VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP183/2019

CATCHWORDS

Sale of land with incomplete house – owners claim against vendor and builder – claims against vendor fail but claims against builder succeed in part – *Domestic Building Contracts Act* 1995 s 8.

FIRST APPLICANT	Robyn Miskec
SECOND APPLICANT	Robert Miskec
FIRST RESPONDENT	Paragon Estate Pty Ltd (ACN: 053 787 518)
SECOND RESPONDENT	Simary Investment Pty Ltd (ACN 131 664 474)
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	22 October 2019
DATE OF ORDER	14 November 2019
DATE OF REASONS	14 November 2019
CITATION	Miskec v Paragon Estate Pty Ltd (Building and Property) [2019] VCAT 1741

ORDER

1. The first respondent Paragon Estate Pty Ltd must pay to the applicants $8,186.20.

2. The first respondent Paragon Estate Pty Ltd must also pay to the applicants $212.50 to reimburse them for the filing fee they paid, so that the total amount payable under this order is $8,398.70.

A. Vassie
Senior Member

APPEARANCES:

For Applicants	Ms. R. Miskec
For Respondents	Mr. S. Leong, Director

REASONS

1. The first respondent Paragon Estate Pty Ltd ("Paragon") is a builder. The second respondent, the correct name of which is Simary Investments Pty Ltd ("Simary"), is a property developer. Simon Leong is a director of both companies.

2. On 12 October 2016 the applicants Robyn Miskec and Robert Miskec purchased from Simary land at unit 4, 109 Aitken Street Gisborne for $410,000.00. The land was described in the contract as a lot in a proposed plan of subdivision. Under the contract the Miskecs were required to pay the balance of the purchase price within 14 days after they received notice of the registration of the plan of subdivision. The plan became registered, they received notice of registration, and they settled the purchase by paying to Simary the balance of the purchase price.

3. At the date of the contract there was a partially-built house on the land. It is common ground between the parties that Paragon was the builder of the house. By the date of settlement the house had been completed to a state that the Miskecs were able to take up occupancy of it. The respondents say that it had been fully completed by that date. The Miskecs say otherwise.

4. The oddity in the contractual arrangements is that there was no written contract between the Miskecs and Paragon that would require Paragon to complete the construction of the house for them, and nothing in the contract of sale between Simary and the Miskecs that would require Simary to ensure that the house was complete, or fit for occupation, by the date of settlement. The oddity has not led to any serious consequences. The Miskecs ended up with a house that was fit for occupation.

5. Nevertheless the Miskecs have made claims in this proceeding for compensation from both respondents. Their claim against Simary is for damages for breach of contract. Because of concessions that Mr Leong has made on Paragon's behalf they also have a maintainable claim against Paragon.

6. At the hearing on 23 October 2019 Robyn Miskec represented the applicants and gave evidence. Her aunt, Johanna Charles, gave evidence for the applicants. Mr Leong represented both respondents and gave evidence for them.

7. The Miskecs relied upon the contents of two expert reports. The first was by Tony Croucher of Tony Croucher & Associates Pty Ltd dated 19 October 2017 following his inspection of the house on the previous day. The second was by David White, an assessor appointed by Domestic Building Resolution Victoria under the *Domestic Building Contracts Act 1995*; Mr White's report

is dated 4 September 2018 and states that he had visited the site on 30 July 2018 to make the assessment. Both reports describe the address as unit 2, 92 Persfield Road Gisborne, which was not the way that the contract of sale had described the address, but it is the same land being described.

The Claims Against Simary

8. The Miskecs have made three claims against Simary:

(i)	Security system not provided	$3,107.50
(ii)	Pergola not constructed	$2,940.00
(iii)	Electricity meter not installed	$ 515.58
		$6,563.08

9. *Security system*. At the hearing Ms Miskec produced a document headed "General Building Specifications for 109 Aitken Street Gisborne as at 12/2/2015". Mr Leong gave evidence that it was a document that Simary prepared for the assistance of Paragon and its sub-contractors. The document listed 28 items in two columns. One of those items identified in the first column was "Security Alarm System"; the second column contained the word "Provided" next to that item.

