

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP 743/2015

CATCHWORDS

Burden of proof, insufficiency of evidence to discharge burden

APPLICANT	Nilian Chen
SECOND RESPONDENT	Max Koshani
THIRD RESPONDENT	Koshani Construction and Development Pty Ltd ACN 114 181 430
WHERE HELD	Melbourne
BEFORE	Member MJF Sweeney
HEARING TYPE	Hearing
DATE OF HEARING & ORDER	19 June 2015
REQUEST FOR REASONS	9 September 2015
DATE OF REASONS	24 September 2015
CITATION	Chen v Koshani (Building and Property) [2015] VCAT 1511

ORDERS

1. The respondent to the claim is amended by consent of the parties as follows:
 - (a) The First Respondent, Zebra Building and Painting Pty Ltd (ACN 114 181 430) be removed from the proceeding;
 - (b) Max Koshani of 14 St Johns Avenue, Mont Albert, Vic 3127 be joined to the proceeding as the Second Respondent;
 - (c) Koshani Construction and Development Pty Ltd ACN 114 181 430, of 14 St Johns Avenue, Mont Albert, Vic 3127 be joined to the proceeding as the Third Respondent.

2. The proceeding is dismissed.

MEMBER MJF SWEENEY

APPEARANCES:

For Applicant	Nilian Chen in person
For Second Respondent	Max Koshani in person
For Third Respondent	Max Koshani, Director

REASONS

BACKGROUND

- 1 Ms Chen makes her claim pursuant to s8 and s9 of the *Domestic Building Contracts Act* against the second and third respondents as builders of the property she purchased.
- 2 Whilst not explicit in her claim, the substance of Ms Chen's claim is that the respondents have breached implied warranties under s8 of the Act in that they failed to carry out the works in a proper and workmanlike manner and did not carry out the works with reasonable care and skill.
- 3 The house is a two storey construction and one of four built by the respondents. The kitchen is located on the ground floor. Above the kitchen area generally is a first floor bathroom and part external lower roof.
- 4 Ms Chen moved into the house on or about 15 April 2013. She says that at that time she noticed a mark on the kitchen ceiling that was a little bit brown in colour. Sometime, still in April, Ms Chen noticed a leak coming from the kitchen ceiling, which she said was leaking at a rate of 'one week, one drip; one week, one drip'.
- 5 By 20 August 2014, some 16 months later, Ms Chen says the leaking rate increased to 'maybe a few drips per day'.
- 6 However, Mr Webster, Ms Chen's partner, gave evidence and said that the dripping at 20 August 2014 was about 1 cup every 15 minutes.
- 7 Around this time Ms Chen said that she turned off the water main to the property and left it off because of the dripping. She turned the water main on only once in a while when she needed water, but otherwise the water main tap was left turned off.
- 8 Mr Webster said that when the water main tap was turned on the dripping restarted after about 10 minutes.
- 9 At the request of Ms Chen, Mr Koshani and/or his contractors attended the house for the first time on 20 August 2014 to investigate the complaint. This is approximately 16 months after the time that Ms Chen says the leak had first started.
- 10 Mr Koshani or his contractors attended the property at least 10 times between 20 August and 22 October 2014. Ms Chen was not sure about the total number of visits by Mr Koshani's contractors, but agreed in cross examination that the number of visits was around 10 times. Mr Koshani said that the number of visits was greater than 10 times.
- 11 During these visits, works were undertaken by the respondents in an attempt to try and locate a leak. The respondents cut out a section of the

plaster ceiling in the kitchen. Mr Koshani said that his trades did this twice but Ms Chen said they only did a cut out once.

- 12 The respondents were unable to locate any leak.
- 13 Mr Webster's evidence is that the water is visible when it runs across the ceiling, about 10 minutes after turning on the water mains tap. Two photos were tendered, taken by Mr Webster, showing a hole cut into the ceiling and another close up photo showing what appears to be several drips on the roughly cut edge of the plaster ceiling.
- 14 Mr Webster believed that the leak is coming from somewhere near the bathroom upstairs above the kitchen but could not say so with any certainty.
- 15 Ms Chen submitted a brief inspection note written by a Mr Hua Le, a plumber under the trading name of H.L Plumbing. The description is dated 29 April 2015. The inspection and note was made some 6 months after the last visit by the respondents on 22 October 2014. This is almost 2 years from the date Ms Chen moved into the house and first noticed a leak.
- 16 Mr Le's note states that 'when turn on the main water valve water leaking from [sic: ?] of the ceiling, turn off the main valve the water stop leaking.' He did not make any comment about a 10 minute delay before the leaking stated.
- 17 Mr Le's note continues 'leaking [sic: ?] location, leaking location at [sic: 'shower room' crossed out] bathroom, between basin cabinet and shower screen and behind tiles'.
- 18 The respondents were unable to find the location of any internal leak on any of their 10 or so visits to the house. Mr Koshani believes that the leak is not a continuous leak or an internal leak. Mr Koshani stated that any leak is intermittent and likely the result of damage to tiles on an external roof.
- 19 Mr Koshani stated that he believed that the cause of a leak was likely to be due to damaged and cracked tiles during Ms Chen's installation of a large pergola structure abutting the lower roof and the installation of a TV antenna or dish. Mr Koshani provided photos of the pergola and an antenna taken from the adjacent property. He was unable to conduct closer inspections, hence could not provide photos of any cracked tiles.
- 20 The issue raised by the proceeding is:
 - whether a leak is the result of the respondents' defective work or some other cause not connected to the respondents' work

PROCEDURAL

- 21 The applicant applied to withdraw her proceedings against the first respondent. The application was granted.
- 22 By consent, the parties agreed and the Tribunal ordered:
 - (a) Max Koshani be joined as second respondent;

- (b) Koshani Construction and Development Pty Ltd ACN 114 181 430 be joined as third respondent.

