VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1637/2017

CATCHWORDS

Building Act 1993: action for breach of warranties implied into a contract for the sale of a home by s137C; defence of time raised: definition of a "building action" in s129 considered; limitation on time when building action may be brought under s134 considered; defence based on pre-purchase reports considered.

FIRST APPLICANT	Cassandra Fraser
SECOND APPLICANT	Darren Peter Fraser
FIRST RESPONDENT	Jessica Mason
SECOND RESPONDENT	Darren Mason
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	27, 28, 29, 30 and 31 May 2019
DATE OF APPLICANT'S FINAL SUBMISSIONS	4 June 2019
DATE OF RESPONDENT'S FINAL SUBMISSIONS	4 June 2019
DATE OF RESPONDENT'S RESPONSE SUBMISSIONS	7 June 2019
DATE OF APPLICANT'S ANSWERING SUBMISSIONS	28 June 2019
DATE OF ORDER	18 July 2019
CITATION	Fraser v Mason (Building and Property) [2019] VCAT 1009

ORDERS

1. The respondents must pay to the applicants the sum of $96,700.

2. The applicants have leave to apply for a further hearing regarding the window flashings. Any such application must be made within 30 days.
3. The issue of interest is reserved. The applicants may make an application for interest within 30 days.
4. Costs are reserved. Either party may make an application for costs within 30 days.
5. The issue of reimbursement of fees under s115B of the *Victorian Civil and Administrative Tribunal Act 1998* is reserved. Either party may make an application for reimbursement of fees within 30 days.
6. **The Principal Registrar is directed to refer any application for a further hearing regarding window flashings, interest, costs or reimbursement of fees to Member Edquist, who will make orders regarding the filing of written submissions alternatively, upon payment of the required fee, listing the proceeding for a hearing.**

C Edquist
Member

APPEARANCES:

For the Applicants:	Ms C Fraser, in person and on behalf of Mr D P Fraser
For the Respondents:	Mr A Schlicht, of Counsel

REASONS

INTRODUCTION

1 Cassandra Fraser and Darren Fraser purchased a two-storey house in Robbs Road, West Footscray, Victoria ("**the house**") under a contract of sale executed on 10 January 2013 ("**the contract**") from the respondents Jessica Mason and Darren Mason.

2 The Masons had bought the house in 2001, and had renovated it in four stages. First, they built a rear extension and ensuite at the front of the house. Some years after this, they carried out a series of small projects without permits. In summary, they converted a pre-existing bathroom downstairs into a bathroom laundry, rearranged and renovated the kitchen, and converted the former living room into a bedroom by constructing a wall and removing a fireplace. The third stage was to restump the house. Finally, they built a substantial second storey.

3 Some time after moving in, the Frasers became concerned about defects. For instance, there was an issue with a shower mixer tap in a downstairs bathroom. When a plumber attended to rectify this, the plumber noted that there was no waterproofing behind the tiles. There was a separate incident regarding external weatherboards cladding the new downstairs ensuite when a painter put his hand through one of the boards, indicating that it was rotten. They had concerns about the electrical wiring, because some light switches were loose. A leak stain which had been present in a down stairs bedroom at the time of purchase became larger. And after returning from holidays interstate in about January 2015, they noticed that the house smelt of mould. Such was their level of concern that the Frasers decided to engage a building consultant to advise as to what they should do. The consultant engaged, Alasdair Macleod of the BSS Group, inspected the house several times in December 2016 and subsequently produced a report.

4 The Frasers initiated this proceeding in 23 January 2018, seeking damages for breach of the warranties implied into the contract of sale by s137C of the *Building Act 1993* ("**Building Act**").

THE HEARING

5 The proceeding came on for hearing before me on 27 May 2019 and ran for the whole week. Ms Fraser appeared on behalf of herself and her husband. She had prepared a witness statement, which she adopted at the hearing. She gave further evidence from the witness box and tendered a range of documents. Mr Fraser did not give evidence. The Frasers called as their principal witnesses Mr Matt Osborne, a building consultant, and Mr Gary Hay, an engineer. They also called a builder who had carried out work on their house, Mr Tobie Le Vaillent. A plumber, Christopher Green, also gave evidence on their behalf. Mr Macleod was not called. As the Masons objected to his report being tendered if he was not going to be available for cross-examination, his report did not go into evidence.

6. The Masons were represented by Mr Anthony Schlicht of Counsel. Mr Mason had filed a witness statement, which he adopted at the hearing. Mrs Mason did not give evidence. The Masons called no expert evidence, and no other lay witnesses.

THE WARRANTIES IMPLIED BY S137C OF THE *BUILDING ACT 1993*

7 As the Frasers make their claim under s137C of the Building Act, it is necessary to examine those warranties, and the statutory context in which they arise.

Section 137B

8. Section 137B(2) of the Building Act makes it an offence for a person who constructs a building to enter into a contract to sell the building under which the purchaser will become entitled to possess the building within a prescribed period unless certain steps have been taken. In a case where the building is a home, one of those steps is that the contract of sale must set out the warranties implied by s137C of the Building Act.

9. Because of the criticality of s137B(2) I set it out in full:

> (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 Points**

10 The effect of s137B(1) is that s137B(2) does not apply to—

> (a) the construction of a building (other than a home) by—
>
> (i) a registered building practitioner; or

(ii) a registered architect; or

(b) the construction of a home under a major domestic building contract except in limited circumstances; or

(c) a building that is exempted from the operation of the section by the Tribunal under the Domestic Building Contracts Act 1995 or

(d) a home sold before completion; or

(e) a building to which Part 2 of the House Contracts Guarantee Act 1987 applies.

Construct

11 The term "construct" is given a wide meaning in ss137B(7). It 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;

12 It is to be noted that this definition says nothing about whether the works are constructed with or without a building permit.

The warranties implied under s137C

13. Section 137C provides as follows:

(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.

14 Again, it is to be noted that the warranties apply irrespective of whether the works have been constructed with a building permit.

15 Reference to the contract indicates that the s137C warranties are set out in clause 2.6.

The prescribed period

16. The Masons assert that the prescribed period referred to in ss137B(7) is critical. They raise a defence based on the proposition that some of the works carried out by them are not caught by the warranties implied by ss137C.

17. The meaning of prescribed period is relevantly given under ss137B(7) of the Building Act as follows:

> (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
>
> (ii) if neither an occupancy permit nor a certificate of final inspection is issued or required to be issued in respect of the construction of the building –
>
> (A) 7 years after the date of the issue of the building permit in respect of the construction of the building; or
>
> (B) if a building permit is not issued or required to be issued in respect of the construction of the building, 6 years and 6 months after the certified date of commencement for the building;…

THE DEFENCE BASED ON TIME AND ITS APPLICATION TO THE FOUR PHASES OF WORK

18. As noted at the outset, the Masons carried out work on the house in four phases. The first phase - creating a rear family room and an ensuite at the front of the house - was carried out under a building permit applied for in November 2005 ("**the first permit works**"). A final inspection was carried out on 4 February 2008. The Masons contend that as a result no warranties implied by s137C are applicable after 6 years and 6 months, ie 4 August 2014. They also argue that the Frasers issued this proceeding on 20 December 2017, their claim on the warranties is made out of time.

19. The works carried out without permits were converting the bathroom into a bathroom laundry, renovating the kitchen and creating a new bedroom from a living room **("the un-permitted works")**. These were carried out in or around 2009. There was no final inspection for any of these un-permitted works. Here the argument made by the Masons is that the warranties expired after 6 years and 6 months, and accordingly had no application after mid 2016 at the latest.

20. The third phase of works was the re-stumping of the house, which was carried out under a building permit dated 22 February 2009 ("**the second permit works**"). The Masons contend that no warranties apply in relation to these works after 6 years and 6 months. The implication is that the claim expired on 22 August 2015.

21 The final phase related to the construction of the upstairs extension ("**the third permit works**"). The plans and documents lodged by the Masons were approved by their building surveyor on 21 July 2010, and the building permit bears that date. The certificate of final inspection was issued on 3 December 2012. The Masons accept that the Frasers' action under the warranties under s 137C in respect of this phase is *not* time barred.

Discussion

22 Clearly in carrying out renovation and extension works to the house the Masons were constructing a building in the sense defined by ss137B(7). As the Masons sold the house to the Frasers, and under the contract of sale the Frasers were to become entitled to possession of the home (or to receive the rent and profits from the home), the contract will be caught by s137B provided it was entered into within the "prescribed period".

23 I accept the Masons' contention that the prescribed period in respect of the first permit expired 6 years and 6 months after the final inspection was carried out on 4 February 2008, ie. 4 August 2014. However, I take a different view about how the prescribed period operates. In my view, as the contract was made in January 2013, it was entered into within the prescribed period. Accordingly, I find that the warranties implied into the contract by s137C apply to the first permit works.

