VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D136/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – Building Act 1983 – s.137B – implied warranties upon the sale by an owner builder – Breach of warranties – Building Regulations 2006 – Reg. 608 - alterations increasing the volume of an existing building - where alterations of existing building more than one half of original volume of building whole building to be made compliant – dwelling one of a pair – whether "building" is the two dwellings or the dwelling that was extended – found to be confined to the dwelling being extended– consequently whole dwelling to be made compliant but not adjoining dwelling.

APPLICANTS	Ronald Balthazar Sukkel, Susan Meredith Sukkel
RESPONDENT	Melissa Anne Mary Rush
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	28 June 2010
DATE OF ORDER	9 July 2010
CITATION	Sukkel v Rush (Domestic Building) [2010] VCAT 1130

ORDER

Order the Respondent to pay to the Applicants $25,356.50.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr R. Sukkel and Mrs S. Sukkel in person
For the Respondent	Ms M. Rush in person

REASONS

Background

1 The Applicants in application D136/2010, Mr and Mrs Sukkel ("the Owners"), are the owners of the dwelling house and land ("the House Lot") at 72 Goldsmith Street Elwood. They purchased the House Lot by contract of sale dated 29 August 2009 from Ms Rush, who is the Respondent in D136/2010 and the applicant in OC248/2010.

2 The House Lot originally had a substantial backyard, but by a plan of subdivision dated 2 November 2006, it was divided into three, the House Lot at the front, incorporating the front garden, whole of the house ("the House") and part of the back yard, and the other two Lots of 106 sq metres and 108 sq metres respectively, being at the rear and fronting onto the laneway.

3 Before selling the House Lot to the Owners Ms Rush carried out an extensive renovation to the rear of the House to build a kitchen, powder room, laundry and combined dining/living area on the ground floor and two bedrooms, a bathroom and a deck on the upper floor. Most of the upper deck was built over the dining room ceiling.

4 Ms Rush had engaged a builder to carry out the construction but before he completed the slab excavation the builder ceased his involvement in a manner which is not clear from the evidence. Ms Rush then took over the construction as an owner builder.

5 A certificate of final inspection was issued on 21 September 2005. Because of the building work that had been done and the operation of s137B of the *Building Act* 1993, Ms Rush should not have sold the House Lot without first complying with that section. She did not do so, but no claim is brought in regard to that.

The defects claim

6 The Owners complain of a number of defects in the House. They complained to Ms Rush about the defects but no agreement was reached and this proceeding was issued on 2 March 2010 seeking damages of $18,556.

7 Directions were given on 15 April 2010 for the filing of (amongst other things) Points of Claim and Points of Defence. A compulsory conference held on the same day failed to settle the matter.

The implied easement claim

8 By proceeding OC248/2010, Ms Rush took proceedings against the Owners, seeking an order pursuant to s.34B of the *Subdivision Act* 1998, to the effect that she was entitled to an easement over the House Lot which she said was implied by s.12(2) of that Act. This easement was, she says, for the passage of water from the metre at the front of the House Lot

diagonally across the front garden to the boundary between the House Lot and the laneway. From that point the pipe was to enter and then travel down the laneway to the frontage of the two rear units.

9 The Owners denied that there was any easement implied by s.12 and said that, since the two rear units front onto a laneway, there is no necessity for such an easement.

The hearing

10 Both matters came before me for hearing on 28 June 2010. The parties were unrepresented and I heard both cases together. In the meantime, further material had been filed on behalf of the Owners, seeking an additional $750.00 with respect to a bathroom window and $7,750 for the installation of a fire rated wall. These issues were also argued at the hearing.

11 I heard evidence from the two Owners on their own behalf and from Ms Rush and Mr Dean for Ms Rush. I also heard the evidence of the expert witness, Mr Adlawin and from two former occupants of the House, Mr Domes and Ms Scommazzon.