10. It was not clear how the Miskecs came to be in possession of this document or when they gained possession of it. Ms Miskec told me that she believed that the real estate agent for Simary in the sale of the land gave her husband the document before the contract of sale was signed. However, Mr Miskec did not give evidence and was not present during the hearing. Without any evidence from him I am not satisfied that the Miskecs have established that either Simary or Paragon had given them notice of the document before the contract was signed or had done anything else before the contract was signed that would support a finding that the document was part of a contract between the Miskecs and either or both of the respondents.

11. The contract of sale made no reference to any building specifications. Special condition 8 provided as follows in its first two paragraphs:

> **Special condition 8 – Variation to Building Works**
>
> The Vendor may vary the building contract by making such minor changes to the Plans as it considers necessary or by changing the construction details, appliances, fixtures, fittings and finish described in the Plans or Inclusion List provided that these changes must not reduce the quality of the home.
>
> The Purchaser acknowledges and agrees that the property forms part of a development which may not be completed at the date of settlement. The Purchaser acknowledges that they must allow the Builder access to the property after the settlement date to carry out any works including but not limited to Building work, rectifying Defects or rectifying defects on another Lot on the Plan of Subdivision or on the Common land.

The contract did not define "the Plans" or "Inclusion List" and did not have any document attached to it which might have corresponded to one or other of those categories. It did define "Builder", but only as "a builder which enters into a contract with the vendor to carry out the Building Works".

12. Mr Leong gave evidence that in 2015 he and his companies had envisaged the provision of a security alarm system for the house to be built on the land that the Miskecs had purchased but before the time of sale had decided not to include it. He pointed to the first paragraph of Special Condition 8 and argued that it prevented the Miskecs from establishing that a promise to install a security system was a term of the contract they had with Simary or a term of any contract they had with Paragon. I accept that a variation to a contract by exclusion of any promise to install a security alarm system would not be a change that would "reduce the quality of the home", so that the first paragraph of Special Condition 8 would have an operation, but its only operation would be upon "the building contract", an expression that appears to refer to a contract between Simary and the "Builder", not to any contract to which the Miskecs were parties.

13. Ms Miskecs gave evidence, which I accept, that she and her husband intend to install a security alarm system. They have a quotation for $3,107.50 for installation of a security alarm system. Simary also sought quotations for a security alarm system, the higher of which was for $1,350.00. It is likely that Simary's quotation is more realistic because it would have been based upon Simary's instruction as to the type and quality of system that it had originally envisaged as being provided, whereas the Miskecs had no knowledge of that type and quality. Had the Miskecs made out this claim, I would have awarded $1,350.00.

14. But the claim fails because the Miskecs have not proved on the balance of probabilities that it was ever a term of their contract with Simary that Simary would ensure the installation of a security alarm system or that Simary ever represented to them that it would.

15. *Pergola*. Ms Miskecs produced another document which was a floor plan for "unit 4, 106 Aitken Street, Gisborne". Its date was "Dec 2010". It showed a pergola. Ms Miskecs gave evidence that she saw this when she signed the contract of sale at the real estate agent's office. Mr Leong gave evidence that the floor plan did correspond to what his companies had originally intended to build on the land but they had had a change of intention well before the building of the house had begun or before the land was offered for sale. He also relied upon Special Condition 8 but that is less helpful to Simary then it was in relation to the security alarm system because a change by omission of the pergola would have reduced "the quality of the home" and so the first paragraph in the condition would have had no operation.

