

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. D1357/2012

**CATCHWORDS**

Claim for building defects in domestic unit; owner builder; warranties implied by section 137C of *Building Act* 1993; applicant had made prior claim in Tribunal in respect of defects in her unit; effect of determination of prior claim on new claim.

<b>APPLICANTS</b>	Mrs Kim Lan Cheng
<b>FIRST RESPONDENT</b>	Mr Alexander Samoylenko
<b>SECOND RESPONDENT</b>	Ms Yevgenya Petrenko
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member C. Edquist
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	16 December 2014
<b>DATE OF ORDER</b>	17 February 2015
<b>CITATION</b>	Cheng v Samoylenko (Building and Property) [2015] VCAT 167

**ORDER**

1. The application is dismissed

**MEMBER C. EDQUIST**

**APPEARANCES:**

For the Applicant	Mrs Cheng in person, with Mr Albert Cheng
For the Respondent	Mr Alexander Samoylenko and Ms Yevgenya Petrenko in person

## REASONS

- 1 Two units at an address in Risdon Drive Notting Hill were constructed by Alexander Samoylenko and Yevgenya Petrenko as owner builders. They were completed in 2005.
- 2 Unit 1 was purchased by Mrs Kim Lam Cheng and her husband Mr Albert Cheng, "off the plan" under a contract for sale of land dated 30 August 2004, which settled on or about 23 May 2005.
- 3 This case concerns a claim by Mrs Cheng for damages in respect of defects that she says exist in the unit.
- 4 As Mr and Mrs Cheng purchased their unit from owner builders, they are entitled to the benefit of warranties implied into the contract of sale they signed with the respondents. These warranties arise under section 137C (1) of the Building Act 1993 and are as follows:
  - 5 the vendor warrants that all domestic building work carried out in relation to the construction by on behalf of the vendor of the home was carried out in a proper and workmanlike manner; and
  - 6 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
  - 7 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.
- 8 A threshold issue exists, which is whether it is open to Mrs Cheng to maintain this action in circumstances she and her husband Mr Albert Cheng commenced proceedings in this Tribunal in 2012 against Mr Samoylenko and Ms Petrenko, for defects in the property, and those proceedings have been determined. It is noted as an aside that in the earlier case Mr and Mrs Chang described themselves as Mrs Kim Lan Chang and Mr Albert Chang, but Mrs Cheng did not dispute at the hearing of the present case that she was the applicant, Mrs Kim Lan Chang, in the earlier proceeding. For consistency the Mrs Chang and Mr Chang will be referred to below as the Mrs Cheng and Mr Cheng.
- 9 In 2012 Mrs Cheng and Mr Cheng sought damages in respect of the following building faults:
  - 10 water leaking into the lounge room;
  - 11 water leaking into the family room; and
  - 12 a leaking shower.
- 13 The fact that Mrs and Mr Cheng instituted proceedings in 2012 seeking damages for breach of warranty in connection with alleged defects in the owner builders' work is of itself sufficient reason to dismiss these proceedings in so far as they relate to defects which were in existence at the time when the previous proceedings were dismissed by the Tribunal. This result follows from the legal principle that the law will not allow the same action to be litigated twice.
- 14 In the present case Mrs Cheng could understandably point to the defects now complained of and say that they are different to the three issues related to water leakage raised in the first proceeding. However, that observation is not sufficient to dispose of

the legal obstacle facing her, because the law is that there is but one action to recover damages for breach of a term of a building contract that the works are to be built without defects, and particular defects in a building are but instances of the one breach of contract.

- 15 Even if I was inclined, having regard to the fact that Mrs and Mr Cheng were not represented in the first action, to look at the reason why they had not brought claims about almost all of the defects about which Mrs Cheng now complains, her cause would not be greatly advanced. This is because in the present case, almost all the defects complained of were present from the time of completion of the Cheng's unit and could have been identified by an observer at the time the Chengs took possession. Accordingly, it was not reasonable for the Chengs not to have included these defects in their first action for breach of the statutory warranties as to the quality of work.
- 16 One exception to this categorisation of the defects is the leaking of the lounge room roof which occurred in November 2013. If that leaking arose from a defect, then that defect was a latent one which was not present at the time the Chengs took possession of their unit, and accordingly its existence would justify a new claim for breach of contract.
- 17 Also, at least one other defect, namely the breakdown of perimeter grouting, may not have been apparent at the time the Chengs took possession of the unit, but no evidence was presented that it became apparent only after completion of the first proceedings. Accordingly, like the defects which were readily apparent at the time they took possession, I consider this defect cannot now be made the subject of a claim for damages.
- 18 Mrs Cheng will no doubt be disappointed that she now cannot make a claim for breach of statutory warranty in respect of any but one of the defects of which she complains. However, as will be apparent from the comments that I make below, the fact that the present action is now largely barred does not give rise to any substantial monetary loss because many of the defects complained of are technical in nature and would not have resulted in a significant award of damages even if a claim in respect of each of them had been allowed.

