VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP350/2017

CATCHWORDS

Building Act 1993 – ss.137B & 137C – sale of house constructed by owner-builders – implied warranties – liability of vendors for defective domestic building work – leak from balcony – expert evidence

APPLICANT	Ms Kylie Douglas
FIRST RESPONDENT	Mr David John Kelso
SECOND RESPONDENT	Ms Tashia Dixon
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	26 April 2018
DATE OF ORDER	2 May 2018
CITATION	Douglas v Kelso (Building and Property) [2018] VCAT 680

ORDERS

1. The respondents must pay to the applicant the sum of $16,549.74.
2. Liberty to apply on the question of interest and costs.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Ms J. Johnston, solicitor
For the Respondents	Ms T. Dixon

REASONS

Background

1. The applicant purchased her apartment in Brunswick in 2013 from the respondents[1]. In June 2016, a serious water leak occurred in the ceiling of the applicant's bedroom, with the consequence that part of the ceiling collapsed on to her bed.

2. The layout of the apartment is such that the bedrooms and bathroom are on the ground floor, with the master bedroom opening to an external courtyard. The first floor includes a kitchen/lounge/dining room which opens out onto an external balcony.

3. Prior to 2012, the first-floor balcony provided the ceiling over the master bedroom but did not extend over the ground floor courtyard. In or about 2012, the respondents had tenants living in the property and received complaints about water entering into the master bedroom from the balcony above. The respondents then carried out building work, in part to address this problem, including extending the balcony so that it provided a complete cover over the ground floor courtyard.

4. The applicant had the leak rectified and now brings a claim for the cost of doing so, together with the consequential costs incurred. The second respondent issued a counterclaim, in which she seeks to recover her costs of defending the proceeding. The first respondent has played no role in the proceeding and the second respondent advised that while they were married at the time of the sale, they are no longer, and they no longer communicate.

5. The applicant was represented at the hearing by her solicitor, Ms Johnston. She gave evidence and she called Mr Leo Fortuna, the builder who carried out the rectification work and who prepared a report[2]. Leave was given for him to give his evidence by telephone, since he was outside Melbourne and not able to attend the Tribunal. The second respondent represented herself and called an expert witness, Mr Ian Forrest, who gave evidence and who prepared a report[3]. With the consent of the parties, evidence from the two experts was given concurrently, with each of them providing a summary of their opinions, each asking questions of the other, and the Tribunal asking questions where appropriate.

Findings regarding implied warranties

6. The second respondent gave evidence that she and the first respondent were living overseas when the tenant complained of the leak. They arranged for

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[1] exhibit A1, Contract of Sale dated 23 March 2013
[2] exhibit A4 undated but filed 21 August 2017
[3] exhibit R1 dated 21 March 2018

their real estate agent in Melbourne to engage building practitioners to attend to the problems. She tendered a number of invoices and statements in respect of the works[4], from which it appears that either the first respondent, or their estate agent, engaged a number of subcontractors or tradespeople to carry out the works, and did not enter into a major domestic building contract with a registered building practitioner.

7. The second respondent agreed that the work that was carried out included partial demolition of the first-floor balcony, rebuilding and extending the first-floor balcony (including re-tiling the balcony), installing spouting and downpipe, other plumbing, insulation and electrical work.

8. The applicant submitted that the respondents were operating as an "owner-builder" when they either had the works carried out, or had their real estate agent carry out the works on their behalf. As a consequence, the respondents have provided warranties to the applicant in respect of the works.

9. Ms Johnston referred the Tribunal to sections 137B and 137C of the *Building Act* 1993 ["*the Building Act*"]. These sections relevantly provide as follows:

> **137 B Offence for owner-builder to sell building without report or insurance**
>
> (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… within the prescribed period unless
>
> …
>
> (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.
>
> …
>
> (7) In this section –
>
> "**construct**" in relation to a building, means –
>
> (a) build, rebuild, direct 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

[4] exhibit R2

(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;

Section 3 of the Domestic Building Contracts Act 1995 ["the DBC Act"] defines **home** to mean "any residential premises…"]

137C Warranties for purposes of homes under section 137B

(1) The following warranties are part of every contract to which section 137 B 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 bend or 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

(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.

