

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP560/2017

**CATCHWORDS**

*Domestic Building Contracts Act 1995; Building Act 1993; Owners' claim for repair of balcony; whether builder's original work was defective.*

<b>FIRST APPLICANT</b>	Mr Eswaran Chidambaram
<b>SECOND APPLICANT</b>	Sharmilla Perera
<b>RESPONDENT</b>	Pace Development Group Pty Ltd (ACN 108 488 817)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Hugh T. Davies, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	8 March 2018
<b>DATE OF ORDER</b>	22 March 2018
<b>CITATION</b>	Chidambaram v Pace Developments Group Pty. Ltd (Building and Property) [2018] VCAT 431

**ORDERS**

1. The application is dismissed.
2. Costs reserved.
3. Any submissions as to costs must be filed in the Tribunal and served on the other party no later than 14 April 2018.

Hugh T. Davies  
**Member**

**APPEARANCES:**

For the Applicants

In person

For the Respondent

Mr Morrison of Counsel

## REASONS FOR DECISION

### The hearing

- 1 The hearing of this application, together with two related Tribunal applications in which separate orders have been made by me today, took place on 8 March 2018.
- 2 The first applicant (“the owner”) appeared in person and gave evidence; he represented the second applicant, his wife, and called no other witnesses, relying mainly upon reports and documents included in the Tribunal Book filed at the hearing by Mr Morrison of counsel who appeared for the respondent (“the builder”).
- 3 Mr. Bridgeman, a director of the builder, appeared and gave evidence. The builder called no other witnesses.

### The Claim

- 4 The applicants claim the sum of \$14561.39 the cost of repairs (“the remedial works”) made in 2017 to a balcony at premises which they have owned at 23/334 Station Street Chelsea Victoria (“the premises”) since 2013 and which have been tenanted since purchase.
- 5 It is claimed that the repairs were required because the zinc aluminium tray (respectively “the product” and “the tray”) on the surface below the wooden deck of the balcony of the premises had rusted and or corroded and that the builder was responsible to meet the cost of repairs.
- 6 In separate proceedings in this Tribunal the owner of the lot below the premise has brought a claim against the applicants for the cost of rectification works said to result from water leaks from the premises.
- 7 The builder, whilst denying liability for the claim, admitted that the remedial works were required in 2017 and did not contest that amount claimed was reasonable having regard to the works involved, albeit his consultant, Mr Morgan, took a different view.
- 8 The remedial works were detailed in the invoice from AWS set out below and involved a rebuild of the balcony.

### The Background to the Claim

- 9 The premises are one of a number of apartments constructed by the builder and completed in May 2007.
- 10 In 2013 problems arose with the tray resulting in water ingress to an apartment below the premises. The builder rectified the problem not accepting liability but wanting, according to Mr Bridgeman’s evidence, to do the right thing as a responsible builder.