24 I now turn to the un-permitted works. In respect of none of these works was there an occupancy permit or a certificate of final inspection. It follows that the relevant prescribed period is 7 years after the date of commencement of the building work. Because the evidence as to when the respective works were carried out is uncertain, it is convenient to measure the prescribed period of 7 years backwards from the date of execution of the contract of sale, namely 10 January 2013. Using this methodology, it can readily be seen that the warranties in the contract of sale implied by s137C attach to any un-permitted works executed after 10 January 2006. As the Masons agree that all the un-permitted works were performed after 10 January 2006, I find that all the un-permitted works are subject to the warranties.

25. A similar but not identical result is reached with respect to the re-stumping works, if they were in fact carried out by the Masons, as distinct from a registered builder, as they contended at the hearing. I accept the Masons' argument that in relation to these works the prescribed period under s 137B is 6 years and 6 months provided there was a final inspection. In my view, this means that if the Masons performed the re-stumping works as owner builders the s137C warranties apply, as they were performed less than 6 years and 6 months prior to 10 January 2013.

26. As noted, there is no controversy about the fourth phase of the works. It is common ground that as the certificate of final inspection was issued in respect of the third permit works on 3 December 2012 the claim has been brought within time.

Is there a limitation on the time in which an action on the warranties can be brought?

27 I consider that where the warranties apply, they can, provided an occupancy permit has been issued or there is a certificate of final inspection, be sued upon until the expiration of 10 years after the date of issue of the occupancy permit, or the certificate, as the case requires. This follows from the operation of s134 of the Building Act. To understand why this is the case, it is necessary to have regard to the definition of building action contained in s129 of that Act. The definition is:

> ***building action*** means an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work;

28 In my view, that definition certainly covers an action brought by the Frasers for breach of the warranties implied by s137C of the Act.

Section 134 of the Building Act

29 Section 134 of the Building Act provides:

> **Limitation on time when building action may be brought**
>
> Despite anything to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

30 The Masons, in their written submissions, contend that s134 of the Building Act does not apply, as it relates to defective building works, whereas an action brought under s137C relates to breach of warranties.[1] I regard this contention as misconceived. An action brought for breach of the warranties implied into every domestic building contract by s8 of the *Domestic Building Contracts Act* is clearly a building action within the definition contained in s129 of the Building Act. The warranties set out in ss137C(1) of the Building Act are effectively identical to the warranties set out respectively in ss8(a), (b) and (c) of *Domestic Building Contracts Act.* It cannot be said that the 10 year time limit for the bringing of a building action arising under s134 of the Building Act applies to an action brought for breach of a s8 warranty, but a different time limit applies to an action brought for breach of a s137C warranty.

Limitation to the application of s134

31 It is to be emphasised that s134 of the Building Act applies only where an occupancy permit has been issued or, where there is no occupancy permit, where a certificate of final inspection has been issued under Part 4.

[1] Masons' final submissions, at [18] and [21]

First permit works

32 For the reasons given above at [23], the s137C warranties apply to the first phase of the works. In a standard action for breach of contract the cause of action accrues at the date of breach of the contract. However, this rule cannot, in my view, be applied to an action for breach of warranty implied under s137C of the Building Act, because there can be no breach of a warranty until the warranty comes into existence. The warranty, of course, comes into existence only on the date of execution of the relevant contract of sale. For this reason, if there has been a breach of any of the s137C warranties, the cause of action must accrue on the date of execution of the contract.

33 The Masons dispute this analysis. They submit that if the relevant time limit (which they say is 6 years and 6 months) applies from the date of the contract of sale, "that could lead to an absurd result"[2]. They give the example of a situation where works are performed and the building is sold five years later. In this case the warranties would extend for 11 years and six months. The Masons say that this "cannot be the case". I agree that in this situation the warranties would not extend for 11 years and 6 months, but not for the reasons given by the Masons.

34 The Masons contention is, I consider, misconceived because it links the statutory time bar with the accrual of the cause of action in a situation where a certificate of final inspection has been issued. In a building action where there is an occupancy permit, or a certificate of final inspection, the limitation period is 10 years, measured from the date the occupancy permit or, if there is no occupancy permit, date of issue of the certificate of final inspection.

35 Applying this analysis, I conclude that the cause of action arising in respect of the first permit works expired on 4 February 2018. As the proceeding was initiated in December 2017, any claims relating to the first permit works are not statute barred.

Second permit works

36 In the case of the second permit works, the re-stumping, there was evidence that a building permit was issued on 22 February 2009, but there was no evidence of any certificate of occupancy or any certificate of final inspection. However, having regard to Mr Mason's evidence that a registered building practitioner carried out this work, one would have expected a certificate of final inspection to have been applied for in due course. If a certificate of final inspection does exist, s134 of the Building Act will apply, and the Frasers will be well within time to bring their action. If a certificate of final inspection does not exist, then different considerations apply.

[2] Masons' final submissions, at [19]

37 The Tribunal has recently determined in *Gledhill v Scotia Property Maintenance Pty Ltd* [3] that in a situation where there is an action for damages for loss or damage arising out of or concerning defective building work, but s134 of the Building Act does not apply because there is no occupancy permit or certificate of final inspection, the cause of action will be barred after the expiration of 6 years from the date on which the cause of action accrued, under s5 of the *Limitation of Actions Act 1958*.

38. If the 6 year time limit arising under s5 of the *Limitation of Actions Act 1958* applies to the re-stumping works, it runs from 10 January 2013. The upshot is that the Frasers are also within time to press a claim in respect of the re-stumping works even if there is no certificate of final inspection.

The un-permitted works

39. I turn now to works which were carried out to convert the ground floor bathroom, the kitchen and the living room. Mr Mason's evidence was that each of these packages of work was carried out without a building permit having been applied for. In respect of each package, there was no certificate of occupancy or certificate of final inspection. In respect of the un-permitted works, s5 of the *Limitation of Actions Act 1958* applies rather than s134 of the Building Act. For the reasons given above, the cause of action in respect of each package of work accrues on the date of execution of the contract. Accordingly, the Frasers would have had until 10 January 2019 to institute proceedings in respect of the un-permitted works.

THE DEFENCE BASED ON THE EXISTENCE OF TWO REPORTS AVAILABLE BEFORE THE PURCHASE

40. In compliance with s137B of the Building Act the Masons provided to the Frasers a report from Just Inspections dated 29 November 2012. This report was incorporated in the contract. The Frasers themselves obtained a pre-purchase inspection report from Urban Property Inspections dated 15 January 2013 ("**the Urban report**").

41. The Masons contend that s137C of the Building Act "specifically excludes any claim for breach of warranty where that breach was known or ought to reasonably have been known to the person to exist at the time of the agreement". Because of this clause, and because a special condition of the contract of sale specifically provided that the Frasers could avoid the contract and receive a refund of the deposit in the event that they did not receive a satisfactory report, the Masons contend that any defects set out in the two reports are not covered by the s137C warranties.

42. I think this argument is based on an oversimplification of the relevant part of ss137C(3) which provides:

> A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in subsection (1) is void to the extent that it applies to a breach other than a breach that was known or ought

[3] [2019] VCAT 422 (2 April 2019)

> reasonably to have been known to the person to exist at the time the agreement or instrument was executed.

43. In my view, the effect of ss137C(3) is to render void any provision of an agreement that is directed at excluding the s137C warranties. An exemption is created in respect of any known breach of warranty i.e. any known defect. The upshot is that the exemption in ss 137C(3) comes into play only if there is a clause in the contract of sale aimed at excluding the operation of the warranties.

44. The Frasers' in their written submissions contended that the contract did not include any clause excluding the warranties. The Masons filed a supplementary submission pointing out that the contract contains special condition 2 concerning "Buildings and Goods", which reads in part:

> The purchaser acknowledges and declares that he has purchased the property as a result of his own inspections and enquiries of the property and all buildings and structures thereon and that the purchaser does not rely upon any representation or warranty of any nature made by or upon behalf of the vendors or his consultants or any agents or servants notwithstanding anything to the contrary herein contained or by law otherwise provided or implied and it is agreed that the purchaser shall not be entitled to make any objection, requisition or claim any compensation whatsoever in respect of the state of repair and/or condition of any buildings or other structures on the property and any terms or chattels within the said buildings or structures.

45 Pausing there, I comment that if the special condition finished at this point, it would already constitute a clause directed at protecting the Masons from liability for any defects in the building. However, the special condition goes on as follows:

> The purchaser acknowledges that any improvements on the property may be subject to or require compliance with the Victorian Building Regulations, Municipal By-Laws, relevant statute and/or any other regulations thereunder and any repealed laws under which the improvements were or should have been constructed. Any failure to comply with any one or more of those laws or regulations shall not be and shall not be deemed to constitute a defect in the Vendors Title and the purchaser shall not make [any] claim (for) any compensation from the Vendor….

46 Clearly, this special condition is directed at limiting a claim by the Frasers for compensation for breach of a relevant statute, and accordingly it is precisely the sort of clause which is limited in operation by ss137C(3).

47. Moreover special condition 13, concerning "Merger", provides that:

> All terms and conditions whatsoever as set out in these Special Conditions, the General Conditions in the contract, the General Conditions implied by legislation and in the Section 32, to be performed on the part of the vendor, shall cease to have any effect whatsoever and shall merge absolutely in the Transfer of Land instrument.

