VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D279/2011

CATCHWORDS

BUILDING ACT 1993 – section 137C, whether defect known or ought reasonably to have been known prior to purchase of property.

FIRST APPLICANT	Miroslav Krivokuca
SECOND APPLICANT	Georgia Krivokuca
RESPONDENT	Deve Mahesan
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	30 November 2011
DATE OF ORDER	2 December 2011
CITATION	Krivokuca v Mahesan (Domestic Building) [2011] VCAT 2265

ORDER

1. Having found in favour of the first applicant on the question of liability, I reserve my determination as to the quantum of the first applicant's claim, pending either further submissions or material made or filed by the respondent pursuant to these orders.

2. **This proceeding is referred to an administrative mention on 12 December 2011, by which date the Respondent must notify the Principal Registrar whether he wishes to make further submissions or file further material on the question of quantum.**

3. Should the Respondent not notify the Principal Registrar in writing that he wishes to make further submissions or file further material on the question of quantum, the proceeding will stand determined in favour of the first applicant in the amount of $38,200.

Note:
You should respond to the administrative mention in writing (by fax or letter) by the above date advising the current status of this matter. You are not required to attend the tribunal on this date.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the First Applicant	Miroslav Krivokuca in person
For the Second Applicant	Georgia Krivokuca in person
For the Respondent	Deve Mahesan

REASONS

1. The second applicant (**'the Owner'**) is the registered owner of a residential property located in Berwick (**'the Property'**). The second applicant is the Owner's husband. He is not registered as an owner of the Property.

2. On 12 August 2009, the Owner purchased the Property from the respondent ('the Vendor'). The Property comprises a dwelling that was constructed by the Vendor as an owner builder. The dwelling incorporates a freestanding garage that has a roof top terrace, which is connected to the main house via a suspended walkway. The garage roof top terrace is what the parties have referred to as the *outdoor entertaining area*. It is tiled and has balustrading around its perimeter.

3. The outdoor entertainment area leaks, which has caused damage to the timber framing within the roof and resulted in the garage plasterboard ceiling collapsing. According to the applicants, the garage and the outdoor entertaining area cannot be used because it is now structurally unsound as a result of the water damage.

4. The Owner claims damages for the cost to make good the garage in the amount of $38,200. This is evidenced by a quotation from C & J Designer Homes dated 6 April 2011.

5. The Vendor contends that he is not liable for any damage because the Owner purchased the Property with knowledge of the leaking garage terrace roof. In that respect, he relies upon the terms of the sale contract and an inspection report that was attached to the vendor's statement.

THE ISSUES

6. The proceeding raises a number of issues:

   (a) How is liability against the Vendor established?

   (b) Did the Owner purchase the Property with notice of the leaking garage terrace roof?

   (c) What is the reasonable cost to make good the leaking garage terrace roof?

BACKGROUND

7. In early August 2009, the Owner saw an advertisement for the sale of the Property. The Property was marketed at a price over $600,000, however, it was listed as an *urgent sale*.

8. The Owner contacted the real estate agent and arranged for inspection of the Property. Initially, she inspected the Property in the absence of the first applicant. However, a subsequent inspection was arranged on the following day, where both applicants inspected the Property in the presence of the relevant real estate agent and the Vendor.

9. During the course of the second inspection, the parties were shown the garage and outdoor entertaining area. According to both applicants, the internal ceiling of the garage was in perfect order and appeared to have been freshly painted. According to the Vendor, the ceiling of the garage was damaged and showed signs of water leakage.

10. Following the second inspection, the Owner offered to purchase the Property for $520,000. A counter offer was made by the Vendor for $525,000. That offer was subsequently accepted.

11. Prior to the offer being accepted, the applicants were given a copy of the proposed contract of sale and vendor's statement. The vendor's statement contained an inspection report, presumably obtained pursuant to s137B of the *Building Act* 1993. That report noted a number of defects in the property which included a defect concerning the garage, described as:

    (a) The garage has a box gutter problem that needs immediate attention by a licensed plumber.

12. According to the applicants, the *box gutter problem* was discussed with the Vendor prior to the sale contract being signed; at which time he indicated that all that was required in order to remedy the defect was to seal the step leading from the outdoor entertaining area to the suspended walkway and re-tile that step. According to the first applicant, the Vendor had promised to undertake that work at his own cost.

13. The Vendor disputes the applicant's account of what was discussed prior to the sale contract being executed. According to the Vendor, he was quite candid about water ingress problems relating to the outdoor entertainment area and suggested that the only way to repair those problems was to construct a roof enclosure over the garage and completely enclose the area, effectively making the outdoor entertaining area an internal entertaining area.

14. The sale of the Property was settled on or about 26 October 2009. Prior to settlement, inspection of the Property was carried out which revealed that the step on the outdoor entertainment area had not been re-tiled. Consequently, a list of items was prepared by the applicants and forwarded to the Vendor prior to settlement. In response, the Vendor forwarded a letter to the applicants dated 27 October 2009 which stated, in part:

    1. Outside entertainment area will have step tiled and sealed. (I WILL HAVE IT DONE).

15. On the face of that representation, the sale contract was settled and the Owner took possession of the Property.

16. Not long after taking possession of the Property, the applicants noticed significant water ingress into the garage.

17. Attempts were made by the Vendor to remedy that situation but to no avail.

18. The applicants have now sought expert opinion on the water ingress problem. To that end, they engaged the services of *All Check Property Inspections* to prepare the building inspection report. Jonathan Storm, registered building practitioner DBU 4562, is the author of that report. Regrettably, he was not called to give evidence in the proceeding. Nevertheless, his report raises a number of defects concerning the construction of the garage. In particular:

    (a) loose cement sheet edges;

    (b) failure of waterproof membrane;

    (c) drummy, loose and crack tiles;

    (d) leaking tiled decking;

    (e) undersize box gutter;

    (f) rotting timber frames:

19. In addition, Mr Storm also notes in his report that the substrate flooring of the outdoor entertaining area is made from particle board flooring, which he opines is contrary to AS1860, when used in an outdoor application. The Vendor did not adduce any evidence disputing the expert opinion expressed by Mr Storm in his report, notwithstanding his admission that he had been provided with a copy of that report prior to the hearing of this application.

