VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP520/2017

CATCHWORDS

Domestic building, representation and s62 of the *Victorian Civil and Administrative Tribunal Act 1998*, application to join a further party – delay and proportionality given the claim size, alleged breach of off the plan sale, alleged breach of warranties under s8 of the *Domestic Building Contracts Act 1995*, extending for the benefit of a subsequent purchaser under s9, measure of damages, absence of television aerial, toilet and hand basin not connected to sewer, inability to use toilet and hand basin for a week, delay in repairing fence and restoring back yard, electricity use, physical injury – lack of jurisdiction, general damages for inconvenience.

APPLICANT	Ms Susan Chandler
FIRST RESPONDENT	Shangri-La Construction Pty Ltd (ACN 130 534 244)
SECOND RESPONDENT	Peel Street Development Pty Ltd ((ACN 164 816 433)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	5 July 2017
DATE OF ORDER	_____ July 2017
CITATION	Chandler v Shangri-La Construction Pty Ltd (Building and Property) [2017] VCAT 1011

ORDERS

1 Under s62 of the *Victorian Civil And Administrative Tribunal Act 1998* ('VCAT Act') I allow the respondents to be represented by professional advocates, noting that the amount in dispute is disproportionate to the use of professional advocates, but the issues raised have some degree of complexity.

2 Leave is not given to join additional parties to the proceeding.

3 The first respondent must pay the applicant $2,933.60 forthwith.

4 The second respondent must pay the applicant $70 forthwith.

5 Costs are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Ms S Chandler, in person
For the First Respondent	Mr Finlay of Counsel
For the Second Respondent	Mr Lardi, solicitor

REASONS

1 Ms Chandler is the Owner of unit in Kew that she bought off the plan from the second respondent-Developer. Her home was built by the first respondent-Builder. The sale of land settled on 21 December 2016 and she moved in the next day.

2 The Owner's claim against both respondents concerns two significant defects. The first is an annoyance – the failure of the respondents to ensure that cable television could be accessed from her home. The second is far more serious – the non-connection of the toilet and the basin in her only bathroom.

3 Both of these issues were eventually rectified. Nevertheless, the Owner gave evidence that she could not have Foxtel installed until one month after she took possession; she was without a functioning toilet in her home for nine or 10 days and the total time until her back yard was returned to a reasonable state was 10 weeks.

4 The Owner's claim is for consequential losses and general damages brought about by what she perceives as significant tardiness in restoring her to the position that she should have been in at the commencement of occupation of her new home.

5 Both respondents took the opportunity to cross-examine the Owner, but neither gave evidence of their own. In consequence, unless the Owner's evidence has been successfully challenged in cross-examination I accept its accuracy. Further, she appears to me to be a truthful witness.

6 Neither respondent chose to attribute responsibility to the other.

7 The Owner appeared for herself. Mr Finlay of Counsel appeared for the Builder and Mr Lardi, solicitor, appeared for the Developer. At the hearing, after submissions from both Mr Finlay and Mr Lardi, I allowed the respondents to be legally represented. I asked the Owner whether she wished the matter to be adjourned to enable her to obtain legal advice and she said she did not.

APPLICATION TO JOIN THE PLUMBER

8 The Builder foreshadowed a possible application to join the relevant plumber to this proceeding. I did not allow the Builder to proceed with this application in circumstances where the amount of the Owner's claim is modest and although the Builder was sent notice of the hearing by the Tribunal on 15 May 2017, no mention of such an application had been made to the Tribunal before the hearing.

9 This ruling does not prevent the Builder taking separate proceedings against the relevant plumber, should it choose to do so.

CLAIM

Basis of claim

10 The respondents complained that the Owner had not particularised her claim. She had not done it as a lawyer might, but I take into account that under s62 of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act') we start with the assumption that parties will not be legally represented.

11 The respondents would not have been ignorant of the underlying facts of the Owner's claim, as she provided a detailed summary, timeline and supporting documents. I deduce that she sued the Developer because she believed it had breached its contract with her. In the course of her opening statement she mentioned that she sued the Builder under s8 of the *Domestic Building Contracts Act 1995* ('DBC Act'). I mentioned in the hearing that s8 implies warranties into every domestic building contract and that s9 provides that the warranties benefit subsequent purchasers, such as the Owner.