48. By reason of ss137C(3), this provision is also partially ineffective insofar as it purports to exclude the operation of the s137C warranties.

49. By reason of the exception to the operation of s137C(3), the Mason's contention is made out. They are not liable for defects that were known or ought reasonably to have been known at the time of execution of the contract.

50. Accordingly, the Masons are justified in contending that the pre-purchase inspection reports have relevance. I note that this conclusion is consistent with the reasoning of Senior Member Riegler (as he then was) in *Kriokuca v Mahesan*[4] where, after referring to ss137C(3), he said at [26]:

> Accordingly, I find that it is of no consequence that the terms of the contract purport to exclude liability in respect of any defects in the property, provided those defects were not known to the applicants or ought reasonably to have been known to them.

51 The Masons highlight the important at this point by referring to the decision of *Mohamed v Pollara*[5] where, at [91], Senior Member Lothian said:

> I find that the Owners were aware of this defect at a time when they could have withdrawn from the contract, but chose not to. I am not satisfied that a defect of which the purchasers were aware at the time of purchase is one for which they can recover for breach of warranty under s137C of the Building Act.

The Frasers' reply

52 The Frasers acknowledge the existence of this defence, but assert that:

> Having mere knowledge of a defect is not sufficient to absolve the Vendors from their responsibilities under the Section 137C warranties. The proper test is that unless the Owners know the true nature and extent of rectification costs, the Vendors are still liable for the Owners' loss and damage. In this respect the Owners refer to and rely on the New South Wales Court of Appeal decision of *Allianz v Waterbrook*.[6]

53. *Allianz v Waterbrook* involved a claim in respect of defects in a home brought by a successor in title to the original owner under a home owners' warranty policy. One of the issues was whether a successor in title sustains "loss" when acquiring a building with defects that are reasonably visible at the time of acquisition.

54. In *Allianz v Waterbrook*, the trial judge McDougall J held that the measure of damages recoverable by the original owner for defective work was that laid down by *Bellgrove v Eldridge*[7], and the clear intention of the [New South Wales] legislation was that the entitlement of successors should be no less. Allianz, during the appeal, submitted that the correct measure of damages was an amount equal to the decrease in value of the building

[4] [2011] VCAT 2265
[5] [2014] VCAT 1291
[6] [2009] NSWCA 224
[7] [1954] HCA 36; (1954) 90 CLR 613

caused by the defective work, and referred to *Bryan v Maloney*[8] in this regard. At [69] Ipp JA stated:

> *Belgrove v Eldridge* was a case in contract and *Bryan v Maloney* a case in tort. The present, to the extent that it involves claims under the Policy is a claim in contract, but it is overlaid by the statutory application of the statutory warranties. Notwithstanding the influence of the statutory rights and duties in this case, I accept [the] argument that the contractual measure of damages (*Belgrove v Eldridge*) applies, as McDougall J held.

55. Ipp JA returned to the measure of damages later, when he stated:

> 101 I turn now to the general law. As mentioned, the ordinary measure of damages in contract for defective work is the cost of remedying the work. Claims for damages for breach of a statutory warranty are not claims for breach of contract in the strict sense, but I accept, as I have stated, that the same measure would ordinarily apply to such claims.
>
> 102 An issue arises as to whether the same measure applies to a claim by a successor in title who acquires a patently defective building, where the defects result from breaches of statutory warranties. There is, in such circumstances, a difficulty in applying that measure. The successor in title may have purchased the building at a discount that takes into account the cost of remedying the defects. Were that to have occurred it would be difficult to contend that the successor in title suffered a loss. Were that not to have occurred, it might be argued that any loss is due to the fault of the successor in title in overpaying for the building in full knowledge of its defects.

56. This was the context in which Ipp JA expressed the following views, upon which the Masons rely:

> 110 In my opinion, applying the same reasoning, a successor in title who acquires a building in full knowledge of its defects, suffers no loss from the existence of those defects. In those circumstances, the builder's breach of statutory warranty could not be said to have diminished the successor's assets, nor increased its liabilities. Any adverse impact to the successor's financial position, and any loss to the successor, would result from the successor knowingly and deliberately paying more for the building than it was worth. The loss would be caused by the successor's own decision to purchase at the agreed price.

57. Taken in isolation, this paragraph provides support for the Masons' contention that they have no liability in respect of any defects which were patent at the time of the sale. However, the paragraph must be read in conjunction with the following paragraph in Ipp JA's judgment, which is the source of the "proper test" relied on by the Frasers. It reads:

> 111 The observations in [110] are predicated on the "full knowledge" of the defects being not only knowledge of the existence of the defects but also knowledge of their significance. A party may know of the

[8] [1995] HCA 17; (1995) 182 CLR 609

> existence of defects (because they are patent), but may not appreciate – even acting reasonably – that major expenditure would be required to remedy them.

58 The significance of this observation was spelt out by Ipp JA at [116], where he said:

> I have pointed out that where defects are patent a party, even though acting reasonably, might be unaware that major expenditure would be required to remedy them. The repair of patent defects that on their face appear to be trivial, might – on opening up the work – be found to require major reconstruction. In my opinion, applying general principles of causation, in such circumstances the knowledge of a successor in title of the patent defects might not be a new intervening cause. In that event, the chain of causation would not be broken and the successor would be able to prove that it suffered loss.

59. I acknowledge the defence raised by the Masons based on the existence of the pre-purchase reports, but will have regard to the approach of Ipp JA expressed at [110] and [116] of his judgment when applying the defence when it is raised by the Masons in connection with particular defects.

DEFENCE BASED ON THE FRASERS' ALLEGED FAILURE TO CARRY OUT DUE DILIGENCE RELATING TO ALL ADEQUATE BUILDING PERMITS AND APPROVALS

60. In their written submissions the Masons draw attention to the Urban report where at page 22 it is recommended that due diligence be followed prior to proceeding with the purchase:

> to confirm that all adequate building permits and approvals were received including checking for compliance certificate from expert trades such as waterproofing experts, electricians, plumbers and the like.

61. I find it surprising this defence was raised by the Masons. In the first place, the contract disclosed only some of the works that had been carried out on the house. Specifically, the only permit disclosed was the third permit relating to the upstairs extension. Omission of the first permit issued in 2005 is understandable, having regard to the fact that the s32 statement only required the Masons to disclose any building permit issued in the seven years prior to the contract, i.e. after 13 January 2006. The Masons' failure to disclose the second permit issued in 2009 appears to be a blatant dereliction of their duty of disclosure.

62. Furthermore, the Masons were unable to produce a full set of certificates from electricians and plumbers who worked on the house. This means that any due diligence carried out of by the Frasers would not have materially assisted them in respect of the un-permitted works which were not disclosed in the contract of sale.

SUMMARY OF THE FRASERS' CLAIMS

63. On the fourth day of the hearing, the Frasers handed up a schedule summarising the defects in respect of which they sought compensation, and the damages claimed. As some of the claims had not been alluded to in their points of claim, objection was taken to the schedule. After a discussion, agreement was reached as to the claimable defects, and after the conclusion of the hearing the Frasers submitted a new schedule. Claims are made under the following headings:

- Storm water connection.
- Internal cracking and floor levelness.
- Suspended sewer.
- Downpipes.
- Water proofing.
- Sealing to butt joins in external cladding.
- Corrugated roof pitch.
- Balcony waterproofing.
- Subfloor framing.
- External termination boards.
- Electrical wiring.

Storm water connection

64. The biggest claim in dollar terms arises out of the state of the stormwater drainage system following the completion of the roof extension. There was also a discrete issue about the failure of the Masons to connect the downpipe draining the gutter to the roof of the ground floor ensuite bathroom.

65. As Ms Fraser pointed out at the hearing, there are three elements to the stormwater drainage claim insofar as it relates to the drainage system after the completion of the upstairs extension. The first element involved the downpipes from the second story roof to the existing gutters on the ground floor roof. The second related to the downpipes from the ground floor gutters to the stormwater drain. The third element related to the connection of the stormwater drainage system to the legal point of discharge.

Mr Smith's evidence

66 Central to the issue of liability is the evidence of Christopher Smith, a licensed plumber who trades as Green Light Plumbing. He was called as a witness, and confirmed the accuracy of a letter he had prepared and addressed "To Whom It May Concern" dated 8 July 2017. The key point of this letter was that he stated "The stormwater piping is not connected to any legal point of discharge on the street or rear of property."

Mr Hay's evidence

67. The Frasers' principal witness in relation to this claim was Mr Gary Hay, an engineer. He had prepared two reports, dated 20 February 2017 and 5 July 2017 respectively. Mr Hay adopted these reports when he gave evidence.