20. As indicated above, the applicants also obtained a quotation from C & J Designer Homes to undertake the work set out in the building inspection report prepared by Mr Storm for a price of $38,200.

HOW IS LIABILITY OF THE VENDOR ESTABLISHED?

21. The Vendor relies upon the terms of the sale contract and the building inspection report attached to the vendor's statement to support his argument that he is not liable for any defects associated with the garage. In particular, under the heading *Planning and Building Controls*, the sale contract states:

> 3. The purchaser:
>
> (a) accepts the property:
>
> (ii) in its present condition with all defects and any non-compliance with any of those controls or approvals.

22. Similarly, the report attached to the vendor's statement states:

> The garage has a box gutter problem that needs immediate attention by a licensed plumber.

23. Section 137C of the *Building Act* 1993 incorporates a number of warranties into contracts for the sale of residential properties constructed by owner builders, such as the present case. That provision states, in part:

> (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.

24. As I have already indicated, no contrary evidence was adduced or submissions made challenging the matters raised in the expert report of Mr Strong. In fact, the Vendor readily accepted that there are water ingress problems associated with outdoor entertainment area. Consequently, I find on the balance of probabilities that the work relating to the garage roof and outdoor entertainment area has not been carried out in a proper and workmanlike manner, in breach of the warranties implied into the sale contract under s. 137C of the *Building Act* 1993. However, the question arises whether the sale contract can exclude the operation of that warranty, as contended by the Vendor.

25. Section 137C(3) of the *Building Act* 1993 states:

> 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 sub-section (1) is void to the extent that it applies to a breach other than a breach that is known or ought reasonably to have been known to the person to exist at the time the agreement or instrument was executed.

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.

WAS THE PROPERTY PURCHASED WITH NOTICE OF THE DEFECTS?

27. The Vendor relies upon the report attached to the vendor's statement and what he says he told the applicants during the course of their

inspection of the Property as evidence that the applicants knew of the problems associated with the outdoor entertainment area.

28. Having considered the material before me and the evidence of all parties, I find that the applicants were not properly advised of the defects relating to the outdoor entertaining area.

29. I do not accept the evidence of the Vendor that he had always intended to enclose the outdoor entertainment area and that he had told the first applicant that a roof was required to be constructed over the area in order to remedy the problems of water ingress. That statement is inconsistent with the approved architectural plans provided to me during the course of the hearing, which did not show any roof structure over the garage entertainment area.

30. In my view, enclosing the outdoor entertainment area would defeat the whole purpose of having an outdoor entertaining area. In that respect I note that the colour brochure marketing the Property expressly stated that the Property had a *garage topped by stunning outdoor entertainer*.

31. I do not accept, as contended by the Vendor, that the Property was sold with the knowledge that the applicants had to construct a roof over the outdoor entertaining area in order to remedy water ingress problems. That proposition is inconsistent with the applicant's evidence and the way in which the Property was marketed.

32. Further, I do not accept that the report attached to the vendor's statement adequately informs the applicants of the problems which they now experience. Indeed, it would appear from the building inspection report of Mr Strong, that the main problem is not merely confined to the box gutter but rather, that the waterproof membrane (if any) under the tiles has failed. In addition, there are other items of defective work which are not mentioned at all in the building inspection report attached to the vendor's statement. Consequently, I am of the opinion that the sale contract and vendor's statement do not exculpate the Vendor from liability.

33. As I have already indicated, I am not satisfied on the evidence before me that the Vendor adequately informed the applicants of the problem associated with the outdoor entertainment area. I therefore do not find that the Owner purchased the Property with such knowledge, nor do I consider that she ought to reasonably have known about the defects prior to her purchasing the Property.

34. Consequently, I find in favour of the Owner on the question of liability. I do not find in favour of the first applicant because no evidence was adduced that had a proprietary interest in the Property.

QUANTUM

35. Turning to the question of quantum, the Vendor indicated that he disputed the quantum claimed. He also said that he had not considered the scope of the rectification work in any great detail. Consequently, I am reluctant to accept that the reasonable cost of undertaking rectification work is $38,200 without giving the Vendor an opportunity to say something further as to the quantum claimed. My reluctance is heightened by the fact that the author of the quotation provided by C & J Designer Homes was not called to give evidence nor does the quotation give an individual cost for each item of work described therein. In my view, to accept the quotation without giving the Vendor a further opportunity to consider the contents of the quotation and adduce additional evidence or make further submissions, if he wishes, would be procedurally unfair.

36. Accordingly, I will at this stage determine the Owner's claim in her favour but only on the question of liability. I will reserve my decision as to quantum to allow the Vendor to either make further submissions or file further material going to the question of quantum only.

37. I will therefore order that the proceeding is referred to an administrative mention on 12 December 2011, by which date the Vendor must indicate to the Principal Registrar in writing whether he wishes to make further submissions or file further material going to the question of quantum. Should the Vendor not inform the Principal Registrar in writing that he requests a further hearing or intends to file further material, I will presume that the accepts the quantum claimed by the applicants and will order in favour of the Owner in the amount of $38,200, based on the quotation from C & J Designer Homes.

SENIOR MEMBER E. RIEGLER