10. Neither the *Building Act* nor the *DBC Act* contain a positive definition of "owner-builder". Instead the effect of section 137B is to make anyone who "constructs" a building an "owner-builder", unless they are excluded by the specific exceptions contained in sub section 137B(1). None of these exceptions apply to the respondents and accordingly I am satisfied that the works carried out by the respondents makes them an "owner-builder" within the meaning of the *Building Act*. They were "constructing" the "home" within the meaning of section 137B of the *Building Act* and section 3 of the *DBC Act.*

11. Further, I am satisfied that the warranties set out in section 137C are to be implied into the Contract of Sale, with the effect that the respondents warrant to the applicant that:

    a. the work would be carried out in a proper and workmanlike manner,

    b. all materials used in that work were good and suitable for the purpose for which they were used, and

    c. the work was carried out in accordance with all laws and legal requirements.

The water damage

12. The applicant gave evidence that in or about June 2016, being approximately three years after she had purchased the apartment, she noticed the ceiling in her bedroom bulging, and with water dripping through a hole. The ceiling plaster then gave way, in part, with plaster, insulation and water falling onto her bed and the bedroom floor. The ceiling plaster had been attached to U-shaped metal channels on the ceiling, and these channels were full of water. There was also damage to the plaster above the window and above the sliding door on the walls opposite to each other. She thought that this was caused by water running along the U-shaped channels and hitting the walls at either end.

13. The applicant called her home insurance company, who made safe the property, then investigated and ultimately rejected her claim, on grounds, she said, that the leak was coming from the balcony above and the balcony had not been constructed correctly in the first place.

14. Because of the emergency nature of the works, the applicants engaged a builder to carry out repairs fairly quickly. She engaged Mr Fortuna of Nazcorp Pty Ltd. and he in turn engaged subcontractors to carry out some of the necessary repairs.

15. Mr Fortuna gave evidence (via the telephone) that he first visited the property not long after the damage had occurred. He saw that the ceiling in the master bedroom had partly collapsed. He saw the U-shaped metal channels exposed, and installation and plaster missing. He formed the view that the source of the water was likely to be the balcony above.

16. He was engaged by the applicant to rectify the cause of the water leak and some of the consequential damage. He provided a written report and copies of the invoices paid to his subcontractors for their works. His report was supplemented by photographs taken by the applicant, both internally and externally, at the time of the damage and during the rectification works[5].

17. Mr Fortuna's opinion is that no waterproof membrane was applied to the balcony when it was rebuilt and extended. He said that when he lifted the existing balcony tiles, he could see adhesive stuck to the cement sheet base of the balcony, but there was no membrane present. The tiles had been laid directly onto the cement sheet. Mr Fortuna said that he saw this with his own eyes and confirmed it in the photographs, saying that they show the light grey coloured adhesive, with trowel marks levelling off the glue and a terracotta coloured base underneath, which he said was the cement sheet floor.

[5] exhibit A3

18. The photographs also show a black line across the width of the balcony, which is the point where the extension is joined to the old part of the balcony. I asked Mr Fortuna what this black line was. He said it was the caulking between the old and the new parts. He said caulking alone is not enough to prevent water getting between the two parts of the balcony, and a membrane should have been put over the whole area.

19. Mr Fortuna also said there was no evidence of caulking along the sides of the balcony either beneath or above the tiles and that the wrong type of grout had been used. He would have used an epoxy grout which would be more waterproof than a traditional cement based grout. However, these concerns were not the determinative factor in his mind, as grout is not of itself a waterproofing mechanism. Grout often allows moisture to penetrate to the substrate, which is why a waterproof membrane should be laid beneath the tiles and above the substrate.

20. The second respondent was at a disadvantage in that firstly, she was not present when the renovation works were carried out in 2012, and secondly, neither she nor her expert, Mr Forrest, had the opportunity to inspect the balcony when the leak happened in 2016. Mr Forrest, provided a written report, but his opinions could only be based on information taken from the applicant's photographs and contemporaneous documents.