Quantification of claim

12 The Owner quantifies her claim as follows:

Foxtel connection appointment	$100
Extra data used on iPhone whilst without aerial	$160
Time taken off work to be at property for workmen - 10 days at $48.20 per hour	$3663
Cost of phone calls, time making calls and writing emails, cost of plunger and time plunging toilet	$800
Electricity used by workmen on property	$200
Non-delivery of essential services on settlement no aerial, nonworking toilet and hand basin – compensation	$4000
Stress, humiliation, physical and mental suffering of 9 days without toilet and time spent travelling to public toilets – compensation	$5000
	$13,923

MEASURE OF DAMAGES

13 To the extent that I find there has been a breach of warranty by the Builder or a breach of contract by the Developer, damages are assessed according to

the amount necessary to put the Owner in the position that she would have been in had the relevant breach not occurred[1].

DEVELOPER'S DEFENCE

14 Mr Lardi said in closing that the Developer had discharged its contractual obligations to the Owner and that she had not taken the steps that she was entitled, or perhaps even obliged, to take under clause 33 of the contract between the Owner and Developer. He also noted that Owner's admission that everything had been completed within 12 months.

Contract provisions

15 Mr Lardi drew my attention to Special Condition 33. The relevant parts of the clause are as follows:

> Rectification of defects
>
> 33.1 In the event the Purchaser [the Owner] believes any defects caused by faulty materials or workmanship exist in relation to the Works as conducted by the Vendor, the Purchaser agrees it shall notify the Vendor within the Defects Rectification Period with no more than one (1) comprehensive and detailed list of all defects claimed.
>
> 33.2 The Vendor agrees that, if a defect is notified in accordance with this special condition 33.1 and accepted by the Vendor as a defect, the Vendor will ensure that:
>
> (a) The defect is rectified by the Builder in a proper and workmanlike manner; and
>
> (b) The defect is rectified within a reasonable time having regard to the nature and extent of the defect, and the availability of the materials and labour, but in any event by the date which is 12 months from the date of notification of the defect.
>
> 33.3 The Vendor will ensure that the Building Contract with the Builder requires the Builder to repair and make good any defects in the improvements on the Land or the Common

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1 As SM Walker said in *Harmonious Blend Building Corporation Pty Ltd trading as Clark New Homes v Ibraham* (Building and Property) [2014] VCAT 1084:

> …the measure of damages for defective workmanship by a builder is now governed by of *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8. In that case, the Court said (at para. 13):
>
> "The "ruling principle"… confirmed in this Court on numerous occasions…, with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365):
>
> "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Property which are caused by the faulty materials or workmanship in a proper and workmanlike manner and within a reasonable period of time depending on the nature and extent of the defect and the availability of materials and labour.

…

33.6 Notwithstanding any other special condition, the Purchaser may not before the Settlement Date require the Vendors to repair any defect or fault in the Property …

…

33,8 If a defect is accepted and made good to the Builder's satisfaction, the Vendor's obligations under this special condition 33 are discharged.

[Underlining added]

Comments on the contract provisions

16 Purchasers off the plan have certain tax advantages but potentially enormous risks. Anyone contemplating such a purchase must be reasonably sure that the developer is trustworthy. This contract contains a number of anomalies. It is appropriate that the Developer was obliged to ensure that defects would be rectified within a reasonable time, having regard to the nature. I note that "a reasonable time" for a toilet not connected to the sewer could be as short as a few hours. 12 months is not a reasonable time for a non-functioning toilet. 12 months is also an unreasonable time for connection of a workable television point.

17 The provision in clause 33.1 that the Owner would make no more than one claim is understandable from the point of view of the Developer, because it does not wish to receive the claims piecemeal. Nevertheless, it is potentially oppressive if there is a matter of urgency that needs to be dealt with immediately and other matters that require further investigation. However the interpretation of this provision is not necessary for the purposes of this proceeding.

18 Clause 33.6 could perhaps be described as "settle and we will fix it later". It also has the potential for oppression and if it had been suggested that the Owner was required to settle in circumstances where her toilet was not connected to the sewer, the Developer would have been requiring her to settle for a property that should not have received its occupancy permit. Again, in this proceeding, that issue is hypothetical.