68. Reference to Mr Hay's first report indicates that he clearly had a concern about the ground levels. It was evident to him from his inspection of the ground levels that they had been altered and shaped so that the surface adjacent to the dwelling was higher than the visible subfloor ground level, and this was conducive to the build-up of subgrade moisture. He had prepared a broad scope of site works which was outlined in a plan. In his oral evidence, Mr Hay made it plain that the site works included preparing the drive to be surfaced. It had to be graded away from the house. A claim for the cost of this work was pressed by the Frasers late in the hearing, but was withdrawn when objection was taken to it.

69. Mr Hay's evidence concerning the stormwater drainage system was contained in his report of 20 February 2017. He noted that on the west side of the house, a storm water pipe is visible above ground leading east beneath the dwelling. On the north side, he noted that the downpipe outlet at the north-east corner was visible at the surface, and terminated in the front veranda. It had been partially buried and was blocked by driveway gravel. He deposed (on page 3) :

> Corrective works should comprise the installation of a system of drainage to regulate the sub- surface moisture around the dwelling as much as possible…. Where possible, existing property drainage would be retained but alterations to existing pipes and fittings would be dictated by corrections to be made to perimeter paving and ground levels and the availability of a suitable drainage outlet.

70. Mr Hay gave further evidence regarding outfall drainage on page 4 of his report where he said:

> In the event that there is no convenient legal point of discharge for property drainage, it may be necessary to design and construct a proper outfall drain. This will involve a local Council in specifying the design and construction requirements and the location of the nearest connection point.

71. Mr Hay costed the required internal drainage and paving works in his report dated 5 July 2017 in the range 38,000-$41,000. On the last day of the hearing Ms Fraser indicated that she was pressing for an award of $38,000, less the cost of landscaping works, which was put at $12,000. The resulting claim for correction of the stormwater drainage system on the site was accordingly $26,000.

The Masons' defence to the stormwater claim

72. Mr Mason gave evidence that he had not touched the stormwater drainage system under the house. Accordingly, he contended, he can have no responsibility for it.

73. This line of defence was amplified in the Masons' written submissions, in which my attention was drawn to *Price v Goodrem*[9], in which Senior Member Walker said at [14]:

> The claims made are for damages for breach of one or other of the statutory warranties set out above. These warranties are both set out in the Contract of Sale and are implied into the contract by s.137C of the Act. As a careful reading of those warranties will show, they are confined to the building works that were carried out by the Respondent. They do not extend to work that she might have done but failed to do. In the present case complaint is made that the Respondent did not upgrade some of the plumbing or electrical wiring of the existing house. In each case, such a failure could only be found to be a breach of a s.137C warranty if it could be established that, in order to do the new work that she did do in a proper and workmanlike manner, the existing work had to be upgraded. That would need to be established by expert evidence.

Discussion

74. I regard this line of defence as misconceived. I say this because responsibilities regarding stormwater drainage were imposed on the Masons as owner builders by the building permit documents approved in connection with the building permit issued on 21 July 2010 for the upstairs extension. In particular, the notes on sheet A01 provide:

> All storm water is to be taken to the legal point of discharge to the relevant authorities approval.

75. Furthermore, the Drainage Notes set out on sheet A02 provide:

> Stormwater drainage discharging point to kerb & channel location to be determined [on] site by builder, owner and plumber with aid of council records.

76 The Masons, in their written submissions, contend at [30] that these notes are of a pro forma nature, and go on to argue at [33] that the requirements in respect of stormwater only become relevant if the permit requires a new stormwater drain to be installed or the existing one to be upgraded.

77 I reject these contentions. In my view, having applied successfully for a permit to carry out a substantial upstairs extension, they became obligated to perform relevant requirements set out in the permit. The creation of a compliant stormwater drainage system was necessary because the upstairs extension had a drainage system under which water from the upper roof gutters was carried by 4 downpipes to the existing ground floor roof gutters.

Cost of making the stormwater drainage system compliant

78. Accordingly, I consider that the Frasers are entitled to an award in respect of the rectification of the drainage system on the property. The cost of constructing a complying system was assessed by Mr Hay at $26,000. No

[9] [2014] VCAT 1409

attack was made on this figure. The Masons in their defence concentrated on liability and did not criticise the Frasers' quantification. I accept Mr Hay's assessment of the relevant works, and award the Frasers **$26,000** in respect of this issue.

Connection to legal point of discharge

79. The Frasers contend that as there is presently no legal point of discharge, it is the obligation of the Masons to pay the cost of making a connection to the Council's asset. They have had this costed at $12,000, and claim this sum.

80. I am not prepared to allow this claim. Mr Mason's evidence was that the stormwater drainage system from the house used to discharge to the kerb. He said the discharge point may have been lost when the Council raised the level of the street when performing recent works. Mr Mason's evidence that the legal point of discharge was to the kerb is consistent with the fact that the house appears to have been constructed in the 1920s with no other legal point of discharge. The fact that the legal point of discharge used to be at the kerb is not contradicted by Mr Hay's evidence. He made enquiries about the matter with the Council, and noted (at page 4 of his first report):

> Some inquiries have been made on this issue with Council indicating a property drain outlet to the kerb in Robbs Road could be used to serve these premises. The outlet point in question is shown to serve No. 15 Robbs Road on the excerpt from Council's construction plan. No such point is provided for No. 17.

81 In her witness statement Ms Fraser confirmed at [6] that in 2013 Maribyrnong Council had ripped up and replaced Robbs Road and the footpaths and the guttering. In the circumstances the conclusion seems inescapable that it was this action of the Council that had closed off the previously available legal point of discharge. The Masons cannot be held responsible for this, and I find against the Frasers in relation to this particular claim.

Internal cracking and floor levelness

82. Internal cracking was noted by Mr Osborne at [3.11] to be present in:

> the ground floor middle bedroom (bedroom 3), the living room, the eastern kitchen meals wall and the upstairs study consistent with failed or non-existing footings.

83. Mr Osborne went on to say at [3.12]:

> At the time of my inspection the entry floor, the floor area under the staircase along with the floor in the adjoining bedroom are dipping down towards the wall connecting to the kitchen meals area, consistent with failing or non-existent bearing capacity.

Ground levels

84. Before the Frasers' claims about settlement of the house and the lack of levelness in the floors are addressed in detail, it is necessary to deal with the primary defence

raised by the Masons, which is that there are numerous references to floor settlement in the Urban report acquired pre-purchase by the Frasers.

85. The relevance of the pre-purchase report has been addressed above at [40-51]. The key point to draw from that discussion is that just because a defect in the house was patent at the time of purchase, this will not necessarily mean that no claim can be made by the purchaser in respect of the defect. As Ipp JA remarked in *Allianz v Waterbrook* at [116], a defect may on its face appear to be trivial, but may prove to require major reconstruction work. The purchaser will be disentitled to claim in respect of a patent defects only where the purchaser has full knowledge of the defect, including its significance.

86. As the causes of the cracking in the house and the lack of levelness in the floors, discussed below, appear to be complex, I propose to approach these issues on the basis that the fact that the Frasers were aware that the floors were dipping and the walls were cracking, does not necessarily disentitle them from bringing a claim for damages, because at the time of purchase of the house they could not have known the reasons for the problems, and accordingly been aware of their potential financial significance.

87. There was controversy about the cause of the cracking of the walls and the settlement of the floors. The house was built in the 1920s, and some unevenness in the floor of a 90-year-old house is to be expected. Mr Hay observed that the ground levels have been altered and shaped so that the surface adjacent to the building was significantly higher than the observed sub-floor ground level in places. He opined that "This condition is conducive to the build-up of subgrade moisture." He added:

> Poorly graded ground on the east and west sides of the building and the absence of proper drainage connections for at least two roof downpipes would exacerbate the situation to some extent.

88. Mr Mason gave evidence, which I accept, that he did not touch the ground levels around and under the house, As a result, the Masons contend, they are not to be held responsible for the problem.

89. The Frasers respond that the first and third permit conditions contain requirements regarding the subfloor. Certainly, the drainage notes on sheet A02 of the permit for the upstairs extension provides:

> **Grading and site drainage**
>
> The area within 2000mm of building line shall be graded so that water will not pond against the building.

The Frasers accordingly assert the works are defective under the third permit.

90. The situation under the third permit is one where I consider the Mason's argument that the notes contained in the permits are of a pro forma nature is relevant. The third permit related to the upstairs extension and did not require any extension of the footprint of the house, and in my view work on the soil levels is not relevant.

91. A different situation, however, exists with respect to the creation of the rear extension under the first permit. Permit condition No. 37 required:

> The ground beneath the suspended floor must be graded so that the area beneath the building is above the adjacent external finished ground level and surface water is prevented from ponding under the building. Alternatively, agricultural pipes shall be provided beneath the building to drain ponding surface water.

92. The creation of the rear room under the first permit clearly extended the footprint of the house. I consider that the Masons were obligated to shape the surface soil beneath the suspended floor of the extension in accordance with the permit requirements. However, I do not think the Masons came under an obligation to shape the surface of the soil under the pre-existing house. Even if I am wrong about this, I find that no claim arises.