21. Mr Forrest challenged the interpretation of the photographs, alleging that it was possible that they showed a membrane. He suggested that as the adhesive had stuck firmly to the base, that was a sign that the base had been sealed, as otherwise adhesive would have stuck to the tiles when lifted. Mr Fortuna disputed this proposition, saying that the adhesive had not properly bonded to the tiles and water got between it and the underside of the tiles.

22. Mr Forrest also suggested that the terracotta colour of the base shown in the photographs could be a membrane. He mentioned one particular company that makes a yellow membrane. Mr Fortuna responded that he had seen the base with his own eyes and there was no membrane present.

23. The second respondent's main line of defence was that the applicant had failed to maintain the balcony in the three years she had owned it. Mr Forrest suggested that she should have checked the grout and caulking around the edges of the balcony at regular intervals and if they were breaking down or missing she should have noticed this. He said that the balcony is exposed to the elements, especially north facing weather, and it would deteriorate within three years. The applicant was questioned about what maintenance she carried out. She said that she swept the balcony regularly with a soft broom and she cleaned out the drain. She did not perform any checks of the grout or caulking.

24. Mr Forrest relied on photographs he took when he inspected the property early in 2018. He said these photographs show that there is caulking

missing around the edges of the repaired balcony. This is evidence of a lack of maintenance, and the state of the balcony now could be indicative of the way the applicant had the balcony prior to 2016.

25. The applicant conceded that caulking was missing around the sliding door. She said that Mr Fortuna had told her that he had applied a temporary product but that his subcontractor was intending to return to complete the caulking once he obtained a particular product. Mr Fortuna agreed that this is what he had said.

26. His response to this proposition was that the question of maintenance was a red herring. The cause of the water entry was the lack of membrane, not a break down in grout or caulking. It was not possible for the applicant, or any homeowner, to be aware that there was no membrane or that water was collecting in the ceiling cavity. Moreover, as grout is not, by itself, a waterproofing material, any breakdown in the grout would not have caused the water entry had a membrane been applied.

27. The second respondent also submitted that there was evidence that a membrane had been installed. She relied on the following documents:

    a. a notice from the Building Services Unit of the Moreland City Council dated 21 February 2013[6] in which it states:

    > "I refer to the above building notice issued on 11 September 2012, relating to the construction of an extension to the existing upper floor balcony at the rear of the dwelling without a building permit being issued and in force for the building work.
    >
    > Having considered the representations made on behalf of the owner by issuing of a 1507 certificate of compliance report on 13 February 2013, by Lloyd Lewis of Approved Building Surveyors Ltd… I hereby cancel the building notice…"

    b. A letter from Lloyd Lewis of Approved Building Surveyors Ltd dated 13 February 2013[7] in which he states:

    > "A statement from BBK Painting And Maintenance had been provided to confirm that a waterproof membrane had been installed in accordance with the standard."

    c. The statement from BBK Painting And Maintenance dated 4 December 2012[8] in which it is stated:

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[6] exhibit A1, contained in the Vendors Statement attached to the Contract of Sale
[7] exhibit A1, contained in the Vendors Statement attached to the Contract of Sale. Note: the date on the letter is 2012 but all parties agreed this must be a typing error, and must mean 2013, since it responds to a building notice issued on 11 September 2012
[8] exhibit R2

> “This letter is to confirm that all tiles, & waterproof membranes (where required) have been installed in accordance with Australian Building Standards.”

28. Ms Johnston objected to the tendering of these documents, as they are hearsay and the authors were not called to give evidence. In any event, she submitted, they do not establish that a membrane was actually applied to the balcony, as at best they say “*waterproof membranes (where required) have been installed”*. There is no evidence of what BBK Painting And Maintenance considers to be what is required, or what was actually applied or where. Mr Lewis appears to have relied on what he has been told by BBK Painting And Maintenance and the Moreland City Council relied on Mr Lewis.