19 Clause 33.8 is oppressive as a defect must only be "made good to the Builder's satisfaction". Many cases come before the Tribunal where an owner thinks that a home must be demolished and rebuilt and a builder thinks it requires a small amount of glue and a modicum of paint. Causing an owner to lose rights upon the builder's satisfaction is unfair and it is

incomprehensible that a fair-minded developer would include such a provision in a contract.

The Developer's involvement

20 The parties agree that the Owner did not notify the Developer directly of either of the claims.

21 I accept the Owner's evidence that:

> An aerial for the building was overlooked completely and not installed until 10 January 2017.

22 It is not clear who overlooked the installation of the aerial. I also accept the Owner's evidence that she contacted the real estate agent, the body corporate and the Builder about the installation of Foxtel weeks before settlement and they all assured her that everything was set up ready to go.

23 Although the Owner did not contact the Developer directly, I find that the real estate agent acted for the Developer who was the vendor to the Owner.

24 The Owner should have been able to depend on the word of the real estate agent – the Developer's agent – and the Builder. With respect to the television aerial, and in the absence of further evidence about precisely what went wrong, I find the Developer and Builder equally liable.

TELEVISION CONNECTION

25 The Owner's claim arising out of the lack of a television aerial is $260 plus an undifferentiated part of her claim for general damages for non-delivery of essential services.

26 I accept the Owner's evidence that she contacted both the real estate agent and the Developer approximately two months before moving into the property and she was told that the property would be ready to be connected to Foxtel when she moved in. When Foxtel attended her home shortly after she moved in on 21 December 2016, the technician told her that although the television point was in a cupboard, there was no wiring to it.

27 I accept her evidence that no aerial was installed until 16 January, that Foxtel was notified by the owners corporation the same day and that Foxtel connected her service on 22 January 2017.

Foxtel connection appointment

28 The Owner gave evidence that part of her payment to Foxtel was a connection and installation fee of $100 that she had to pay twice because when the technician from Foxtel attended her home, the system could not be installed because of the lack of the appropriate connection.

29 Under cross-examination by Mr Finlay, the Owner could not identify when, or even if, she had paid $100 for the second time. I am not satisfied that this item of her claim is proven and I do not allow it.

Extra data on iPhone

30 I accept the Owner's evidence that she incurred approximately $160 more in her Telstra bill for data between 2 January and 24 January 2017.

31 Under cross-examination by Mr Finlay, the Owner was unable to explain why she used extra data on 23 and 24 January if Foxtel was connected on 22 January. Nevertheless, I accept her evidence that in the three months before the relevant bill, from 25 December 2016 to 24 January 2017, she had paid the minimum sum payable by her for each month of $181.60. Mr Finlay asked whether, perhaps, she had used data in all that period for other purposes. She denied this was so.

32 I allow 14 days of extra data at $10 a day being $140. The Developer and Builder must each pay $70 with respect to the data used.

TOILET AND BASIN CONNECTION

33 I accept the Owner's evidence in her summary:

> Approximately three weeks after I moved in, my toilet made a knocking noise each time it was flushed and the water level in the toilet was low, so contacted the Owners Corporation, the internal plumbers of the building and the builders themselves. It was found that the piping for my toilet and hand basin had not been connected to the sewerage system and that the pipe was laying in the dirt somewhere under my property. I was left without use of the only toilet in my apartment and hand basin for nine days before this was finally rectified. I have attached a compliance certificate that was issued regarding sewerage and drainage which was clearly false.
>
> During the nine days, I had to take numerous days off work to make phone calls, emails and be present at my property to allow access for workmen. I had to visit public toilets up to 3 times a day – many of which were unhygienic and the inconvenience and stress to me because of this was enormous. Visiting public toilets after dark was particularly confronting with syringes and empty alcoholic bottles in many of them. I was unable to have guests over – having to cancel planned barbecues over the Australia Day weekend and dinners during the week because of being unable to provide a toilet to guests. This was all very distressing.