16. The gap in time between "Dec 2010", the date the floor plan bears, and 12 October 2016, the date of the contract, and the fact that there is no mention in the contract of a pergola or what "the Plans" were, tell against a contention that the floor plan was part of the contract between Simary and the Miskecs. I find that it was not. Despite Ms Miskec's evidence that she saw the floor plan before she signed the contract, there was no evidence of reliance by her or by her husband upon the floor plan as an inducement to enter into the contract, or of what they would have done if they had been told that there would be no pergola, so any misrepresentation by the real estate agent does not lead to any legal remedy for them.

17. Again I accept Ms Miskec's evidence that she and her husband intend to build a pergola in any event. She has obtained a quotation for $2,940.00 from a contractor who, she told me, had been to her home and had inspected the site before quoting. Mr Leong supplied a quotation from another contractor for $2,376.00 who had not inspected the site but had worked from plans. Had I been persuaded by the Miskecs' case about the pergola I would have preferred their quotation and would have awarded them $2,940.00. But their claim for this item fails for the reasons I had given in the previous paragraph.

18. *Electricity meter*. When the Miskecs entered into possession of the house after settlement there was no electricity meter installed. They installed one themselves at a cost of $515.58. They claim that amount from Simary.

19. Special conditions 10 and 16 in the contract of sale provided:

> **Special condition 10 – Services**
>
> The Vendor will ensure water, gas, electricity and sewerage will be made available to the property and it is the Purchasers responsibility to make the necessary application for gas and electricity connections to the dwelling prior to settlement and all costs in relation to the connection will be borne by the purchaser.
>
> **Special condition 16 – Connection charges**
>
> On settlement, the Purchaser must allow in favour of the vendor an amount equal to the amount or amounts paid by the Vendor to connect any service to the property into the name of the Purchaser including but not limited to electricity, gas, water and sewerage services and meters.

In view of Special Condition 16, in particular, Simary would have been entitled to recover from the Miskecs the cost of installation of an electricity meter if Simary had had one installed. Regardless of who installed the meter, the contract provided for the Miskecs to bear the expense. They have no right to recover the cost of installation from Simary.

20. All three claims made against Simary have failed.

The Claims Against Paragon

21. The Miskecs have made eight claims against Paragon:

(i)	Builder's clean	$ 400.00
(ii)	Fences	$ 5,336.10
(iii)	Front door	$ 895.00
(iv)	Water tank	$ 2,400.00
(v)	Excess water charges	$ 189.50
(vi)	Further clean	$ 400.00
(vii)	En-suite tiles	$ 2,100.00
(viii)	Tony Croucher's report	$ 2,612.00
		$14,331.10

22. At the hearing Mr Leong not only admitted that Paragon had built the Miskecs' home but also told me that Paragon accepted that, if the Miskecs made out any of the above eight claims, Paragon would be liable to pay them compensation. I have taken Mr Leong's statements as being concessions that:

    (a) there had been a domestic building contract, within the meaning of the *Domestic Building Contracts Act 1995*, between Paragon and Simary;

    (b) that contract had included the statutory warranties created by s 8 of that Act whereby the builder warrants that its work will be carried out in a proper and workmanlike manner and with reasonable care and skill;

    (c) the Miskecs as owners are now entitled to the benefit of those statutory warranties; and

    (d) the making out of any of those claims would be a breach of those warranties that had caused loss or damage to the Miskecs.

23. Once the Miskecs had provided Paragon with a copy of Mr Croucher's report dated 19 October 2017 Paragon remedied some of the building defects mentioned in the report. But there are some, say the Miskecs, that Paragon has not remedied.

24. *Builder's clean*. Mr Croucher's report supported the Miskec's evidence that Paragon had not cleaned the house satisfactorily before she and her husband took possession of it. They engaged their own one contractor who charged them $400.00 for the clean She produced the contractor's invoices.

25. Mr Leong did not dispute that Paragon was obliged to have performed a builder's clean but opposed the claim because he had received no complaint before settlement about the state of the house; had such a complaint been made he would have required Paragon's cleaning contractor to perform a better clean at its own expense. Ms Miskec admitted that she had made no

complaint before settlement and said that she had been advised by her lawyers not to attempt to withhold any amount from the balance of purchase money on account of any monetary claim she and her husband had but to settle the purchase and make the complaint later. I think that was good advice. The claim for the clean is reasonable in the circumstances. I allow $400.00.