- 11 Whilst these repair works were being carried out Gemcan Constructions Pty. Ltd. (“Gemcan”) on behalf of the owner, inspected the balcony and provided a report dated 7 August 2013 (“the first Gemcan report”)
- 12 Following an approach by the builder on 27 August 2013, Gemcan reinspected the premises and provided a second report (“the second Gemcan report”) to the owner on or about 2 October 2013.
- 13 On 3 March 2014, Mr Gannon an employee of the builder, after being on the roof of the building of which the premises form part, sent the owner an email which he stated, in part *“we noticed when walking passed your apartment that the tenant clearly still has an animal toileting on the external balcony (photos of faeces attached). As you are aware we are of the firm belief that his behaviour was a major contributing factor to the previous premature deterioration of the balcony. Obviously this will be taken into consideration if Pace are ever requested to attend to any further balcony leaks”*. On the next day, by email, the owner acknowledged receipt of that email.
- 14 Again in 2016 water leaked from the balcony to the premises below.
- 15 In January and February 2016 and in April 2016, at the request of the responsible Owners Corporation, Tymaline Building Services Pty. Ltd. (“Tymaline”) attended the building of which the premises form part; it provided an invoice for those services dated 15 June 2016 (“the Tymaline invoice”). In August 2016 Tymaline provided a quotation for the repair of the balcony at the premises and nearby gutters.
- 16 The builder denied liability for the further claim then made which alleged defects in the tray.
- 17 Following negotiations between the owner and the owner of the apartment below and the Owners Corporation, the remedial works were carried out. Those arrangements, and the adjoining owner’s claim for the cost of remedial works resulting from water ingress from the premises, are the subject matter of the related applications referred to above.
- 18 This proceeding commenced in April 2017.
- 19 On 24 August 2017 AWS provided a quotation for the remedial works.
- 20 On 1 November 2017, AWS Services Vic Pty. Ltd. (“AWS”) provided a report to the owner after inspecting the balcony in September 2017 (the AWS report”).
- 21 AWS carried out the remedial works in October and or November 2017 for the quoted amount of \$14651.39.
- 22 On 6 March 2018, Mr Morgan of APPCo Projects provided to the builder a report (“the APPCo report”) in which he stated that *“I did not complete an inspection of the property at any time. This report is limited to evidence revealed within the documents provided. I could not determine the exact type of metal sheeting used for the construction of the roof.”*

He had been provided with copies of all of the reports, quotations and invoices referred to above.

- 23 There is no dispute between the parties as to the content of this background statement by the Tribunal

### The Evidence

- 24 *The owner's evidence* in effect went no further than to repeat, in general terms, the claim, the alleged defects, and the cause of the defects, and to adopt and rely upon the documents referred to above, excepting of course the APCCo report.
- 25 *Mr. Bridgeman's evidence* was that the method of construction of the balcony as built, including the use of the product, was proper, and that, although there was no fall in the slatted timber deck of the balcony, the tray itself had a fall of 65-70 mm (or 1:100) to the exterior gutter. He stated that this was a method of construction his company had adopted on more than 100 balconies with few problems.
- 26 He denied that any rusting or corrosion of the tray in 2013 or 2016 resulted from unacceptable ponding of water and claimed that the owner or the tenants had failed to properly maintain the balcony by allowing dog faeces and urine and other extraneous materials to remain on the decking and to get into and remain in the tray, thus causing corrosion.
- He relied upon a number of photographs attached to the documents referred to above.
- 27 Mr. Bridgeman's evidence was that the fall in the tray was adequate and in compliance with all relevant building standards and requirements, albeit no specific reference was made to the guides and standards referred to below.
- 28 *Otherwise the evidence* came from the invoices, photographs, quotations and reports referred to above which can be summarised as follows:-
- 29 *The first Gemcan Report* – its author, Mr Warrin, general observations aside, said that he was being “*more speculative*” in his observations and that as he did not believe the problems arose from movement in construction, he believe the deck had always been holding water.
- 30 Mr Warrin removed some but not all of the decking and observed that “*you can clearly see that the water is sitting in a pool back along the external wall, which confirms that the falls are incorrect and need to be rectified.*”
- He went on to state that a 2 degree fall was required.
- 31 The second Gemcan report – again from Mr Warrin, stated that “*as expected there were pools of water in several of the roofing bays that were not draining into the box gutter, if they were the urine would not have been able to sit for long periods as it would have been continually washed away. Therefore avoiding the problem which has occurred.*”