93. The reason for this is that the Frasers presented no evidence as to the significance of the failure of the Masons to shape the soil under the new rear extension. That extension was relatively small, and constituted in my estimation, based on an examination of the footprint of the extended house set out in the first permit, only one seventh of the total floor area. Accordingly, I do not regard the failure of the Masons to properly contour the surface soil immediately under the new extension as a significant factor in the distress caused to the house and the lack of levelness in the floors.

Soil moisture content

94. Mr Hay made a link between lack of a proper stormwater drainage system and the settlement issues, saying:

> It is likely that the moisture level of the underlying soils has increased at certain points resulting in swelling and lifting of parts of the dwelling…..
>
> Corrective works should comprise the installation of a system of drainage to regulate the sub-surface moisture around the dwelling as much as possible."[10]

95. I accept Mr Hay's view that a build-up of sub-grade moisture might lead to ground movement.

96. However, it is not clear the extent to which the stormwater drainage system did contribute to the problem. At the site inspection I observed the downpipe from the ensuite roof was not connected to the stormwater drain, but as this was next to the boundary fence of the property and about a metre from the wall of the original house, I am not satisfied that it would have contributed significantly, if it contributed at all, to the presence of moisture under the house. It is relevant to note that this downpipe drained a small area roof of approximately 4 m^2.

97. Mr Hay referred to a second roof downpipe not being properly connected, but did not specify which downpipe this was. I suspect that it was the downpipe in the middle of the west wall of the house, which the Frasers contended at the inspection was not connected. Mr Mason disputed this, and said that the downpipe was connected to a PVC pipe that ran east under the house and was connected to the drainage pipe running to the north that used to drain to the kerb. I could not be satisfied from my inspection that this downpipe was not connected in the manner

[10] Mr Hay's final report, page 3

Mr Mason contended.

98. To complicate matters, Mr Hay noted that "The sideway of the neighbour's property immediately west is not adequately drained and run-off from this area would add to the build-up of moisture in the subgrade soils."

99. In all these circumstances, I am not prepared to attribute to the Masons liability for the sub-soil conditions.

The work carried out on the house

100. In order to assess whether the Masons had responsibility for the settlement of the subfloor, it is also necessary to consider the work they did on the house. As noted, the Masons extended the ground floor of the house in 2005 by creating a family room at the rear, and constructing the ensuite on the western side at the front. At the inspection conducted during the course of the hearing Ms Fraser pointed out some cracking in the rear family room. However, these cracks are not referred to in Mr Osborne's report, and no allowance is made by him for the rectification. I made no allowance for these cracks.

101. The Masons also carried out re-stumping of the house under a re-blocking permit issued on 25 February 2009. At the hearing, Ms Fraser said she was not pressing a claim in relation to this work. No further consideration of this particular phase of the works is accordingly required.

102. Ms Fraser contended that the subfloor system for the house could not bear the weight of the upstairs extension. However, neither Mr Osborne nor Mr Hays suggested the subfloor system for the house could not bear the weight imposed upon it. Indeed, Mr Osborne under cross-examination confirmed that the cracks he had seen were not compression cracks (caused by weight from above) but were caused by differential settlement of the footings.

103. Ms Fraser's theory that the cracking was caused by the weight of the upstairs extension was not consistent with the method of construction of that extension, which Mason explained was supported by three columns of steel posts supporting steel beams. The design had been fully engineered, and a Certificate of Compliance-Design signed on behalf of J T Consulting Engineers Pty Ltd dated March 2010 relating to the upstairs extension was put into evidence.

104. Ms Fraser submitted at [3] of her written submissions that Mr Osborne's report identified that there were discrepancies between engineering plans regarding the required founding depth of footings. She was clearly referring to paragraphs 3.6 - 3.8 of Mr Osborne's report. However, Mr Osborne confirmed at [3.9] that he had not conducted any destructive work to assess the actual footing depths, and accordingly I cannot be satisfied that the engineering plans have not been complied with.

105. I find that the cause of the cracking was not the weight of the upstairs extension, but was caused by settlement of the foundations.

106. The Masons raise a further point, which I consider to be relevant. This is that the Frasers themselves engaged cornerstone Foundations to carry out re-stumping work. I accept the Masons' contention that the engagement of Cornerstone

Foundations breaks the chain of causation between the current state of the walls and floors in the house and any alleged defective work carried out by the Masons.

107. For all these reasons, I find that the Masons are not responsible for the settlement of the foundations, I find against the Frasers in connection with their claim regarding the internal cracking and the lack of levelness in the floors.

Suspended sewer

108. The key evidence put forward by the Frasers in connection with this item is to be found in the Green Light Plumbing letter. This relevantly states:

> It is my professional opinion that the existing work that was completed by the previous owners of this property are of an substandard quality. If an plumbing certificate of compliance was issued then I doubt it would have passed an audit. (Sic)
>
> There are many areas of concern, including the suspended sewer, which is connected below ground onto the existing terracotta piping. (Acceptable to the P.I.C but not good practice) It was undersized and leaking in four areas due to there being no glue used on the pipe work. The work we have undertaken is now to code, but not ideal. To suspend all the sewer and reconnect to the boundary shaft would approximately cost 12k.

109. It is not clear from the Green Light Plumbing letter whether the suspended sewer referred to was from the ensuite bathroom which was created in 2005, or from the main ground floor bathroom which Mr Mason said was renovated without a permit in 2009. However, when Mr Mason was asked about the suspended sewer, his first response was that he was not sure what sewer was being referred to. He then clarified that there was a suspended sewer upstairs, and a suspended sewer from the ensuite. On this basis I conclude that the suspended sewer to which the author of the Green Light Plumbing letter, Christopher Smith, referred was the suspended sewer from the ensuite.

110. When he gave evidence at the hearing, Mr Smith confirmed that good plumbing practice would have been to suspend the pipe all the way to the front of the house, and then connected to the sewer pipe underground. However, although discussing good practice with the Frasers, no change to the pipe was made. It follows that the work carried out to the suspended sewer was of a minor nature.

111 I turn now to the claim in respect of the cost of having the suspended sewer suspended all the way to the front of the house, and reconnected at the boundary. This work was estimated by Mr Smith in the letter of 8 July 2017 at $12,000. I note that an award cannot be justified in respect of this work, as Mr Smith opines that the condition of the suspended sewer, which is connected to the existing terracotta piping under the house and not at the boundary, is acceptable to the Plumbing Industry Commission (the "PIC" he referred to) and that the pipe is "now to code".

112. For these reasons I find against the Frasers in respect of their claim in respect of the suspended sewer.

Downpipes

113 The claim here is separate to those relating to the issues referred to in connection with the storm water drain. It appears from the Masons' written submissions that they thought this claim related to the downpipe from the ensuite roof. If that was the only claim, the Masons' could appropriately deflect it by pointing to the fact that it had been disclosed in the Urban report at [26]. But there is another claim regarding downpipes not referred to in that report.

114 Mr Osborne observes that the upstairs section of roof has four downpipes discharging onto the lower roof. However, there are only two downpipes from the lower section of the roof to the ground. He suggests that this number is inadequate, as the number does "not appear to take into consideration the size of the roof area". Although Mr Osborne's language is equivocal, I find the decision made by the Masons' roof plumber when constructing the upper story roof to be instructive. That plumber evidently thought four downpipes were appropriate. In the circumstances, I do not think that the Masons can simply assert that they do not have to address the adequacy of the ground floor downpipes because they were pre-existing. I accept that two new downpipes should have been added.

115 The amount claimed for the installation of new down pipes by the Frasers is set out in Mr Osborne's report on page 47. I note at the outset that these figures were not challenged by the Masons. Mr Osborne's assessment is that it will take a plumber six hours work at $85 per hour to install the drainpipes. I interpose to note that the rate of $85 for a licensed plumber is in my experience reasonable, and I allow this figure. A further 8 hours work is claimed for a plumber to connect the new stormwater pipes to the stormwater system. This allowance seems reasonable to me. The upshot is that 14 hours work at $85 an hour are required, which I calculate to be $1,190. Materials are assessed at $1,300. Details are not provided, but in the absence of any comment from the Masons, let alone expert evidence, I have no reason to question this assessment. The total base allowance is accordingly $2,490.

116 Mr Osborne also allows 10% for contingencies. I can understand why a contingency might be required in respect of the installation of the new downpipes to the stormwater system, as this will involve some subsurface work, and the ground conditions cannot be fully known at present. A 10% contingency on this component (which is $680) is in my view justified. The resulting figure is $68. However, I cannot understand why it is said that there needs to be a contingency on the creation of two new downpipes, which is straightforward work. Nor can I understand why a contingency should be allowed for materials in so far as the visible downpipes are concerned. There is nothing uncertain about the quantity of downpipe required. However, I accept that a contingency on the subsurface pipes is justified. Because the allowance for materials is not divided into above surface and subsurface work, I attach a contingency of 10% to half the total allowance for materials i.e. 10% on $650. The total contingency allowed, accordingly is $68 for labour and $65 for materials, a total of $133. When this figure is added to the base figure, the subtotal calculated is $2,623.