29. I agree with Ms Johnston that these documents cannot be used to prove the truth of their contents. In the absence of their authors, the evidence of their contents is hearsay. Further, and more significantly, these documents do not actually say that there was a membrane applied to the balcony.

30. The second respondent challenged Mr Fortuna’s qualifications and experience to give his opinion. She said that he is not qualified as a waterproofer and is not an expert. He also is not independent, as he has carried out the rectification works. Mr Forrest on the other hand is qualified as an architect, a building inspector and a building surveyor and is experienced in building inspections.

31. I accept Mr Fortuna’s expertise to give his opinion in this matter. He is registered as a domestic builder – unlimited and as a commercial builder – unlimited, with 25 years’ experience in the industry. He told the tribunal of other cases he had been involved with concerning leaking balconies, including his own building work, and he had learnt from experience what to look for. Most significantly, he was present at the property shortly after the damage occurred and when the rectification works were being undertaken. He saw first hand what had been built by the respondents before it was replaced. He may not have been independent if he had a financial interest in the rectification works, but he provided the Tribunal with his subcontractors’ invoices and receipts for materials which demonstrate that he seems to have charged a margin of 10% on the job[9], which I accept is reasonable.

32. I should also note that I accept Mr Forrest’s expertise as well. He is an experienced and well-qualified practitioner. I accept his opinions on the possible causes of the damage, in so far as they are possibilities, but where firsthand evidence is given of what had been actually constructed on site, I prefer that evidence.

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[9] This was not raised in evidence or in his report but this is my observation – see paragraph 37 below

33. Accordingly, I accept Mr Fortuna's evidence that there was no membrane laid on the balcony. Whether or not there was any lack of maintenance by the applicant, the failure to provide a membrane is a breach of the warranties implied by section 137C of the *Building Act*. As a result, the respondents are liable to compensate the applicant for her loss and damage.

Findings regarding damages

34. The applicant seeks the following damages:

    a. Cost to repair the balcony (already expended) by Nazcorp $13,607.24

    b. Painting of ceiling to be completed $400

    c. Air conditioning unit to be re-gassed $350

    d. Sanding and polishing of bedroom floor to be completed $500

    e. Cost to remove damaged bed (already expended) $75

    f. Cost to purchase new bed (already expended) $3735

35. I will allow the total amount of $16,549.74, made up as follows:

Cost to repair the balcony $13,607.24

36. This item is the amount already paid by the applicant to Nazcorp Pty Ltd (which is the company operated by Mr Fortuna) for the removal and replacement of the balcony tiles, waterproofing, and plastering of the bedroom ceiling. Mr Fortuna provided the invoices of his subcontractors and receipts for materials, as follows:

Work	**Supplier**	**Amount**
Balcony works	AD Tiling	$7920
Plastering ceiling	Avanso Pty Ltd	$2090
Painting internally and externally	Powch Painting Services	$1320
Purchase of tiles	De Fazio Tiles & Stone	$968.76
Purchase of cement sheeting, glue, screws		$71.46
Margin 10%	(see paragraph 37 below)	$1237.02

Total		$13,607.24

37. I note that no evidence was given during the hearing in relation to the margin charged by Nazcorp. In Mr Fortuna's written report (at Attachment A) he sets out the amounts paid to his subcontractors and for materials, and attaches their invoices and receipts. He then states that he has added 10% GST to those invoices to make the total due to Nazcorp $13,607.24. I note that each of the invoices and receipts attached to the report already include 10% for GST and so Nazcorp should not have added a further 10% for GST. Rather than not allow this item, I will accept that it would be reasonable for Nazcorp to charge a margin on top of the actual costs for its services in managing and arranging the rectification works. I accept that 10% is a reasonable amount.

38. I find that the amount of $13,607.24 is reasonable and I will allow it. The respondent did not dispute the amounts charged, and I note, with approval, the comments of Deputy President Macnamara (as he then was) in *Serong v Dependable Developments Pty Ltd*[10] that:

> "…the actual cost of rectifying the defects is the proper measure of damage where those defects have been rectified: Hyder Consulting (Aust) Pty Ltd v With Wilhelmsen Agency Pty Ltd [2001] NSWCA 313".