### **Expert Evidence**

- 19 Ms Cheng relies on an expert report from Robert Paul, a building practitioner of Just Inspections who prepared a report dated 8 October 2013. Mr Paul did not attend the hearing, but gave evidence by telephone.
- 20 The builder relied on expert evidence from Joseph Borg, a building practitioner and Robert Jawiewicz, a building consultant.

### **Garage door**

- 21 Ms Cheng claims that the garage door is not a waterproof exterior door. In his report, Mr Paul stated: "external rear access does not appear to be of exterior quality and is delaminating". During the hearing, Mr Paul confirmed that the major reason for his conclusion that the door was not of exterior quality was that it was delaminating.
- 22 Mr Borg's evidence was the door was of exterior quality as it was a solid core door. Furthermore, he disagreed that the door was delaminating. He said it was facing the weather but had not warped. He referred in his report to a receipt he had appended from Tile Importers 25 October 2004. He said it was for the door. The receipt attached

certainly was from Tile Importers and bore the date 25 October 2004. It was for two “Ext solid T/Door” but no purchaser or intended address was identified.

- 23 Mr Samoylenko said he had installed a solid garage door in the unit he sold to Mrs Cheng.
- 24 Mr Jasiewicz, questioned Mr Paul's assessment that the garage door was an interior door because it was delaminating and said that a standard test to determine whether a door is internal or external is to test the weight of the door, which can be done even when the door has been fixed.
- 25 I am satisfied on the evidence before me that the garage door in Mrs Cheng's garage is of exterior quality. I accept Mr Samoylenko's sworn evidence that he installed an exterior door in Mrs Cheng's garage. I note the documentary evidence, such as it is, is consistent with Mr Samoylenko's statement, as the receipt confirms two exterior doors were ordered in October 2004.
- 26 There is a clear contest as to whether the door is now delaminating. If the door was of appropriate quality when it was installed, then it may be that it requires repainting, as more than nine years have elapsed since the door was installed. Maintenance, including repainting, is the owner's responsibility.

### **Articulation joint near the garage was not sealed**

- 27 The owner contends that the articulation joint near the garage was not sealed. Mr Paul accepts that the unsealed joint was not exposed to the weather, but said that there was a risk of moisture ingress from the air.
- 28 Mr Borg accepted that the articulation joint was not sealed. However he said that the joint was in a sheltered position and noted that there had been no structural movement as a result of the joint not being filled.
- 29 Mr Jasiewicz argued that the seal was sufficiently filled with foam.
- 30 I accept that the failure to seal the articulation joint was a technical defect as it constitutes a breach of BCA 3.3.1.8 (e). However, as the articulation joint is protected from the weather and there has been no ingress of moisture into the brickwork in the period of more than nine years since the unit was certified for occupancy, the breach of the warranty implied into the contract of sale of land by section 137C(1)(c) of the Building Act to the effect the work was carried out in accordance with all laws and legal requirements is purely technical in nature. No damage flows.

### **Range Hood**

- 31 Mrs Cheng complained that the range hood does not exhaust to the exterior, but rather into the upper storey sub floor space. Accordingly, she contends that it represents a potential fire hazard.
- 32 Mr Borg said that this risk would be minimised if the range hood was installed with a carbon filter. Mr Jasiewicz agreed, and added that in up to 95% of cases builders adopt this solution.
- 33 Mr Paul also agreed that a carbon filter would make the current installation of the range hood satisfactory.
- 34 Mr Cheng produced a filter which he said came from the range hood. This filter is clearly not a carbon filter. Mr Borg agrees.

- 35 Mr Samoylenko tendered an invoice from Polly & Plumbing Pty Ltd, which confirmed that it had supplied and fitted a carbon filter for the range hood in Mrs Cheng's unit.
- 36 I am accordingly faced with a contest between documentary evidence, which suggests that a carbon filter was initially installed in unit 1, and Mr Cheng's physical evidence that the filter currently installed in the range hood is not a carbon filter.
- 37 I understand that range hood filters require to be changed from time to time. In circumstances where more than nine years have passed since the unit was completed, I accept the documentary evidence that a carbon filter was initially installed in unit 1. This is of itself a sufficient reason to reject the claim.