117 Mr Osborne has allowed a margin of 30%. Such a margin is often sought in the Tribunal in cases such as this, and the Masons did not criticise it, let alone bring

evidence that was unreasonable. In the circumstances I am prepared to allow it. 30% on $2,623 is $786.90, which I round up to $787. This figure, when added to $2,623, comes to $3,410.

118 GST will be payable by the Masons, which brings the total to $3,751. I award a rounded down **$3,750** to the Frasers.

Water proofing

119 The Frasers complain of water proofing problems in all three bathrooms. Waterproofing in the bathrooms is governed, in Mr Osborne's opinion, by AS 3740:2004. Conveniently, Mr Osborne summarised the requirements of this Australian Standard in Attachment E to his report. In brief, in shower areas, walls are to be waterproofed to a height the greater of:

a. not less than 150 mm above floor substrate, or not less than 25 mm above maximum retained water level, and

b. water resistant walls in shower area to not less than 1800 mm above finished floor level of the shower.

Where a preformed shower base was used, the walls were to be constructed in a water resistant manner (e.g. using tiles) to a height not less than 1800 mm above the finished floor level of the shower.

In the area outside the shower area, timber floors including particleboard are to be waterproofed.

120. Although Mr Osborne could describe the formal requirements, he was not personally in a position to provide evidence of breach of these requirements. Accordingly, when he asserted in his report at [6.8] that the ground bathroom had not been waterproofed in accordance with AS 3740: 2004 he must have been relying upon the observations of others.

The downstairs bathroom/laundry

121. Mrs Fraser's evidence was that in about 2016 she engaged a plumber to investigate the faulty mixer in the downstairs bathroom. When the mixer was pulled off the wall, the plumber noted that it wasn't waterproofed underneath. It was this event that triggered "alarm bells" and led the Frasers to having the bathroom re-built.

122 Mr Mason confirmed that the downstairs bathroom/laundry had been waterproofed. Whether he did the work personally was not clear. When he expressly confirmed that the laundry had been waterproofed, it sounded as if he had done the work himself. However, he also indicated that a tiler had been engaged to do the bathroom/laundry and that the tiler had been instructed to put in waterproofing.

123 Christopher Smith, the plumber from Green Light Plumbing, deposed that when he came to the site he saw a labourer engaged by the Frasers' builder pulling up tiles from the floor of the downstairs bathroom. He confirmed that the tiles had been glued to the floor. He could not recall whether cement sheeting had been placed beneath the tiles. However, he was clear that no waterproofing had been used.

124 Corroborative evidence was given by Tobie Le Vaillent, the builder who trades as

Fleur-de-Lys who was engaged by the Frasers to carry out rectification to the house. Mr Le Vaillent confirmed that when the tiles in a downstairs bathroom were removed, he saw no waterproofing.

125 On the basis of the direct evidence given by Mr Smith and Mr Le Vaillent, I find that in breach of AS 3740: 2004 the floor of the renovated bathroom/laundry was not waterproofed. There was no direct evidence regarding the waterproofing on the walls, but I am satisfied that there was none, because there was no waterproofing on the floor where it was clearly required, and no waterproofing was sighted by the plumber when he removed the shower mixer.

126 A salient point in Mr Mason's evidence about the main bathroom/laundry renovation, apart from the fact that the whole job had been done without a permit, was that he did not use a licensed plumber. Under cross-examination, he sought to minimise the amount of plumbing work done. There was plumbing work involved in moving a bath and separate shower from the western wall under a window to the eastern (internal) wall where a shower over a bath was installed. A vanity was moved from the southern wall of the bathroom to the centre of the room where it was placed next to a newly constructed dividing wall. The lavatory was rotated so that it backed onto the new dividing wall, but Mr Mason insisted that the plumbing connection was not moved. Mr Mason could not produce a certificate from a licensed plumber in relation to this work. The situation here accordingly is in marked contrast to the situation relating to the 2005 ensuite construction. I find that no licensed plumber was engaged with this work.

127 This finding reinforces why an award is to be made in respect of waterproofing. The walls were tiled, and but for the fact I have found no plumber was engaged for the bathroom/laundry I would have limited the award to the Frasers in respect of waterproofing to an award in respect of the floor and to a height of 150mm of the walls. However, the Frasers were entitled to know the true state of the plumbing in the bathroom/laundry, and to do this they would have had to remove tiles. They are entitled to an award which will cover the cost of doing this and then replacing the tiles. On this basis, the full scope of work recommended by Mr Osborne is to be allowed for the bathroom/laundry. The costings are addressed below.

The ensuite

128 The ensuite downstairs was built as part of the first permit works. The Masons were able to produce a certificate in respect of the final work dated 19 June 2006, but no documentation was produced regarding waterproofing.

129 That no effective water resistant wall had been created by the shower was made manifest on 26 October 2015 when a painter engaged by the Frasers, Mr Hiep Ho touched the weatherboards on the external walls of the ensuite and his hand went through the ward. This event is recounted in Ms Fraser's statement at [12].

130 The evidence about the waterproofing of the floor was sparse. Mr Green, the plumber, did not mention waterproofing in his letter of 8 July 2017, and he made no mention of it when it was asked about the downstairs ensuite when giving evidence. Mr Le Vaillent was a little they when giving evidence about this ensuite as he could not recall whether his workers had found chipboard beneath when they

removed the tiles. Accordingly, I place no weight on the fact that he does not recall waterproofing. However, a photograph tendered by the Frasers the floor of the ensuite shower after the tiles had been removed suggests that the floor was damp, and there was certainly no sign of waterproofing.

131 The Masons, in the written submissions, submit that the Urban Property Inspections report mentioned leaking in the downstairs ensuite. No page or paragraph reference was given, but I note that in [7] of this report the reference to silicon caulking between the shower base floor tiles and wall tiles separating, and resealing was recommended. I consider this to be a good example of the sort of situation referred to by Ipp JA in *Allianz v Waterbrook* where a defect is apparent, but its significance is unknown. I find the Frasers are not disentitled from pursuing this claim simply because of the reference to leaks in the ensuite in their pre-purchase report

132 I accordingly find that the Frasers are entitled to an award of damages to enable them to rebuild the bathroom with water resistant walls behind the shower and a waterproofed floor in accordance with AS 3740:2004. Costings are dealt with below.

The upstairs bathroom

133 In respect of this bathroom Mr Mason's evidence was unambiguous. He had done the waterproofing and the tiling. He deposed that the waterproofing in this bathroom had been performed in accordance with AS2740: 2010. When he was asked why he had not followed the Australian Standard called up in the specification approved for the building permit for the upstairs is extension, which was AS3740-2004 he said there had been "a mistake." I do not accept this necessarily to be the case, because when Mr Mason was asked how he knew about the regulations for waterproofing, he said that he followed the instructions on the packet provided by the manufacturer.

134 Mr Le Vaillent deposed that when the tiling had been removed from the upstairs ensuite he observed thin waterproofing. Importantly, he said there was no membrane into the waste drain. Under cross-examination, he confirmed that there was no waterproofing around the drain, and that it was "bouncing". However, it is to be noted that Mr Le Vaillent also initially gave evidence that there had been no waterproofing under the shower, but he acknowledged he would be mistaken if a photograph proved that there had been waterproofing under the shower. I accordingly put his evidence on this issue to one side.

135 Photographs were put into evidence. From these photographs I have formed the view that waterproofing had been placed over only part of the floor. However, it was also clear that an attempt had been made to waterproof the walls immediately around the shower base, in accordance with the requirements of AS3740-2004. For this reason, I am of the view that the Frasers are entitled to an award in respect of the cost of waterproofing the floor of the bathroom, but not the entire bathroom.

Costings

Overview

136 The works required to waterproof each of the ground floor ensuite, the ground floor bathroom and the second floor ensuite were addressed by Mr Osborne altogether[11]. In each case, the work involved was removal of the existing fixtures and fittings and then storing them, removal of the existing tiling, removal of rubbish, replacement of damaged plaster on the walls, the installation of cement sheeting substrate on the wet floor areas, the installation of waterproofing to wet areas, the installation of tiling to wet areas, and the reinstallation of original fixtures and fittings. In assessing the cost of these works, Mr Osborne assumed that there would be 12 hours work involved in removing the existing 50 fixtures and fittings, at a rate of $75 per hour. This appears to represent a blended rate for a labourer and a plumber, as the unit cost for removing the tiling only was put at $55 an hour, which is consistent in my experience with a labourer's rate. The rate used for a plasterer was $85 per hour. I regard these rates as reasonable.

137 Mr Osborne's costings were not directly criticised by the Masons, and no expert evidence to counter Mr Osborne's assessment was presented. I accordingly accept most of Mr Osborne's assumptions, including that it is appropriate to allow for contingencies of 10% and for margin of 30%.