12 At the conclusion of the proceeding Ms Rush indicated that she wished to forward to me a quotation that she received from her builder. After some discussion I informed her that I would receive the document provided that she sent a copy also to the Owners and that I received it within 7 days. That was done.

The implied warranties

13 Since Ms Rush was an owner-builder, the contract for the sale of the House Lot to the Owners contained the implied warranties set out in s137C of the *Building Act* 1983. Sub-section 1 of that section 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 The defects complained of are set out in the Archicentre report which was prepared by an Architect, Mr Alan Green. Further evidence was given by Mr Adalwin. I find the following defects proven. In each case the defect

amounts to a breach of the implied warranties and the Owners are entitled to damages being the cost of rectification.

15 As to the cost of rectification, the Owners have produced a quotation from a builder They have also tendered a letter from the Architect who prepared the report who says that the quoted figure for that and other items of work was fair and reasonable. He adds that it was less than the "rough estimate" that he gave at the time and suggests that a figure be allowed for contingencies of between 10% and 20% for hidden items that might be uncovered. They have also produced a later quotation from the same builder as to the last two items. The total of all these items is $25,356.50. Particulars are as follows.

No flashing

16. There was no flashing installed under the underside of the tiles in the gutter leaving an opening gap about 100mm deep. Not only did this allow birds to enter a nest in the roof space, the absence of flashings meant that the windows leaked. Photographs were tendered showing water on the window frames. The Owners have since had the necessary flashing installed at a cost of $2,500. This should be allowed.

Lack of insulation

17. The insulation was very poor and quite insufficient to achieve the required 4 star energy rating. The quotation to replace the insulation is $1,800 which will be allowed.

External balcony

18. There are a number of problems in regard to the external balcony. It leaks into the room below. According to the Archicentre report there are fine cracks between the grout and the tiles and Mr Green has said that it is apparent that a breakdown of the waterproofing membrane under the tiles has occurred or that no waterproofing membrane has been installed. He also comments on water ponding on the balcony due to insufficient fall.

19. An associated problem is the top step that leads from the balcony down to the rear yard. All of the risers are of a uniform height except for the top one, which is 20mm higher than the others. That is a potential hazard and, as Mr Adalwin agreed, is probably due to the thickness of the tiling. A professional builder would have taken that into account in installing the steps and either positioned the top riser or adjusted the fall on the balcony accordingly. Neither has been done and this needs to be addressed. For this reason I accept the expert evidence that the balcony needs to be reconstructed. This will increase the fall so as to eliminates the problem with the top riser of the step and also prevent water from ponding on the balcony.

20. The quotation obtained by the Owners to reconstruct the balcony was for $5,975.00 plus GST, making $6,572.50. As stated above, Mr Green

considered the figures in the quotation reasonable and advised that a contingency should be added.

21. Mr Adalwin said in his report that an estimated cost to do reconstruct the balcony was $3,500 including the cost of demolition and clean up. In his evidence he said that would include adjusting the level of the balcony. His figure is an estimate whereas the Owners' figure is what someone is willing to do the work for. In view of Mr Adlawin's evidence I will not allow any contingency sum.

The downstairs bathroom

22. In the downstairs bathroom, the joins between intersecting planes in the shower recess were grouted instead of sealed with a flexible sealant as required by the Building Code of Australia ("the BCA"). Water has penetrated through to the adjoining rooms. Evidence was given by two former occupants of the House to say that they did not notice any dampness in the shower while they were living there but there is clearly dampness in the two walls that adjoin the shower recess. Since this is localised dampness and does not effect the rest of the walls I think that Ms Rush's explanation that it is rising damp due to the age of the House is an unlikely one. I think it is more likely to be, as Mr Green said, that it is due to water penetrating from the bathroom shower.

23. It is therefore appropriate, as Mr Green said in his report, to allow for the retiling of the bathroom and I will allow the amount of the quotation of $3,720 plus GST, making $4,092.00. I note that Mr Adalwin said that the cost should be about $3,000 but that is an estimate and he has not offered to fix it for that sum.

