

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP395/2014

CATCHWORDS

Domestic Building Contracts Act 1998 - s.8 - implied warranties – subsequent owner entitled to benefit of – s.9 – evidence of defect – parties cannot contract out of

APPLICANT	Ms Antonia Digiovine
RESPONDENT	Faba Homes Pty Ltd (ACN: 079 823 331)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	11 December 2014
DATE OF WRITTEN REASONS	3 February 2015
CITATION	Digiovine v Faba Homes Pty Ltd (Building and Property) [2015] VCAT 105

WRITTEN REASONS SUPPLIED AT THE REQUEST OF THE RESPONDENT

I heard and determined this proceeding on 11 December 2014 and gave brief oral reasons for the order that I made.

On 15 January 2015 a request was made for written reasons, which appear below.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the Respondent	Mr G. Faba, Director

REASONS

Background

1. This is an application in which the Applicant, Mrs Digiovine (“the Owner”) claims damages for cost of rectification work carried out in regard to some leaking showers in her house (“the House”).
2. She bought the House “off the plan” from a developer. It was constructed by the Respondent (“the Builder”) pursuant to a major domestic building contract entered into between the developer and the Builder (“the Contract”).

The Contract

3. The Contract was unusual because, although the Builder was to be responsible for the supervision of the work, the trades and sub-trades were paid directly by the developer.
4. The registered builder responsible to the Builder for the construction was its director, Mr Faba, and the entity recorded as the builder in the domestic building insurance policy is the Builder and not the developer.
5. There is a provision in the building contract relating to a maintenance period whereby the Builder agrees with the developer to attend to any maintenance items arising for a period of 12 months following completion.
6. The liability of the Builder under this building maintenance clause arises by force of this written term of the Contract. It is quite distinct and independent from the liability imposed upon the Builder by s.8 of the *Domestic Building Contracts Act 1995* (“the Act”). That second liability cannot be contracted out of and, by force of s.9 of the Act, it can be relied upon by a subsequent owner which, in this case, is the Owner. The issue is simply whether there is any defective work. If there is, the Builder is liable to the Owner for the reasonable cost of rectification.

The claim

7. By this claim the Owner seeks to recover what she has spent in stopping the leaks in her shower.
8. Mr Faba’s principal complaint here is that he was not called back to give an opportunity to repair the problem. However the evidence shows that complaints were made to him but he did not return and rectify the problem. In any case, subject to possible arguments of mitigation, the Builder had no contractual entitlement to rectify the defects.

The cause of the leaking

9. The difficulty with the shower was first manifested when the carpet was found to be wet. Further wetness was then found in the skirting and architrave and then, when a hole was cut in the wall, it was seen that water was penetrating into the plasterwork in the corner next to the shower screen.

10. There were several attempts to fix it. First of all, a plumber went in to investigate and ruled out a lot of options as to the cause of the problem. Hair was pulled out from underneath the waste but it does not seem likely that that was the cause of the problem because any blockage caused by a blocked drain would have caused the water to bank up into the shower base and the person having a shower would have been standing in it. That was not established by the evidence
11. The plumber could find nothing wrong with the shower installation and so suspicion then fell on the shower screen. The shower screen people came out, took off the screen and re-installed it. A defect with the shower screen, was identified, which is that the bottom rail of the shower screen was butted up against the wall allowing water ponding in that rail to run to the wall, penetrate it and track its way up through the plaster and into the wall cavity. Whether that on its own would have caused the extensive damage to the carpet and the degree of explosion of the skirting and architrave that I saw in the photographs is questionable. In any event, after that was attended to the leaks continued and so it appears that, if it was a cause of the leaking, it was not the only cause.
12. The Owner then called a company specializing in leaking showers called Megaseal. In their report, Megaseal said that they found that some of the grout was not full depth. They cut a section out with a Stanley blade. One does not normally stick a Stanley blade into a grout line because of the danger of damaging the membrane behind it. However if grout is properly applied it cannot be easily scraped out. According to the Megaseal report, the grout in that area was very thin. They addressed the problem by pumping material into the gaps. That sounds credible, in that, if there had been no gaps, there would have been nothing to pump it into.
13. Since that work was done there haven been no more leaks.

Conclusion

14. On that state of the evidence I found that the installation of the shower was defective in the respects referred to and that the amount of \$2,981.00 the Owner paid to fix the leaking was properly incurred. I found that the Builder was responsible for the defects under the implied warranty under s.8 of the Act upon which the Owner was entitled to rely by reason of s.9 of the Act.
15. I therefore made an order for the amount claimed of \$2,981.00 plus the issuing fee of \$158.90, making together the sum of \$3,139.90.

SENIOR MEMBER R. WALKER