138 As three bathrooms were assessed, together, it is appropriate to adjust the hourly allowance for each item of work. A straight division of each figure by 3 is not appropriate for 2 reasons. The first is that the downstairs ensuite was much smaller than either the bathroom laundry or the upstairs ensuite. Broadly speaking, in terms of floor area, I consider the downstairs ensuite represents 20%, the downstairs bathroom/laundry 40% and the upstairs ensuite 40%. The second is that different scopes of work are allowed by me in respect of each bathroom. As noted, in respect of the downstairs bathroom/laundry, I have found that the award to the Frasers should cover the full scope of work identified by Mr Osborne.. With respect to the downstairs ensuite, I have found that the Frasers are entitled to an award of damages to enable them to rebuild the bathroom. In the upstairs bathroom I have concluded that the Frasers are entitled to an award in respect of the cost of waterproofing the floor of the bathroom, but not the entire bathroom.

139 Bearing these points in mind, I now turn to an assessment of damages in respect of each of the bathrooms.

The downstairs bathroom/laundry

140 Mr Osborne's total figure for the three bathrooms was for $37,138. As noted above, I consider the downstairs/laundry represents 40% of the total area of the 3 bathrooms. I allow the Frasers 40% of Mr Osborne's total figure in respect of this room, and award **$14,855** to the Frasers for this item.

The downstairs ensuite

141 As a starting point in the assessment process, I allocate 20% of Mr Osborne's total figure for the three bathrooms of $37,138, namely $7427.60, to the downstairs

[11] Mr Osborne's report, page 48

ensuite. As I have concluded that the Frasers are entitled to an award in connection with the re-construction of the downstairs ensuite bathroom with water resistant walls behind the shower and a waterproofed floor, I award this sum, subject to it being rounded down to **$7,425**.

The upstairs ensuite

142 The Masons, in their final submissions, contend that the best estimate of the cost involved is Mr Le Vaillent's first quotation in which he put a figure of $4,000 on the cost of repairing the leaking floor in the upstairs ensuite. This work covered removal of floor tiles, laying 6mm fibrous cement sheet, applying waterproof membrane to the floor, and re-laying tiles.

143 While I agree with the Masons that the Frasers are not entitled to an award which reflects the cost of demolishing and then waterproofing and re-tiling the entire bathroom, I am also satisfied that the $4,000 referred to in Mr Le Vaillant's plate is insufficient to cover the full scope of work involved in removing the floor tiles, properly waterproofing the floor and then re-tiling the floor, because no allowance is made for removing the existing items including plumbed fixtures.

144 I have indicated above that is appropriate to allocate 40% of Mr Osborne's total assessment for the cost of waterproofing three bathrooms of $37,138 to the upstairs ensuite. As previously noted, 40% of that total, rounded down, is $14,855.20. As with the downstairs bathroom/laundry, I award half of that figure, rounded down to **$7,425,** and award this figure to the Frasers in connection with the waterproofing of the upstairs ensuite.

Summary regarding waterproofing

145 In respect of the bathroom/laundry, I have awarded $14,855. In respect of the downstairs ensuite, the award is $7,425. $7,425 is also awarded in respect of the upstairs ensuite. The total of these figures is $29,705. I round this down and award **$29,700** in respect of waterproofing.

Sealing to butt joins in external cladding

146 At the hearing Ms Fraser complained that the Masons when placing weatherboards on the house had failed to prime the cut edges. The Masons note in their written submissions that Urban Property Inspections had, in their report at [23] remarked that the weatherboards visible from the balcony contained unpainted cut edges that needed to be adequately sealed, and that this should be completed throughout the property. The Masons contend that the Frasers were on notice about this defect, and cannot make a claim about it. I accept this submission in so far as it relates to the whole of the upstairs extension. The weatherboards visible from the balcony above that extension, and the ends of visible boards had not been properly seen, the Frasers might reasonably have inferred that the rest of the weatherboards in the upstairs extension suffered from the same defect.

147 I do not think this defence avails the Masons in respect of new weatherboards apply elsewhere in the house. This is important what, as at the hearing Mr Mason sought to minimise the problem. However, Ms Fraser in a very effective cross examination forced Mr Mason to concede that he had not only placed

weatherboards on the upstairs extension, but had altered the weatherboard exterior of the house on the ground floor in the second bedroom when the front rebuilt, in the kitchen/dining room where a window was moved, and in the bathroom laundry when the exterior door in the west wall was cut. On this basis for Mr Mason was also forced to concede that he had cut into the weatherboards in about 80% of the house.

148 Mr Mason was asked about who had done the work. Question by question, he disgorged that he had been assisted with the weatherboards by a friend named Simon, and that he did not know whether Simon was a registered builder or not. As to the exterior door in the bathroom/laundry, Mr Mason said he had been assisted by a carpenter named Mullins.

149 Mr Osborne opined that the failure to paint and sealing edge of the weatherboards will cause deterioration of the weatherboards, and he noted that it was not in compliance with the Building Code of Australia V2:2010, but was not more specific.

150 Mr Le Vaillent gave evidence that he had replaced 80% of the weatherboards. I note this is consistent with Mr Mason's concession that he had cut into about 80% of the weatherboards. Mr Le Vaillent's work included replacing all the boards in the upstairs renovation, and a number of boards that had been replaced by the Masons on the east wall downstairs. The weatherboards on the west side of the ensuite were also replaced. He deposed that the weatherboards had not been sealed at the edges. Moreover on the back of the boards, only factory sealing was present. Under cross-examination he explained that the factory priming would not be satisfactory over the long-term.

151 I accept on the basis of Mr Osborne's evidence that it was appropriate to change the weatherboards that not been sealed at the edges. I allow this claim in principle in relation to the downstairs weatherboards that had been cut into or replaced by the Masons.

152 As to quantification, I refer to Mr Osborne's report, where he costed the labour and material required to seal the butt joins in the external cladding $38,360. This figure comprised $7,500 for the erection of 60 lineal metres of scaffolding, $6,000 for labour calculated at $75 per hour for two carpenters to remove all the weatherboards, $4,000 for replacement weatherboards, trims and flashings, $1,360 to undercoat the weatherboards, $8,400 for two carpenters to reinstall the weatherboards, trims and flashings, $10,200 for repainting of the weatherboards, and $900 for waste disposal. These figures were not attacked by Mr Mason, and no expert to give evidence to the contrary was called by the Masons. I accordingly accept Mr Osborne's assessments in principle. Mr Osborne allowed for contingency of 10%, margin of 30% and GST of 10%. These figures were not attacked by the Masons either, nor was expert evidence given in respect of them. I accept that they are reasonable. Incidentally, I note that Mr Osborne's total costing of $60,399 is similar to the total of the payments made by the Frasers to Mr Le Vaillant in respect of external repairs ($45,801.80) and in respect of painting ($15,000).

153 Although I accept Mr Osborne's assessment in principle, major adjustments have

to be made because I have found against the Frasers in respect of the weatherboards installed as part of the upstairs extension. The first adjustment is that there is to be no allowance for scaffolding, because this, in my view, would be necessary only for the upstairs work. This reduces the base cost of labour and materials to $30,860. To this I add contingency of 10%, ie $3,086, to get a subtotal of $33,946. I then add margin of 30%, ie $10,183.80 to get a new subtotal of $44,129.80. Finally, I add 10% for GST, to get a total of $48,542.80.

154 The second adjustment is called for because the other costs associated with the placement of the weatherboards upstairs are to be excised from the assessment. To arrive at the necessary adjustments, I take a global approach. I assess from the building designer's plans that the footprint of the upstairs extension is approximately 75% of the footprint of the ground floor. Accordingly, of all the weatherboards in the house, the weatherboard upstairs represent only 3/7 or 42.86% of the total. It is unrealistic to insist that the assessment is so precise. In broad terms, 60% of the boards are downstairs. I then take into account that both Mr Mason and Mr Le Vaillent assessed that 80% of all the weatherboards in the house had been replaced. On this basis, I assess the percentage of boards replaced downstairs at 48% of the total, which I round up to 50%.

155 Mr Osborne's costing, putting aside his figure for scaffolding, but adding 10% for contingency, 30% for margin and GST, is as noted, $48,542.80.

156 I award the Frasers 50% of this figure, namely $24,271.40, rounded down to **$24,250**, in respect of replacement of weatherboards.

Corrugated roof of downstairs ensuite

157 The Frasers rely on Mr Osborne's report in which he asserts that the metal roof sheeting does not comply with the pitch and spend limitations between roofing supports contained in the Building Code of Australia V 2:2010, Figure 3.5.1.5.

158 The Masons contend the roof complies with the code, and rely on the compliance certificate issued to them by Rodney Olsen dated 19 June 2006. They also rely on the defence of time.

159 For the reasons given, I do not accept the claim is time barred. However, on the basis of the plumber's certificate, I find for the Masons.

Balcony waterproofing

160 Ms Fraser complained that the balcony constructed by the Masons leaked. Mr Osborne opined that the leaking balcony does not meet the standard set out in "GTST:2007" which I understand be a reference to the VBA's Guide to Standards and Tolerances 2007. Clause 13.04 of this document provides "Water proof decks and balconies that leak are defective".

161 Mr Mason contended that the balcony was not defective. He also referred to the state of the balcony during the inspection, and said that it was in the same state he had left it. In other words, he was disputing that it had been renovated.