26. *Fences*. Paragon had engaged a sub-contractor, Mick Godfrey, to construct perimeter wooden fences on three sides around the land. The Miskecs say that the fences were constructed poorly and ought to be demolished and replaced. They have obtained from Rangeland Fencing a quotation of $5,336.10 for the cost of removing and replacing the existing two side fences and the back fence.

27. Mr Croucher included in his report a comprehensive criticism of the standard of the fencing work, supported by photographs. Mr Leong got the fencer to return and do rectification work. He told me that the fencer had said that the Miskecs were satisfied with the result. Once they had begun this proceeding he got the fencer to go back again and do any necessary further rectification work. Mr Godfrey did go back, but reported that there was nothing wrong with the fences and supplied photographs.

28. The quotation from Rangeland Fencing, which was dated 21 May 2019, made many criticisms of the state of the existing fences: fence posts in backfilled material allowing movement, palings fixed too wide and inadequacy nailed and starting to split, and "several rails have twisted".

29. Ms Miskec produced two photographs of a fence at the side where a water tank is situated. The photographs showing a bowing of a large section of the fence to an unacceptable degree. That fence has been poorly constructed. The Miskecs are entitled to be compensated for the cost of removing and replacing the fence on that side. Otherwise, the photographs that Mr Godfrey supplied to Mr Leong – selective though they must have been because they did not include a photograph of the bowed fence – show fences in reasonable condition. I am not satisfied that the other two fences need to be removed and replaced.

30. The floor plan to which I referred earlier suggests that the three fences are likely to be similar in length. I conclude that the cost of removing and replacing the bowed side fence would be one-third of the quoted figure of $5,336.10, which is $1,778.70. I allow the claim in that amount.

31. *Front door*. There had been difficulties with the front entrance from the beginning. Mr Croucher had reported on gaps between the door and the doorway frame and the absence of weather-proof seals, Mr White also referred to the absence of seals. Paragon did attempt some rectification work on those matters. Now the Miskecs say that they ended up having to replace the front door with one that fitted better. They have produced a tradesman's invoice for $795.00 and Ms Miskec gave evidence that they paid a handyman $100.00 to paint the door.

32. Mr Leong objected to the claim, saying that if the Miskecs had told him that the door itself was defective he would have been able to get the manufacturer to provide a replacement door at no cost. The evidence, however, seemed to be not that the door itself was defective but that it would not fit properly as a consequence of other defects and attempts to remedy them. I consider that the Miskecs have proved this claim. I allow $895.00.

33. *Water tank*. The Miskecs claim that the water tank, installed by Paragon or its sub-contractor and placed upon a concrete slab, is slowly tilting towards the side wall of the house. They say that it requires a new slab base. They have obtained a quotation from Charles Bros, builders, for $2,400.00 as the cost of removing the existing slab, preparing for and pouring a new slab, and reinstalling and reconnecting the tank. The written quotation includes the observation that the tank "has been installed on unsuitable slab base".

34. Mr White in his report had given an opinion that the catchment area for the tank was not large enough to comply with the relevant Australian Standard. Mr Leong gave evidence that in the course of attending to that problem the slab had been taken up and replaced. Ms Miskec gave evidence that in the course of attempted rectification work Paragon or its sub-contractor had broken the tank and had to replace it.

35. A photograph provided by Ms Miskec showed the water tank in the distance (between the bowed fence and the side wall) but one cannot tell from the photograph whether the tank is tilting.

36. There is a lack of expert evidence about this item. Mr Croucher did not mention it at all. Mr White's report says nothing about the slab. There is only the unexplained sentence in the quotation from Charles Bros about the base for the slab being unsuitable. I can make no finding about whether the tank is tilting. If it is, I consider that Miskecs have not established that the cause is anything that Paragon has done or has failed to do. I do not allow the claim.