34 I accept the Owner's evidence that the first time she contacted anyone was on 18 January when she contacted first the owners' corporation manager and then the plumber on the list of trade contracts, Global Plumbing. At that point all the Owner knew was that the toilet was slow to drain and there was a knocking sound after flushing and that it was not refilling to the previous volume. This was all she could communicate to the owners' corporation and Global Plumbing and so, without the benefit of hindsight, it is probably not surprising that Global Plumbing suggested she try a plunger.

35 The next morning the Owner contacted the Builder for the first time who asked Global Plumbing to assist at its earliest convenience. Again, given the

facts at hand, this was probably not an unreasonable approach. There was no evidence at that time that this plumbing was seriously defective.

36 On 23 January Richard from Global Plumbing attended site and attempted to rectify the problem to no avail. In the words of the Owner "he advised that there may be rubble or concrete in the pipes or a possible crack in the pipe". He also advised that the Owner could not use the toilet or basin until the problem had been rectified. It is at this point that the problem became immediate and urgent and should have been the first priority of the Builder. I remark that the Builder and Global Plumbing should have been in contact with each other about what was occurring at this time.

37 For reasons which are not particularly obvious, the Owner was told that the storm water plumber would also have to be involved. When Jeff from that plumber attended on 25 January he expressed the suspicion that the pipe for the hand basin and toilet were not connected to the sewer and called Richard from Global Plumbing. He also advised the Owner to call the Builder. A call to the Builder resulted in a message back from the Builder's receptionist to say that the Builder's defect manager would call on 27 January after the Australia Day holiday.

38 On 27 January the Builder's defect manager, Mr Gonzalez, called to say that internal and external plumbers were blaming each other and that the matter would probably be fixed on Monday 30 January as 27 January was a Rostered Day Off for the building industry.

39 On 30 and 31 January Kumnick's Plumbing undertook work and in the early afternoon of 1 February 2017 the Owner emailed Mr Gonzalez of the Builder to say that the plumbing had now been rectified. In the meantime, the fence had been cut and not restored, backyard paving had been removed and broken in part and much of the backyard had been dug up.

40 It is almost incomprehensible that an occupancy permit could have been given for an apartment or even for the building containing the apartment when the toilet and basin were not attached to the sewer. It goes without saying that this error should not have been made at all. It is further exacerbated by the careless and arrogant attitude of the Builder and/or its sub-trades to the Owner from 23 January when they knew she could not use the toilet in her home.

REINSTATEMENT OF BACK YARD

41 I accept the Owner's evidence in her summary:

> My backyard was dismantled during works – rendering it unusable during this time. After waiting so long to move into my first property, I was so disappointed that I could not show it off to family and friends because of the mess created. I had tradesmen waiting to start improvement works in my outside area but I was unable to schedule these or get these done before [the Builder] repaired the damage they had caused.

> I have had to arrange and take considerable time off work to be at my property when workmen have been scheduled to attend or when they actually did attend. Many of my emails and phone calls were not responded to which continually frustrated me.

APPLICANT'S TIME AND EXPENSES

42 1 February 2017 should have been a day of relief for the Owner. It was a day when her toilet and basin were finally usable. But it was only the start of trying to get her backyard into the condition that it was in before the repair works commenced.

43 I accept the Owner's evidence that there were many occasions when she was told the Builder or its tradesmen would attend and they failed to do so or attended without the appropriate tools. I also accept her evidence that the work done was not always in accordance with the standard of the finish before the repair works were undertaken and it was not until the Owner told the Builder that she would lodge an application with the Tribunal that the work was finally finished.

44 The Owner said that Sid, the construction manager of the Builder, told her that an application to the Tribunal for compensation was unrealistic but that "he could send me flowers and champagne and have the repair work completed for me on Friday [7 April]". I accept the Owner's evidence that the work was finished, and the champagne and flowers delivered but that she was not happy. As mentioned during the hearing, sometimes a gesture like champagne and flowers can be entirely appropriate and a good idea, particularly if accompanied by a genuine apology. At other times it can be dismissive and insulting.