Painting of ceiling to be completed $400

39. The applicant gave evidence that the bedroom ceiling still needs to be repainted. She obtained a quotation online from MJ Painting Vic, after providing it with the ceiling measurements and a photograph of the area[11].

40. The quoted amount was $400, which I find to be a reasonable amount. I note that the applicant has already paid for some painting works as part of the Nazcorp scope of works, but she was not questioned during the hearing as to why the ceiling had not been painted at that time. I accept her evidence that the work remains outstanding.

Air conditioning unit to be re-gassed $350

41. The applicant gave evidence that the air conditioning unit had to be removed from the balcony while it was retiled. It will be necessary to re-gas the unit now that it has been replaced. She obtained a quotation from The Australian Air Conditioning Company[12], in the sum of $350. I accept this is a reasonable amount.

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[10] [2009] VCAT 760
[11] Exhibit A5
[12] Exhibit A6

Sanding and polishing of bedroom floor to be completed $500

42. The applicant gave evidence that the bedroom floor needed to be sanded and polished, as a result of the damage caused by the falling ceiling and the rectification works. I accept that this work is required. She obtained a quotation from 7 Omens Flooring[13], in the sum of $500. The quote states that it is for an area of 25m2. When obtaining the painting quote, the applicant advised that the area of the bedroom was 3.5 x 3.6 metres. This is 12.6m2, not 25m2. The applicant was unable to explain why 7 Omens Flooring had quoted for 25m2, although she thought it might include the hallway. The respondent said that the hallway is approximately 4m2. In the absence of any evidence as to why the hallway needed to be treated, and in light of the discrepancy in measurements, I will allow half the amount of the quote, being $250.

Cost to remove damaged bed (already expended) $75

43. I accept the applicant's evidence that she had to have her old bed removed, at the very least to carry out the repairs, and the cost for this was $75, which she has paid in cash.

Cost to purchase new bed (already expended) $3735

44. The applicant said that her old bed was irretrievably damaged by the ceiling collapse and she had no choice but to replace it. She tendered a credit card statement to show the purchase price of $3735[14]. No evidence was given of the nature of the damage, nor of any attempts to have the bed cleaned, nor of the age of the bed being replaced, nor of whether it was just a mattress or a base as well.

45. The second respondent did not challenge the amount claimed, but did question why no photographs or other records had been kept supporting the claim. I share the concerns of the second respondent, but must make a decision on the available evidence.

46. It is a matter for the applicant to prove her claim. I accept that on the balance of probabilities, some damage would have occurred to the bed when the ceiling collapsed. However I am unable to be satisfied that this damage would have necessitated a complete replacement of the bed. In those circumstances, I will allow 50% of the amount claimed for the bed, being $1867.50.

Reconciliation

47. The applicant is accordingly entitled to a total award of damages from the respondents of $16,549.74.

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[13] Exhibit A7
[14] Exhibit A8

Interest and Costs

48. The applicant seeks an order for interest on the judgment sum, from the date of issuing the proceeding, at the rate specified by the *Penalty Interest Rate Act* 1983. Both parties have sought their costs of the proceeding (the second respondent by her counterclaim). I will reserve the questions of interest and costs, with liberty to apply.

49. If an application is made in relation to interest, the applicant will be required to show from where the Tribunal obtains power to award interest on a claim made under section 137C of the *Building Act*.

50. In relation to costs, the parties' attention is drawn to section 109 of the *Victorian Civil & Administrative Tribunal Act* 1998, which provides that each party is to bear its own costs of the proceeding, unless the Tribunal can be satisfied it would be fair to depart from that position by reason of one or more of the matters set out in subsection 109(3).

Orders

1. The respondents must pay to the applicant the sum of $16,549.74.

2. Liberty to apply on the question of interest and costs.

SENIOR MEMBER S. KIRTON