### **Articulation expansion joints**

- 38 The first complaint in this category was that the required vertical articulation joint was not in place in the front wall in breach of BCA Part 3.3.1.8. In particular it was pointed out by Mr Paul in his report that as the front wall had openings of more than 900 x 900mm, articulation joints are required at not more than 5m.
- 39 Mr Borg referred to a site investigation report, which had been prepared for the development by CCB Consulting Engineers dated 1 December 2003, in which it was stated that:

*"All brickwork should be well articulated by the provision of full height articulation joints at a maximum continuous spacing of 10m."*

Mr Borg said this meant the code requirement did not apply. When questioned by me about this, Mr Paul agreed.

- 40 On this basis, the claim would have failed factually in any event if it had not been barred on the basis that it was an obvious defect which could have been noticed when the Cheng's took possession of the unit, well before the first proceedings were commenced.
- 41 The second concern regarding an expansion joint articulated by Mrs Cheng was that the vertical articulation joint in an external window sill did not continue right through the sill bricks, in breach of BCA 3.3.1.8.
- 42 This defect was acknowledged by Mr Borg. However, he said the defect was a technical issue and pointed out that the wall had not moved. He emphasised that only the sill was affected. Mr Jasiewicz agreed.
- 43 In his evidence, Mr Paul accepted that it would take about 20 minutes to install the required expansion joint. On the basis of this evidence, I comment that even if the claim had been legally permissible now, it would have resulted in only a very small award of damages.

### **Spreaders to be fitted to down pipes**

- 44 This claim related to an allegation that spreaders had not been fitted to downpipes discharging to the lower level roof.
- 45 It was accepted on all sides that this had been one of the complaints which had been ventilated before the Tribunal in the first proceeding which was dismissed in February 2013. Once dismissed, a claim cannot be re-agitated in subsequent proceedings.

## **Flexible grouting to all corners and edges of tiled areas**

- 46 In support of this claim Mr Cheng referred to page 2 of Mr Paul's report where he states that flexible perimeter grout was required by AS 3958.1, section 5.4.5.2(c), and the building contract specification at section 9, clause 9.2.
- 47 As evidence, Mr Cheng handed up a photograph, which appeared to show a lack of flexible grouting at a point on the exterior of the unit.
- 48 Mr Samoylenko said that he had installed grout. Mr Borg explained that movement of adjoining material due to thermal expansion and contraction might cause the grout to fall out. Mr Jasiewicz suggested this was a maintenance issue.
- 49 The cost to rectify claimed by Mrs Cheng was \$1200 inclusive of GST, as quoted by Campi's Maintenance Contractors & Builders on 1 September 2014. Mr Paul, Mrs Cheng's expert, did not regard this as reasonable.
- 50 Mr Cheng said the Campi's price was justified because the existing hard grouting had to be removed before flexible grouting could be installed. Mr Paul doubted whether this work would really be necessary.
- 51 This claim, if it was not already barred, would not have justified a substantial award of damages.

## **Mirror to tile joints to be sealed with flexible grouting**

- 52 Mrs Cheng made three complaints under this heading. The first related to the wall mirror in the ensuite. The second related to the wall mirror in the toilet. The third related to the wall mirror in the bathroom.
- 53 Mr Borg said these issues were not defects because the work complied with the BCA at the time of construction, as the mirrors are above the required splashback. In any event, even Mr Paul agreed that if the problem had to be addressed it could be fixed by running a bead of silicon around the mirrors. This would take a builder half an hour, and would require a tube of silicon. However, an assessment of damages is not necessary as the defects are obvious, and could have been raised in the first action brought by Mr and Mrs Chang.

## **Laundry door out of square**

- 54 Mrs Cheng complains that the laundry door jamb is out of plumb with the result that it does not stay open but closes automatically. Mr Paul in his report explains that the door jamb is out of plumb by 15 mm in 2 m, which he opines is outside the acceptable band of tolerance, and is accordingly a breach of the warranty relating to proper and workmanlike work.
- 55 Mr Samoylenko conceded that the door was out of plumb and had been since it was built. Mr Borg agreed the door was out of plumb by more than the acceptable tolerance.
- 56 Mrs Cheng had obtained a quotation from Campi's to rectify the door of \$1530 inclusive of GST. Mr Paul thought it would take half a day for a carpenter to rectify the door and estimated the work at \$600-700. Mr Borg said a simple door stop would fix the problem of the door automatically closing.
- 57 This claim, if it had been allowable, would have justified an award in the range assessed by Mrs Cheng's expert Mr Paul. However, it is barred, as it is a glaringly obvious defect and could have been claimed in the first proceeding in 2012.