37. *Excess water charges*. This claim is explained by the Miskecs in their Points of Claim as "estimated excess usage component due to water tank not working for the first 6 months". The claim is for $189.50, which is half of $379.00. The only evidence that Ms Miskec gave about this is that her husband had made that calculation. She could not tell me how he had done it or what the figure of $379.00 represented. Proving in any circumstances that an increase in water charges is caused by a particular fact or event is difficult at the best of times. It has not been proved in this case. I do not allow the claim.

38. *Further clean*. Ms Miskec gave evidence, which I accept, that when rectification work on the water tank was done the workmen left some gravelly debris behind near the fence which is bowing. Paragon had an obligation to make good or clean up following the work. It did not meet it. The claim is for $400.00 for the estimated cost of removing the debris. It is reasonable. I allow it.

39. *En-suite tiles*. Directly in front of the toilet in the en-suite is a stained tile, cut to fit next to the base of the toilet bowl. A photograph of the tiles shows that clearly. Ms Miskec gave evidence, which I accept, that the stain was already there when she and her husband took possession of the house and that all of her attempts to clean it have been futile. The claim is for $2,100.00 which is the amount of a quotation for replacement of all the floor tiles in the en-suite, which Ms Miskec acknowledges is a worst case scenario.

40. Mr Leong gave evidence that the tiles of the kind used for the en-suite floor were still available from the supplier and that it would take no more than half a day for a tiler to replace the stained tile. He did not produce any document from the tile supplier that might have supported his assertion that tiles of the same kind were still available.

41. It is far from obvious that merely replacing the one stained tile is a feasible means of rectifying this building defect. I have concluded that I should accept the evidence of the cost of replacement of all the tiles as proof of the cost of rectifying the defect. I allow $2,100.00.

42. *Tony Croucher's report*. The cost of the report was $2,612.50, as Ms Miskecs proved. It was reasonable for the Miskecs to have sought expert assistance in identifying defects and presenting them in a way which persuaded the builder to return to the site and attempt to remedy them, as Paragon did. This expenditure is a consequence of defective building work which exposed Paragon to a claim for the cost of rectifying defects. It is an item of damage rather than an item of costs, even though it was also evidence that supported the Miskec's case in this proceeding. I allow the claim for $2,612.50.

43. *Summary*. The claims against Paragon that I have allowed are:

(i)	Builder's clean	$ 400.00
(ii)	Fences	$1,778.70
(iii)	Front door	$ 895.00
(vi)	Further clean	$ 400.00
(vii)	En-suite tiles	$2,100.00
(viii)	Tony Croucher's report	$2,612.00
		$8,186.20

Costs

44. The Miskecs have claimed $738.10 as their solicitor's costs and $212.50 for the filing fee that they paid for their initiating application in this proceeding.

45. There is a presumption that they are entitled to an order that Paragon pay them the amount of the filing fee if they have been substantially successful in the proceeding: *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") ss 115B and 115C. In considering whether they have been substantially successful I ignore the claims against Simary which failed and have regard to the claims against Paragon. They have succeeded in obtaining an order for payment of more than half of the amount that they claimed. In my view they have been substantially successful against Paragon and are entitled to an order, which I make, that Paragon pay them $212.50.

46. Otherwise, the VCAT Act provides in s 109(1) that parties are to bear their own costs in a VCAT proceeding. By virtue of s 109(2) the Tribunal may order one party to pay costs to another if it is satisfied that it is fair to do so, having regard to criteria set out in s 109(3) which include any other matter the Tribunal considers relevant. After having had regard to all of those criteria I am not satisfied that it would be fair to require Paragon to pay any costs other than the filing fee of $212.50.

Outcome

47. There will be an order that Paragon must pay the Miskecs $8,186.20 plus $212.50, a total of $8,398.70.

A. Vassie
Senior Member

14 November 2019