162 Mr Le Vaillent gave clear evidence about the balcony. He deposed that "we measured the fall. It was 1°-2° in the best spots. It was flat or flowed back to the

house at places. The bearers were partly rotten, and were replaced."

163 Under cross-examination, Mr Le Vaillent confirmed that in order to rectify the balcony the boards had to be pulled up in order to expose the rafters underneath. Accordingly, the boards and the waterproofing had to be replaced.

164 As a costing for this work, I refer to Mr Osborne's report at [9.7-9.10]. His recommended scope of work included removing the decking to the balcony, removing the substrate, correcting the fall to the joists, and then reinstalling the substrate and decking. At page 49 of his report he costed the work of two carpenters at $75 an hour to remove the decking and the substrate and correct the fall to the balcony at $2,400, and the labour of two carpenters to install a new substrate and the decking at $1,200. He costed materials to create the substrate and decking at $640, and the waterproofing at $1,040. Waste removal was costed at $450. These figures were not attacked by Mr Mason, nor was any expert evidence brought by the Masons to throw another light on these costings. I accept the base costings as reasonable, and note that that they come to $5,730. I accept also the application of contingency, margin and GST, as there was no evidence from the Masons that they should not be accepted. This brings the total to $9,012. Interestingly, this compares favourably with Mr Le Vaillant's schedule of actual work completed as at 16 February 2017, where he put a figure of $11,450.45 against the completion of the balcony repairs. I award to the Frasers the total amount assessed by Mr Osborne of $9,012, rounded down to **$9,000**.

Subfloor framing.

165 The complaint relates to the living room constructed at the rear eastern side of the house in 2005. Mr Osborne at [10] of his report points out that the engineering plans called for two bearers. However, he noted that the bearer installed to the external eastern wall was a single bearer, and he suggested that as this was not in accordance with the approved engineering documents, the work was defective.

166 The defence raised by the Masons at the hearing was that the bearer referred to by Mr Osborne was the perimeter bearer, not the bearers under the floor. I accept this. In my view, Mr Osborne's report did not conclusively confirm that there has been a non-compliance with the approved engineering plans.

External termination boards

167 The complaint here was that the Masons had not installed termination weatherboards to the very top of the external wall cladding in between the exposed truss tails, in the upstairs extension. Mr Osborne opined in his report at [12.3] that:

> In my opinion the failure to terminate the weatherboards to the correct height is defective works by the vendors due to the vendors workmanship (Sic).

168 Ms Fraser gave evidence that this defect had real consequences, because over time their roof space became infected with birds. The Frasers responded by calling in Dawsons Australia, a pest and bird control service. Someone from Dawsons Australia inspected the roof in July 2015 and advised that the first-floor roof had no bird boards. For this reason they could not guarantee the birds would not return after they were removed. A week later Dawsons Australia quoted $2,200 to provide

50 linear metres of bird proofing, but noted that to install the bird proofing they would require scaffold to be erected at a cost exceeding $4,000. Not surprisingly the Frasers baulked at this, and the work ultimately was carried out by Mr Le Vaillent.

169 The Masons in their written submissions at [12] contend that "finishing the eaves to the premises was a design element". They do not expressly say this, but it is clear that they mean that the issue was obvious at the time of purchase. I accept this.

170 I also note that in their final submissions, at [50] they submit that this issue is "at best, an omission as stated in *Price v Goodrem.* The importance of this is, of course, that in that case Senior Member Walker explained that the s137C warranties are confined to building works that were carried out, and do not extend to work that might have been done but was not done.

171 For both these reasons, I find against the Frasers in respect of this claim.

Electrical wiring.

172 Ms Fraser put into evidence a quotation from Laser Electrical to re-wire the house at a total cost of $13,780.71, inclusive of GST. She claimed the whole amount, relying on the statement of the author of the quotation that:

> In order to be able to sign off on the wiring in this house with a certificate of electrical safety, we would need to allow for a total rewire and inspection. this would mean cutting holes in walls and ceilings to gain access for cables to be pulled through. (Sic)

173 The Masons contend all that a full rewiring could not be justified, because the Laser Electrical quotation itself made a number of important concessions. These included the following:

> It appears the correct sub circuit wiring is the correct size and the switchboard is correct with the right size circuit breakers and safety switches.
>
> All power circuits and light circuits have the correct circuit breaker and safety switch protection.
>
> There is one old power circuit that has not been upgraded, unclear which power points are supplied from this but it would indicate it is part of the front bedroom of the house, it's still okay…
>
> The consumer mains look like they haven't been upgraded but are 16 mm² in size which is still good…
>
> [T]he main earth is 6 mm² which is the required size and has a good main earth stake on side of house.
>
> All switches and power points are in good condition with some a bit loose on the wall. (Sic)

174 I accept the thrust of the Masons' contention that the Frasers have not demonstrated that the whole house needs to be rewired. On the other hand, I note that searches conducted by the Frasers with Energy Safe Victoria indicated that only two certificates were available in their records in connection with the house. Although the Masons understandably contended that the results of this search were

not conclusive, it was notable that Mr Mason did not put into evidence any certificate of electrical safety in relation to the conversion of the downstairs bathroom into a laundry, in relation to the moving of the oven and other rearrangements in the kitchen area, nor in relation to the conversion of the ground floor lounge into a bedroom which has light switches installed in the new wall.

175 Mr Mason gave conflicting evidence about the kitchen under cross-examination, saying firstly that he could not recall whether he had got an electrical certificate when he moved the oven. then later saying that he had got a certificate. I accordingly regarded his evidence about the kitchen as unhelpful. I note Ms Fraser in her witness statement, at [5], stated that the oven did not work when they moved in. For these reasons I am satisfied on the balance of probabilities that a qualified electrician was not engaged to work on the kitchen.

176 As noted, the conversion of the existing bathroom into a bathroom/laundry and the conversion of the lounge into a bedroom were works carried out without permits. In the absence of the production of any certificates of electrical safety, I also find on the balance of probabilities that no licensed electrician was engaged in respect of either of these projects.

177 In these circumstances, I am satisfied that the Frasers are entitled to have the electrical wiring in the downstairs bathroom/laundry, the kitchen, and the bedroom created from the former lounge room checked for electrical safety. Reference to the floor plan to the house suggests that they constitute about half of the ground floor, which itself represents about 60 % of the footprint of the whole house, taking the upstairs into account. On this basis, those rooms represent approximately 30% of the house. Doing the best I can on the evidence, I award to the Masons 30% of the Laser Electrical quotation to rewire the entire house of $13,780.71, namely $4,134, which I round down to **$4,000.**

OTHER CLAIMS

178 This completes the analysis of the claims set out by the Frasers in the Scott Schedule.

Window flashings

179 However, I note that the Frasers had initially claimed in respect of window flashings. In respect of this claim, the Frasers also rely on Mr Osborne, who at [15.2] of his report indicates that at the time of his inspection, the head flashing had been attached to the outside of the weatherboards, rather than behind the weatherboards as required by the installation instructions.

180 Mr Osborne costed this defect at page 51 of his report. The fixing of the flashings was assessed at $943 inclusive of contingencies and margin and GST.

181 The Frasers did not address this claim in their Scott Schedule, possibly because the works have been rectified by Mr Le Vaillent and the cost has been subsumed in the cost of rectifying the upstairs weatherboards.

182 In the light of my finding against the Frasers in respect of the upstairs weatherboards, it is fair that the Frasers be given an opportunity to address this

claim. On the other hand, it would also be unfair for me to make any determination about the issue without giving the Masons an opportunity to be heard, because understandably they did not think the issue was still alive when they prepared their final submissions.

Replacement of a timber post on the front veranda, and the rectification of the damaged timber truss

183 Mr Osborne noted two other defects in his report, namely the replacement of a timber post on the front veranda, and the rectification of the damaged timber truss. No comments were made about these items at the hearing, and they were not listed in the Scott Schedule. I according regard them as having been abandoned, and make no further comment about them.

SUMMARY

184. I have made awards in favour of the Frasers in respect of the following defects in the following amounts:

Storm water connection:	$26,000
Internal cracking and floor levelness:	$Nil
Suspended sewer:	$Nil
Down pipes:	$3,750
Waterproofing:	$29,700
Sealing to butt joins in external cladding:	$24,250
Corrugated roof:	$Nil
Balcony waterproofing :	$9,000
Subfloor framing:	$Nil
External termination boards:	$Nil
Electrical wiring:	$4,000
TOTAL:	**$96,700**

I will order that the Masons pay to the Frasers $96,700.

185. I will grant to the Frasers the right to apply for a further hearing at which they can present evidence and make submissions regarding the window flashings. The Masons, of course, will have the opportunity at any such hearing to present their own evidence and submissions regarding this issue.

186. I will give leave to the Frasers to make an application for interest within 30 days.

187. Costs will be reserved, on the basis that either party may make an application for costs within 30 days.

188 The issue of reimbursement of fees under s115B of the *Victorian Civil and Administrative Tribunal Act 1998* is also reserved, on a similar basis.

C. Edquist
Member