## **Laundry door sill requires support**

- 58 The claim here is that the aluminium sill to the external laundry door flexes and accordingly constitutes a breach of the warranty regarding proper and workmanlike work.
- 59 Mr Borg said in his report that the concrete slab supports the installation of the frame and a portion of the doorsill, and that this is the acceptable standard installation of sills. Accordingly, he was of the opinion that the owner builders had installed the frame in accordance with common acceptable building practice. Mr Jasiewicz agreed the sill had been installed compliantly.
- 60 In his oral evidence, Mr Borg conceded that the sill flexed, but said that it could be fixed by inserting sealant underneath.
- 61 Mrs Cheng's expert Mr Paul agreed that the sill could be fixed but considered it appropriate for the sill to be replaced by a treated pine sill. He estimated this work at two hours for a carpenter at \$60 per hour plus GST. This suggests that, inclusive of materials, the work would cost about \$150. Alternatively, if the sill was further supported but not replaced, Mr Paul said he would prefer hard grout to be used. This would not be a more expensive solution.
- 62 An assessment of the cost to fix this defect is not necessary, as the claim is barred as this is an obvious defect which should have been included in the first proceeding.

## **Leaking Lounge Roof**

- 63 Mrs Cheng is seeking damages in respect of losses which have arisen as a result of a leak in the lounge roof.
- 64 When I pointed out that water leaks were the subject of the earlier VCAT claim, I was assured that these leaks were separate, and arose as a result of leaking under the tiles which had occurred due to a build up of debris.
- 65 The materials tendered, including an A1 Building Group Pty Ltd invoice dated 22 November 2013 which refers to emergency works to ensure safety commencing on 13 November 2013, suggest that the leak occurred on or shortly before that day. I find that the leak accordingly occurred well after the conclusion of the first VCAT determination on 8 February 2013. On this basis there would appear to be a fresh cause of action, which would not be precluded by the fact that an earlier claim for defects had been commenced and determined.
- 66 The costs claimed included:
- a) the cost of obtaining a report as to the cause of the leak from Melbourne Roof Tile Trading -\$231;
  - b) the cost of supplying and fitting a flashing along a wall over the existing box gutter, estimated by Melbourne Roof Tile Trading at \$670 including GST; and
  - c) the cost of emergency works to stem the leak and make the site safe, performed by A1 Building Group on behalf of AAMI at a cost of \$665.28.
- 67 Consequential losses were also sought including;
- a) the cost of fixing/replacing water damaged skirting and architrave and blinds caused by the roof leak (\$1638.08);

- b) the cost of replacing a cedar Venetian blind \$179; and
  - c) the cost of replacing a Sunscreen Roman blind (\$213).
- 68 In respect of the cause of the leak I was referred to a report by Melbourne Roof Tile Trading dated 24 January 2014 headed “Expert Report (Roof/Leak Detection)/Observations”. This report stated:
- “Upon inspection the entire roof appeared to be in excellent condition. There is however one area of concern where the roof has continued to leak. The water runs over the edge of a flashing near a brick wall over the front left of the property. This flashing is not coping with medium to heavy rain downpours. It does appear to be wide enough but the water is leaking over the edge after very small amounts of debris build up under the tiles. It is not unreasonable to expect this area to keep the water out even in the heaviest of rain”.*
- 69 In my view, the key observations are that the flashing is wide enough; and that leaking occurs after the build up of debris under the tiles. The build up of debris is a maintenance issue.
- 70 The report does not suggest that there is an issue of workmanship or materials.
- 71 In support of the proposition that the roof had been constructed satisfactorily, I was referred by the owner builders to a Plumbing Industry Commission compliance certificate issued in respect of the unit addressed to “Alex & Jane Samoylenko” dated 16 March 2005. The compliance certificate confirmed the view of the certifier that all works including the roof plumbing were “completed as per standards”. This compliance certificate is not definitive evidence that the roof was well constructed, but it supports the contention that it was.
- 72 In the absence of any direct evidence that the roof was not built satisfactorily, I find that it was constructed in accordance with the relevant standards. This claim accordingly fails.
- 73 For these reasons, I dismiss the application.

**MEMBER C. EDQUIST**