

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTYLIST

VCAT REFERENCE NO. BP1353/2015

CATCHWORDS

Domestic Building, exemption from the obligation of owner-builders to obtain domestic building warranty insurance (as required by s137B of the *Building Act 1993*) under s68 of the *Domestic Building Contracts Act 1995*, exceptional circumstances, undue hardship.

APPLICANTS	Mr Allan Turriff and Mrs Ursula Turriff
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	16 December 2015
DATE OF ORDER	21 December 2015
CITATION	Turriff (Domestic Building Exemption) (Building and Property) [2015] VCAT 2043

ORDER

1 The Tribunal orders pursuant to s68 of the *Domestic Building Contracts Act 1995* that the building situated at 64 English Street, Seville, Victoria on the property comprised in Certificate of Title Volume 10227 Folio 114 ("the Property"), is exempted from the operation of s.137B(2) (b) and (c) of the *Building Act 1993* subject to the following conditions:

- a. The Vendor's statement to be provided under s32 of the *Sale of Land Act 1962* and the contract of sale with respect to any sale of the Property must include, in prominent, bold type, the following clause:

WARNING:

There is no domestic building insurance in force with respect to the building works on the land sold.

- b. A copy of these orders and reasons must also be attached to the s32 statement.
- c. These orders do not alter or affect any obligation on the Applicant, in respect of any sale of the Property, to provide a building inspection report to an intending purchaser of the Property in accordance with section section137B(2)(a) of the *Building Act 1993*.

- d. The Vendor's statement to be provided under s32 of the *Sale of Land Act 1962* and the contract of sale with respect to any sale of the Property must include the following clause:

In respect of the home on the land:

- (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, the Building Act 1993 and the regulations made under the Building Act.*
- e. A copy of these orders and reasons must be annexed to the Contract of Sale of the Property and the Vendor's statement.
- f. If the Property is sold by public auction, the warning clause referred to in paragraph 1(a) above must be read out immediately before the auction.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants

Mr Allan Turriff and Mrs Ursula Turriff in person

REASONS

- 1 The Applicants who are owners-builders seek an exemption under s68 of the *Domestic Building Contracts Act* 1995 (“DBC Act”) from the operation of s137B of the *Building Act* 1993 insofar as it requires them to obtain domestic building warranty insurance:

137B. Offence for owner-builder to sell building without report or insurance

- (1) This section does not apply to—
- (a) the construction of a building (other than a home) by—
 - (i) a registered building practitioner; or
 - (ii) an architect registered under the *Architects Act* 1991; or
 - (b) except as provided in sub-section (5), the construction of a home under a major domestic building contract; or
 - (c) a building that is exempted from the operation of this section by the Victorian Civil and Administrative Tribunal under the *Domestic Building Contracts Act* 1995; or

...

- (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.

(3) A contract entered into in contravention of sub-section (2) is not void by reason only of the contravention but is voidable at the option of the purchaser at any time before completion of the contract.

...

2 Section 68 of the DBC Act provides:

68. Exemptions from owner-builder restrictions on sale

- (1) A person may apply to the Tribunal to have a building exempted from the operation of section 137B of the *Building Act* 1993.
- (2) The Tribunal may exempt a building from the operation of section 137B of the *Building Act* 1993 if it is satisfied that –
 - (a) there are exceptional circumstances; or
 - (b) full compliance with section 137B is impossible or would cause undue hardship.
- (3) In granting an exemption the Tribunal may impose any conditions it considers appropriate.

EVIDENCE

3 Mr Turriff gave evidence on behalf of the applicants. I accept his evidence that:

- a The Applicants obtained a building permit in 2005 to undertake renovation and extension work. The work consisted of:
 - i adding a family room and bedroom to the north,
 - ii adding a deck and extending the living room to the east,
 - iii reversing the position of the kitchen and dining room,
 - iv extending the size of the new dining room to the east,
 - v replacing a double carport with a double garage,
 - vi reconfiguring the laundry and bathroom, and
 - vii adding a rumpus room below the extended living room.

All of this work was undertaken in accordance with the stamped Building Permit Endorsed Plan dated 8 September 2005.

- b At the time the permit was obtained Mr Turriff was managing a company but one month later he was retrenched and then when he started a new job it was difficult for him to complete the work. His second employer went bankrupt and it was then difficult for the applicants to afford the materials. The result was that the applicants

were not in a position to finish the work and obtain an occupancy permit until June 2015.

- c The applicants sought domestic builders warranty insurance from VMIA, which was refused by letter dated 25 September 2015 and Australian Owner Builder Insurance Service Pty Ltd, which was refused by letter dated 1 October 2015. The grounds for refusal by both insurers was that there was an unduly long gap between the building permit and the final inspection.
 - d The applicants obtained a domestic building works owner builder construction report from House Inspection Services Proprietary Limited dated 1 June 2015 which identifies three defects being:
 - A1 No door hardware to sliding doors from Living to Bedroom and Bedroom to Bathroom.
 - A2 Wall cladding to double doors from Family to decking - poor finish requires attention.
 - A3 No membrane between timber decking and subfloor members.
 - e The applicants now seek to sell the property because the block is two thirds of an acre and hard to maintain. They are absent from the property for substantial periods and the property is two storey and they have difficulty with stairs.
- 4 I am satisfied that there are both exceptional circumstances and that full compliance with section 137B of the Building Act is impossible.

DISADVANTAGE TO POTENTIAL PURCHASERS

- 5 Nevertheless, section 137B has been included in the legislation for the protection of potential purchasers from defects that might be discovered in homes built under owner-builder permits. In order to protect such potential purchasers, I grant the exemption sought subject to compliance with the orders made.

SENIOR MEMBER M. LOTHIAN