45 I accept the Owner's evidence that she spent significant time at home waiting for trades or attending while trades were present. I also accept her evidence that she spent a substantial portion of her own time telephoning and emailing. Mr Finlay asked the Owner during cross examination whether she could have left a key to enable the Builder to access the site in her absence. She said nothing in the Builder's conduct led her to have confidence that she could repose trust in them and I accept her explanation.

46 Her claim is for 10 days and a further $800 for time telephoning and emailing. I allow six days in total being 23 January for a whole day, 24 January for half a day, 30 January for half a day, 28 February for a whole day, 9 March for half a day and 29 March for a whole day, rounded up to make six days. I note that some of the time allowed was within the Owner's annual leave. I make no distinction between her working days and her annual leave as her leave is for her to use as she sees fit, not for the convenience of the Builder.

47 I accept that the Owner bought a plunger to use on her toilet, but as mentioned during the hearing, a plunger is a useful thing to have around a household and I make no allowance for it.

48 In accordance with the Owner's evidence I allow these six days at eight hours per day at $48.20 per hour, being $2,313.60.

Electricity use

49 The Owner claims $200 for electricity used by the workmen in the course of removing pavers and reinstatement work. She was unable to say what it was used for and did not provide evidence of the difference between her bill for electricity when the workmen were present and after that date. She said in evidence that her current bill is similar to the bill when the tradesmen were present, but it is colder now and her heating is electric.

50 Nevertheless, I accept the Owner's evidence that she was asked to plug in the Builder's extension cord and did so. In the absence of better evidence[2] I allow $50 for this item.

GENERAL DAMAGES

51 Under s9 of the DBC Act, the Owner is entitled to the benefit of the warranties in s8 as if she had been a party to the original contract. I find that the Builder has breached a number of the warranties because the work was not carried out in a proper and workmanlike manner, it was not carried out in accordance with all laws and legal requirements, it was not carried out with reasonable care and skill and the home was not suitable for occupation when handed over to the Owner.

Stress humiliation, personal injuries – physical and mental suffering

52 The Owner is not a lawyer and has not necessarily characterised her claim as a lawyer might. However she has suffered substantial inconvenience due to the lack of a working toilet from 23 January until 1 February 2017. Had she moved out of her home and sought the cost of accommodation, I would have been inclined to give it to her. She said the cost of renting a similar property is $400 per week, but that she could not move out because she has two cats that would also need to be accommodated.

53 I accept Mr Finlay's submission that under s54(2) of the DBC Act, the Tribunal does not have jurisdiction to award damages for personal injury. He also said that this proceeding is not appropriate for an award of aggravated or exemplary damages, and I accept his submission.

54 In *Lin v P&T Constructions (Vic) Pty Ltd*[3] Judge Jenkins said:

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2 As per Mason CJ and Dawson J said in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83:

> The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can …

3 [2014] VCAT 1125 at [118], quoting the High Court in *Gray v Motor Accident Commission* [1998] HCA 70 at [15].

> To attract an award of exemplary damages, the defendant's conduct in committing the wrong must amount to "conscious wrongdoing in contumelious disregard of the plaintiff's rights".

I am not satisfied that the Builder's conduct, while thoughtless and rather arrogant, was sufficiently severe to pass this test.

55 However, the Owner's claim can also be characterised as a claim for substantial inconvenience.

56 In accordance with the decision of the High Court in *Baltic Shipping Company v Dillon*[4] I am satisfied that the Owner can recover damages for physical inconvenience. Not having a working toilet is physical inconvenience of a high order and I allow her $500 for the week that she was without a working toilet and hand basin.

57 The respondents should have promptly rectified the television aerial and the Builder should also have promptly rectified the Owner's backyard. However, I am not satisfied that the physical inconvenience of these failures was sufficient to entitle the Owner to general damages.

BUILDER OWES THE OWNER

58 The Builder owes the owner total of $2,933.60 being:

Data	$70.00
Days off work and other time	$2,313.60
Electricity use	$50.00
Damages for physical inconvenience	$500.00
	$2,933.60

COSTS

59 Costs are reserved with liberty to apply, noting the difficulty of obtaining an order for costs under s109 of the VCAT Act, and that even costs sought under s112 are subject to the discretion of the Tribunal.

SENIOR MEMBER M. LOTHIAN

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4 [1993] HCA 4 at [39]