ISSUE: Was a leak the result of the respondents' defective work or some other cause not connected to the respondents' work?

- 23 In claiming that a leak from the kitchen ceiling is the responsibility of the respondents, Ms Chen relies in part on the inspection note of Mr Le. Mr Le did not attend to give evidence and his inspection note written in a docket book is briefly made. Ms Chen said she found the services of Mr Le from a newspaper advertisement. The Tribunal does not know of his qualification or years of experience. Ms Chen said that he is a licensed plumber.
- 24 The Tribunal has not had the opportunity of hearing direct evidence from Mr Le who could have attested to his experience and qualifications as a plumber. Mr Le could also have attested to important matters, including the circumstances of his inspection; the extent of his investigations; the frequency of the leak at the time of inspection; details of a relationship between the leak and the mains water being turned on; likely cause of a leak; evidence supporting his determination of the particular location of a leak in an area that is not accessible.
- 25 The plumber's inspection report says the location of the leak is in the upstairs bathroom between the basin cabinet and the shower screen. In cross examination, Ms Chen could not say how Mr Le arrived at his opinion as to the location of the leak. She gave evidence that he did not make any internal inspection of the wall or get into the ceiling due difficulties of access. When pressed in cross examination, she said that she thought Mr Le must have 'guessed' the location as being behind the tiles and between the basin and shower screen.
- 26 Mr Koshani said that he had arranged for three different and independent tradespersons to attend and investigate a leak but that they were unable to locate a leak. The independent tradespersons were sub contractors for Mr Koshani's companies from time to time. Their names are Alan, Jeff and Mohamad. Mr Koshani could not recall their last names.
- 27 In response to Mr Koshani's statements that the construction of the pergola damaged the roof tiles on the lower roof, Ms Chen made a strong denial. Mr Koshani stated that one of his contractors observed a cement roof tile had been damaged by the pergola being bolted to the roof.
- 28 Ms Chen acknowledged that a TV antenna had been installed by means of a tradesperson climbing up a big ladder onto the roof.
- 29 Mr Koshani did not see broken or cracked cement tiles himself but said that it was observed by one of his contractors who he had sent to investigate Ms Chen's complaint.

- 30 No explanation was given by Ms Chen as to why there had been no complaint made to the respondents about a leak in the period 15 April 2013 to 20 August 2014, a period of approximately 16 months.
- 31 The Tribunal is puzzled by Ms Chen's evidence, supported by Mr Webster, that the leak complained of persisted for almost 2 years, causing Ms Chen to turn off the mains pressure water tap for a large part of this time, and that the first time a plumber was called to make an inspection (other than the respondents), was almost 2 years after the leak. If the leak had been continuous for 2 years, it would be reasonable to expect that a person would have the source of the leak fully identified and/or repaired.
- 32 The other support for Ms Chen's claim that a leak in the kitchen ceiling is due to the respondents' defective work, is that the leak stops when mains water is turned off. The Tribunal is being asked to infer from this that the leak could only be due to defective internal water piping installed by the respondents and that this defect only becomes manifest when mains water is turned on.
- 33 In support of this proposition, Mr Webster presented a video. It showed water dripping from the ceiling into a bucket. Mr Webster said that he had turned on the mains water tap 10 minutes before starting the video.
- 34 In the Tribunals' view, the video is not conclusive evidence of anything other than a video showing some dripping water. The video does not, of itself, assist in proving that the mains water pressure had been turned on leading to a commencement of a leak or the location of the leak. Again, the Tribunal could have been assisted by Mr Le on these matters.

CONCLUSION

- 35 In this case, little of the evidence of either of the parties is clear. The evidence of the applicant's plumber, Mr Le, is not direct evidence. His statements are made briefly. They are made in a fashion that does not describe how he determined the location of the leak. The applicant herself did not know how Mr Le identified the alleged location and surmised that he may have guessed at it.
- 36 The absence of a more particular explanation is of considerable importance to the Tribunal's task of seeking to determine liability. This is particularly so in circumstances where several other qualified trades, albeit connected with the respondents, were unable to locate a leak problem and said that it was due to a leaking external roof due to a broken tile or tiles.
- 37 The video evidence of Mr Webster is inconclusive. That water mains when turned on lead to a leak in the kitchen ceiling is denied by the respondents. The respondents say it is caused by cracked or broken tiles. The evidence of a connection between the mains being turned on and a leak commencing shortly thereafter is inconclusive.

- 38 Evidence could have been produced without great cost or the need for intrusive testing behind wall cavities. Mr Le himself may have been able to shed some light on the matter in this direction.
- 39 Whilst it can equally be said that the evidence of the respondents is not clear, it is not up to the respondents to prove that the cause of the leak is broken tiles resulting from Ms Chen's construction of a pergola or the installation of a TV antenna.
- 40 The burden of proving the claim falls on the applicant, Ms Chen, to prove on the balance of probabilities that the respondents, or either of them, caused the leak.
- 41 The applicant has failed to meet the required standard. It follows that her claim must fail.

MEMBER MJF SWEENEY