. He said it was unknown if there were any side flashings installed but said that the drawings required the Builder to “flash all heads sills and jambs”.

42. Upon inspecting the stacker door frame sill flashings Mr Mackie found that the black plastic flashing was not folded up around the window sill and that there were signs of moisture with rust marks on the carpet smooth edge. He could not determine how the moisture was escaping from the sill flashings as no outlet was located.
43. Mr Mackie spelt out a scope of works involving removal of flashings to inspect the leaks, removal of sliding door architraves and glass sliding doors and fixed panels and fabricating new matching Colorbond sub-sill flashings and head flashings to the windows and doors. The affected internal linings were then to be repainted. A similar scope of works was specified for the lower level windows. He costed the scope of works at \$3,150 plus margin and GST.
44. Mr Forrest acknowledged the lack of clearance between the external cladding material and the sills which he said had caused the build up of dirt and airborne materials and moisture to bridge the gap so that the underside of the wall panels appeared to be constantly damp, causing the material to become affected with mould and mildew and deteriorate and stain. He said that building movement had caused the flashing connection to open, allowing stormwater entry into the building structure. He acknowledged the manufacturer had specified a 10mm minimum gap spacing which, he said, would eliminate the build up of mould and mildew.
45. Mr Forrest said that the breakdown of the flashing had been exacerbated by the failure of the Owners to have carried out any maintenance on the horizontal cladding junction joint at the upper floor level so as to ensure that the external surfaces are clean. I think this is an unrealistic view. The external cladding material junction at the first floor level of the House is not readily accessible and cleaning it is not something that would occur to a home owner as being necessary maintenance. When cross examined on this issue Mr Bradley said that he carried out no maintenance of this nature when he was occupying the House.
46. Mr Forrest agreed that water penetration had entered the structure and could have fallen down to the ground floor level. His scope of works was to clean out the horizontal joint, wash down the wall sheet over the joint and cut back the base of the sheet with the appropriate tool to allow 10mm clearance of the flashing. As an alternative, he suggested the removal of the external wall cladding, a checking of the structural integrity of the internal building materials, the provision of new flashing and generally a scope of works similar to that specified by Mr Mackie.
47. Since it is acknowledged that water has penetrated the structure of the building and it does not appear to be disputed that there is insufficient

effective flashing I prefer Mr Mackie's opinion that the Builder failed to allow the required gap in the cladding or adequately flash the windows. I am not satisfied that it was contributed to by any lack of maintenance by the Owners.

48. I think that the greater scope of work specified by Mr Mackie and in the alternate proposal on Mr Forrest is required and I shall allow the amount specified by Mr Mackie.
49. The total for the upper and lower windows is \$3,150.00. With builder's margin and GST the figure becomes \$4,504.50.
50. Since this work relates to the flashing and external cladding it is the responsibility of the Builder.

Other claims

51. There was a claim for checking the west facing windows to see if they are properly flashed but no deficiency in these windows was established. I cannot make an order for the cost of checking something that might not be defective.
52. The Owners said in their Submission that Mr Mackie "omitted an estimate" for the main bedroom door stacker window. They invited me to find that further rectification costs would be incurred equivalent to what is to be allowed for the upper windows. My interpretation of Mr Mackie's evidence was that the figures that he gave was for all of the work that he considered necessary.

Orders to be made

53. There will be an order that Mr Bradley pay to the Owners \$8,4523.11. There will also be an order that the Builder pay to the Owners \$8,651.50.
54. The Owners also seek an order for costs of the proceeding but since I have heard no submissions about costs, costs will be reserved for further argument.

SENIOR MEMBER R. WALKER