The external privacy screen

24. There is an external privacy screen erected on the boundary of the balcony and the adjoining property. It is of lightweight construction; that is, a timber frame sheeted with fibro-cement sheet. Mr Adalwin said that he is unable to ascertain whether the sheeting was blueboard or some other fibro-cement product. The nails are popping and cracks have appeared between the sheets. Mr Green said that water will enter those cracks and rot the timber support frame. The problem seems to be related to inadequate nailing and fixing of the sheets and the quote of $1,320 plus GST ($1,452.00) to do that has been said by Mr Green to be reasonable.

The sewer vent

25. There was a vent pipe that finished within the roof space instead of projecting through the roof. This has been rectified at a cost of $440.00. the plumber's bill has been tendered which contains a detailed description of the work.

The bathroom window

26. There is a sash window in the upstairs bathroom adjacent to the end of the bath. The shower is over the bath in this position. The BCA requires this to be toughened glass and it is clear from the evidence that it is not. The BCA also requires the window closure to permit the window sash to open no more than 125mm for ventilation in order to prevent anyone from falling out of the window. This window has an ordinary closing mechanism that, when released, allows the window to fully open. It is clear on the evidence that the glass needs to be replaced and a proper catch needs to be installed. I find that the quote of $750 sought is a fair and reasonable sum for that.

The fire rated wall

27. The final and most significant item is the lack of a fire rated wall to the roof space. The dwelling is one half of a building that was built as a pair of single dwellings in the years when no fire separation was required between two semi-detached houses. There is therefore no fire separation in the roof to stop the spread of fire from one dwelling to the other. According to Mr Green the Building Regulations require a building undergoing renovation to conform to the requirements of the current regulations if the alterations "represent more than half the original volume of the building". In such a case, he says, "… the entire building must be brought into conformity with the regulation".

28. It is necessary to look carefully at the precise wording of the regulations he is referring to, which are the *Building Regulations* 2006.

29. Regulation 109 provides that the Building Code of Australia is adopted by and forms part of the regulations, as modified.

30. Regulation 608(1) to (3) is in the following terms:

> "(1) This regulation applies to alterations to an existing building.
>
> (2) Subject to this regulation and to regulation 609, building work to alter an existing building must comply with these Regulations.
>
> (3) If the proposed alterations, together with any other alterations completed or permitted within the previous 3 years, represent more than half the original volume of the building the entire building must be brought into conformity with these Regulations."

31. Regulation 608(4) states:

> "The relevant building surveyor may consent to partial compliance with sub regulation (2) or (3)."

32. Regulation 608(5) then goes on to provide the matters the building surveyor must take into account in determining whether to give a consent under Regulation 608(4). Regulation 608 (6) provides that, if any part of the alteration is an extension to an existing building, the building surveyor may only consent to partial compliance in respect of the extension if the floor

area of the extension is not greater than the lesser of 25% of the floor area of the existing building or 1,000 sq. metres.

33. The building surveyor passed the work and granted a Certificate of Occupancy without any fire separation in the roof on the basis that, as he interpreted the regulation, "the building" means the whole building comprising both dwellings. On that basis, the extension does not represent more than half the original volume of that building. On the other hand, if "the building" means the single dwelling then it does. How is the regulation to be interpreted?

34. There is no evidence in this case as to whether or not the building surveyor took any of the matters in Regulation 608(5) into account but it is plain that he did not require compliance with the BCA, which would have required a fire rated wall in the roof space to separate the two dwellings.

35. In both instances, it is a question whether "building" means the building as a whole or a single dwelling.

36. It is questionable whether a power to consent to <u>partial compliance</u> means that the building surveyor can dispense with compliance altogether, although "partial" may be interpreted as referring to the part of the requirements of the BCA that require the construction of the fire wall in the roof. I do not need to consider that.

