VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D248/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building work – defective construction not apparent until heavy rain – Limitation of Actions Act 1958 s.5 – action to be brought within 6 years of accrual of cause of action - cause of action for defective construction accrues when defect becomes apparent – no duty of care owed by director of builder to party contracting with builder

APPLICANT	Denise Heinjus
FIRST RESPONDENT	Tony De Felice
SECOND RESPONDENT	Enesor Constructions Pty Ltd (ACN: 005 362 096)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	4 September 2008
DATE OF ORDER	17 September 2008
CITATION	Heinjus v De Felice (Domestic Building) [2008] VCAT 1940

ORDER

1. Order the Second Respondent to pay to the Applicant the sum claimed of $3,653.51.
2. The claim against the First Respondent is dismissed.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Ms D. Heinjus in person
For the Respondents	Mr T. De Felice in person

REASONS

Background

1 The Applicant ("the Owner") is the owner of a house ("the House") at 117 Edgevale Road Kew. The House forms part of a building that was once a bookshop but it was converted by the Second Respondent ("the Builder") in about the year 2000.

2 The conversion of part of the building to the House was carried out by the Second Respondent pursuant to a major domestic building contract that it had entered into with two individuals ("the Developers") who appear to have been the developers of the project. A certificate of occupancy for the House was issued on 26 June 2000 and a certificate of completion of the plumbing work for the House was issued by the plumber on 24 June 2000.

3 After it was completed, the House was sold by the Developers to a Mr and Mrs Kleeman who appear to have been its first occupiers.

The claim

4 The master bedroom of the House is on the second floor. This has an external door opening onto a balcony which overlooks the street. It would seem from the description that was given to me that this has been cut out of the original roof line of the building but I have not been provided with any plans. The evidence as to the size of the balcony is vague but the invoice for the supply of the tiles required to retile it allows for 16.02 sq metres of tiles. I therefore infer that it was approximately that size.

5 The Owner claims that during heavy rain water falling on the balcony penetrates the House via the balcony and enters the rooms on the ground floor. The cost that she has incurred rectifying the balcony so as to prevent water penetration is said to be as follows:

Repairs to rectify drainage and to increase the size of the drainage outlet	$605.00
Tiler	$2,310.00
Supply of tiles	$738.51
	$3,653.51

6 She said that she also spent money to rectify damage to the plasterwork and paintwork consequential upon the water penetration but since she has lost the invoices she did not seek to claim those amounts.

Hearing

7 The matter came before me for hearing on 4 September 2008. The Owner represented herself and the Builder was represented by its Director, the First Respondent Mr De Felice.

8 The Owner tendered invoices for the three amounts claimed together with a letter from the rectifying builder. This letter sets out the defects as follows:

1. The absence of a barrier\tiled lip from the storage room to the balcony;
2. Replacing the water proofing underneath the tiles and retiling
3. Rectifying the existing drainage by increasing the overflow and the drainage capacity.

9 The Owner also tendered a letter from Mr and Mrs Kleeman who said that on three occasions between 2003 and 2005 they had called Mr De Felice back to the House due to water entry following substantial torrential downpours causing damage to the laundry and second bedroom below. They said in their letter that they expressed their concerns to Mr De Felice about the balcony paved area and asked him to lift the tiles and check if the membrane was adequate to stop water seepage. They say that they were assured by him that there was no need to go through that exercise and that the leakage was not coming from that source.

10 They also said in the letter that on another occasion when they had leakage into the storage room off the balcony, which led to problems in the laundry and second bedroom and water dripping through the bathroom lights, they called Mr De Felice and asked him to look at the downpipe. They say that when it was removed he said that it was not his responsibility. They say that Mr De Felice examined the roof for leaking and placed silicone on different points including the ceiling.

11 Mr De Felice denied all of this evidence and said that Mr and Mrs Kleeman had never complained to him about flooding or water leaking from the balcony. It seems unlikely that:

(a) former owners not interested in the outcome of this case would write such a letter and make such allegations if they were not true; or that

(b) anyone suffering substantial flooding would not have made any complaint to the builder.

As a matter of law in the absence of any other evidence I must prefer sworn evidence to a mere letter. However the letter is not the only evidence as to the balcony leaking.

11. The Owner says in her own sworn evidence that a very short time after she purchased the House in 2006 there was a heavy downpour of rain which led to leaking through the ceiling into the rooms below the balcony. She says that she contacted Mr and Mrs Kleeman who informed her that they had raised the same thing with the Builder. She said that she attempted to ring Mr De Felice and left messages which were not returned. Finally, she said that she spoke to him approximately eight months ago but nothing was done.