37. The term "building" is not defined in the regulations themselves but is defined in the *Building Act* 1983 in the following terms:

> "Building includes structure, temporary building, temporary structure <u>and any part of the building or structure</u>".

38. Regulation 608 contemplates that the "existing building" is the building that is being altered. Only the half belonging to Ms Rush was being altered. The consequences of having to comply with Regulation 608 are to bring the <u>whole building</u> into conformity with the regulation. In the case of two dwellings with different owners, if "building" encompassed both dwellings then the effect of the regulation would be that an owner wishing to extend one of the dwellings might (depending upon the extent of the renovation) be forced to bring the entire building including the dwelling owned by the adjoining owner into conformity with the BCA. That would be not only be an absurd result but it would also be unjust as far as the first mentioned owner is concerned. It would also impossible to comply with without the consent and co-operation of the owner of the adjoining dwelling.

39. As a consequence, when the Regulation refers to an "existing building" it is referring to the dwelling that is being altered, in this case, one half of a larger structure encompassing the two dwellings. Were the Regulation interpreted otherwise that would lead to the absurd result referred to.

40. For these reasons I think the only sensible interpretation of Regulation 608 is that it applies to the building comprising the half that is being extended, not the dwelling to which it may be attached. Accordingly, there is a

requirement to install a fire wall in the roof and it was not open to the building surveyor to consent to the partial compliance of the BCA because the volume of the extension is greater than 25% of the volume of the existing "building", ie, the dwelling. I will therefore allow the amount quoted for the fire wall of $7,750.

The claim for an implied easement

41. Turning now to the other proceeding, the House Lot fronts Goldsmith Street with a frontage of 7.04 metres and extends down the lane for 36.5 metres. There is then Lot 1 with a frontage to the lane of 7.15 metres and Lot 2 on the corner of the lane and a rear lane with a small cut off for the corner and a with a width of 7.15 metres at the rear.

42. Water is currently supplied to the House Lot at the front boundary at Goldsmith Street from a water main in Goldsmith Street. It passes through a 20mm pipe to a single water meter that services the House Lot.

43. When subdivision of the land was first sought it was referred by the relevant council to South East Water as a referral authority prior to the council certifying the plan pursuant to the *Subdivision Act* 1988.

44. By a letter dated 15 May 2006 South East Water required the plan of subdivision to show a 2 metre wide sewerage easement along and within the northern boundary of the 3 lots, such easement to be in favour of South East Water. That was done. It then required a body corporate schedule in the plan of subdivision if it were proposed by the then owner, Ms Rush, that there be a common water supply. Alternatively, it said that the owner of the subject land could enter into an agreement with South East Water for the provision of separate services to each individual lot.

45. These alternatives were put to Ms Rush who opted for the first one. As a result of this there was a body corporate schedule added to the plan of subdivision.

46. Since there was no common property in the subdivision, the creation of an owners corporation was unnecessary (see s.27A). Without an owners corporation there would not have been any body corporate in which to vest any common meter which may explain why South East Water wanted to ensure that there was such a body. However the mere creation of a body corporate does not otherwise effect the owners of the units or the body corporate. There is still no common property.

47. On 27 January 2010 South East Water wrote an email to Ms Rush and her advisors to say that, since there was a body corporate, all lots on the plan of subdivision could share a common connection with South East Water's water supply. It said in its email that, in order for that to be done, the existing 20mm service to the front of the House Lot would need to be upsized to a 25mm service in order to provide sufficient supply to all 3 lots. All 3 lots would then have separate check meters connected to the common

main water meter in the House Lot to register the individual water usage for each lot. The last paragraph of this email reads:

> "Any issues will need to be resolved between the owners of the properties, or raised with the body corporate, as South East Water does not get involved with permission for access for internal services." (my emphasis)

48. On 24 February, Ms Rush's solicitors wrote to the Owners requiring them to grant access over the House Lot in order to obtain water for Lots 1 and 2. The author of the letter appears to have been under the impression that the water would travel from the common metre through the House Lot to Lots 1 and 2 as happens in a unit subdivision with a common metre. In fact, that was not Ms Rush's intention. What she proposed was that the pipe travel diagonally across the front garden of the House Lot in the position where it presently goes in order to service the House. She proposed that it would then continue out into the lane, and then run down the lane to the front boundaries of Lots 1 and 2.

49. Such a connection is clearly not what South East Water's communication contemplated. The contemplated pipe over the House Block would not be an "internal service" for the supply of water through the House Block to Lots 1 and 2 but rather, it would be a pipe to supply water outside the subdivision to a private pipe running down the lane for Lots 1 and 2.

50. The Owners objected to this proposal on the basis that it would create an easement over their land. They argued that Ms Hunt should take water for Lots 1 and 2 directly from the main and run the service down the lane through a proper pipe way constructed by South East Water. They said that they have been informed by the council that a private pipe way in the lane will not be permitted either by the council or by South East Water. Whatever view the council or South West Water take, I have to decide whether there is an implied easement of the nature asserted over the House Lot. In that regard, the problem is that the pipe does not run to the two lots. It runs out into the laneway. It is not suggested that Ms Rush has an easement or any other right to lay pipes in the laneway.

51. On 9 March 2010 Ms Rush obtained a further email from South East Water providing a quote of $20,244 to construct a water main in the laneway to service Lots 1 and 2. The email goes on to refer to the alternative of running water for all 3 units to the front of the House Block. What this email makes clear is that it is perfectly feasible and practical for Lots 1 and 2 to obtain water directly from the main in Goldsmith Street by extending the main down the laneway, albeit at the cost quoted.

52. There was considerable argument in regard to whether, by reason of the operation of s.12(2) of the *Subdivision Act* 1988 there is an easement over Lots 1 and 2 entitling Ms Rush to construct a water pipe over any part of Lot 3 in order to service Lots 1 and 2.

53. Section 12(2) provides as follows:

"Subject to subsection (3), there are implied—

(a) over—

(i) all the land on a plan of subdivision of a building; and

(ii) that part of a subdivision which subdivides a building; and

(iii) any land affected by an owners corporation; and

(iv) any land on a plan if the plan specifies that this subsection applies to the land;

and

(b) for the benefit of each lot and any common property—

all easements and rights necessary to provide—

(c) support, shelter or protection; or

(d) passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission); or

(e) rights of way; or

(f) full, free and uninterrupted access to and use of light for windows, doors or other openings; or

(g) maintenance of overhanging eaves—

if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property." (My emphasis)

54. It is apparent from this section in order for there to be an implied easement over the House Lot, the easement must be necessary for the reasonable use and enjoyment of Lots 1 and 2. That is not the case at all.

55. The evidence as to precisely how Ms Rush proposes to take the water from the common meter to Lots 1 and 2 is highly unsatisfactory. Mrs Sukkel said that she had been informed by Ms Rush's builder that he proposed to run the pipe down the laneway in the excavation done for the electricity cable. Mrs Sukkel said that she then made enquiries and ascertained that this was illegal. The allegation that she intended to run the water in this way was not denied by Ms Rush. There is no evidence at all to indicate that it is proposed to run the water from a common meter through the House Lot directly into Lots 1 and 2, whether down the shared sewerage easement or otherwise. From the direction in which Ms Rush wants the pipe to go it is clear that she intends to run it to the laneway as the Owners allege. If she is taking water for Lots 1 and 2 from the laneway then that should be done lawfully through a proper pipe constructed by South East Water. It is clear from the email from South East Water that such a service is available.

56. I am not therefore able to find that it is necessary to imply an easement over the House Lot as Ms Rush is seeking and her application is therefore dismissed.

SENIOR MEMBER R. WALKER