12. In response to that evidence Mr De Felice said that he had asked the Builder's plumber to contact her but by that time the work had already been

undertaken. Since the work was undertaken in June I infer that nothing was done about the Owner's complaint between January and June.

12 I invited Mr De Felice to examine the documents that the Owner had tendered but he declined to do so and said that he relied upon the fact that the "statutory warranty" for the House had expired, the Certificate of Occupancy having been issued over eight years ago. In response to the evidence of inadequate drainage from the balcony he confirmed that only a 50mm drainage point was put in. He said that the membrane had been laid by a "professional" firm.

13 The store room that is accessed off the balcony is an area of lined roof space. At the doorway to this store room there is no lip between the tiling on the balcony and the roof space area to prevent the entry of water into the roof space and the balcony was not graded in such a way as to direct rain water that fell onto the balcony into the drain hole. No evidence has been led by the Builder in regard to the allegations of defective workmanship.

14 Since the remedial work was done there have been several substantial downpours but no further water penetration has been experienced. From all of this I conclude that the water penetration was due to the defective construction of the balcony in failing to make adequate provision for its drainage and failing to construct it so as to prevent water accessing the roof space in heavy rain.

15 I find that the amounts incurred by the Owner were incurred by her in order to rectify these defects. Subject only to the question of limitations, the claim for the loss has been established.

16 I should add that I do not believe Mr De Felice's evidence that Mr and Mrs Kleeman did not complain to him about water penetration or leakage from the balcony. Given the nature and extent of the problem it is inherently improbable that they would have complained only of the minor unrelated matters Mr De Felice referred to and not about the more substantial problem with the balcony.

Is the claim statute barred?

17 The warranties implied into a major domestic building contract are set out in s.8 of the *Domestic Building Contracts Act* 1995. These enure for the benefit of subsequent owners (see s.9 of the Act). Since s.8 provides that the warranties are implied into the contract it follows that a breach of any such warranty must be a claim for breach of the contract. The warranties do not "expire" as Mr De Felice suggested. However by s.5(1)(a) of the *Limitation of Actions Act* 1958, actions founded in contract or tort shall not be brought up at the expiration of six years from the date on which the cause of action accrued.Quite apart from any claim for breach of the warranties imported into the contract by statute there is also the question whether the loss claimed arose through the Builder's negligent construction. When did that cause of action accrue?

18 The general position is that a cause of action in contract arises when the contract is breached (*Halsbury: Laws of England 4th Ed. Vol 28 para. 662*) which, in a contract for work and labour, is when the work is done (*para 673 and 685*). In negligence, it is when loss is suffered (*para 623*). However in regard to economic loss arising from latent defects in a building caused by negligence, the position is much more complex.

19 In the well known case of ***Bryan -v- Malony*** (1994-1995) 182 CLR 609 the High Court found that a professional builder constructing a dwelling house owed a duty of care to a subsequent owner of the house to take reasonable care in its construction. The majority judgement contains the following comments (at p.625 of the report):

> *"It is in the context of the above mentioned relationship of proximity that one must determine whether the relationship which exists between a professional builder of a house such as Mr Byrne, and a subsequent owner, such as Mrs Malony, possesses the requisite degree of proximity to give rise to a duty to take reasonable care on the part of the builder to award the kind of economic loss sustained by Mrs Malony in the present case. It is likely that the only connexion between such a builder and such a subsequent owner will be the house itself. Nonetheless, the relationship between them is marked by proximity in a number of important respects. The connecting link of the house is itself a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly the most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss, of the kinds sustained by Mrs Malony, to the owner of the house at the time when the inadequacy of the footings first becomes manifest. When such economic loss is eventually sustained and there is no intervening negligence or other causative event, the casual proximity between the loss and the builder's lack of reasonable care is unextinguished by either lapse of time or change of ownership."*

20 The time at which the cause of action accrues in such a case is when the inadequacy becomes manifest. In the present case that was when Mr and Mrs Kleeman first experienced the flooding, which was in 2003. That was less than six years before the commencement of this proceeding and so the cause of action is not statute barred. I am satisfied that the defective construction in the present case arose through the Builder's negligence and that the loss claimed by the Owner was suffered by her as a consequence.

Conclusion

21 I will therefore order the Second Respondent to pay to the Applicant the sum claimed of $3,653.51. Since the duty of care was owed by the Builder and not by its Director Mr De Felice (see *Korfiatis v Tremaine Developments, Ktori & ors* [2008] VCAT 403) the claim against the First Respondent will be dismissed.

SENIOR MEMBER R. WALKER