- 32 Mr Warrin added that he believed that the problem was dog urine which caused corrosion which had dramatically affected the life span of the product but which could have been avoided if continuously washed away.
- 33 Mr Warrin went on to review the rectification works the builder was then proposing and stated that (with the work done) *“Pace have performed everything that is required to rectify this issue along with making sure that this will not be an issue in the future.”*
- 34 *The Tymaline invoice* noted that its representative found water pooling in trays of the roof deck and heavy rust and small rust holes and that the works need to be replaced *“with correct fall”*.
- 35 *The AWS report* and its quotation dated 24 August 2017 provided for a totally different method of construction of the balcony from that adopted by the builder initially and was to ensure *“that there is adequate fall to the box gutter...”* There was no other reference to the extent of the then existing fall.
- 36 The APCCo report, limited as it is because by the time it was prepared there was no opportunity to inspect what had been the builder’s works, was critical of some of the comments and conclusions drawn by the authors of the reports referred to above.
- 37 Whilst not of great significance, the author of the APCCo report, Mr Morgan stated that there was no problem in the builder, as AWS observed, having fixed timber to the tray.
- 38 He went on to state, as the authors of the other reports had not commented at all, that having reviewed those reports and the photographs provided to him (which were all in evidence before the Tribunal, .....*sheeting profiles can be constructed at a 1 degree pitch. It is important for a roof pitched at such a low degree be kept clear of debris” and that photographs (....show a build-up of debris on the roof which may have restricted the egress of water, created latent water and accelerated the deterioration of the metal roof. It is not surprising to see the rusted roof sheet is the one with most debris. ....Clearing the debris from the roof is a maintenance issue and the responsibility of the owner.*”
- 39 The Tribunal draws little from the fact that these comments referred to a *“roof”* as it is clear that Mr Morgan was looking at photographs of the balcony and had seen it referred to as such in the other reports he had read.
- 40 The builder’s submissions (as put by counsel at the conclusion of the evidence) were that the only evidence from the reports which could be regarded as being critical of the builder’s works were:-
- from AWS that there was no membrane on the balcony (to which he submitted that the method of construction and the use of the tray was a proper alternative to more common types of membrane and there was no evidence to the contrary);

- from AWS that timber joists were sited on the tray (to which he submitted that there was no evidence to suggest that this issue was of any relevance to the problems with the tray); and
- as noted above, that there was insufficient fall in the tray (to which he submitted that a proper consideration of all of the evidence would lead the Tribunal to conclude to the contrary).

### The Tribunal Findings.

- 41 The evidence leads the Tribunal to conclude that, in 2013, the builder did the works as explained to Mr Warrin of Gemcan and as set out at paragraph 33 above.
- 42 There was no evidence before the Tribunal which would lead it to find that the mere ponding of any fluids in the tray constituted and/or was evidence of a defect in the balcony at the premises as constructed and as repaired, in 2013. The applicants did not offer evidence to suggest that the product itself was not suitable.
- 43 Leaving aside the issue of the fall, the reports upon which the applicants relied contained only mild criticism of the method of construction and certainly not enough to warrant a finding that the builder's design and choice of materials was in any way defective.
- 44 By way of example, the Victorian Building Authority Guide to Standards and Tolerances 2015 ("the Guide), states, at Chapter 7.03, that gutters are defective if they retain a depth of more than 10mm of water.
- 45 The Guide, at Chapter 13.04, states that external decks and balconies are defective if they leak and, at 13.05, defective if they are not constructed in accordance with the Building Code of Australia ("the Code") and AS 4654.2. ("the ASA") or if not installed in accordance with the manufacturer's installation requirements.
- 46 The Guide, at Chapter 13.07, states that balconies that are required to be waterproofed (as was the uncontested requirement in this instance) are defective if they are not provided with adequate drainage and provision for overflow.
- 47 Photographs put in evidence show that in 2013, 2016 and 2017 there was a considerable and excessive amount of debris on the tray and the tray and deck were left uncleaned and not properly maintained.
- 48 Mr Bridgeman warned the owner of the risk of this in 2013 but, in the view of the Tribunal, the problem continued unabated and more likely than not impeded the flow of water from the tray to the gutter.
- 49 Importantly in the second Gemcan report, Mr Warrin said that the measures the builder was taking in 2013 would avoid future problems.

50 Whilst this deck (the tray) has leaked, the likely causes have to be established by the applicants who have not provided persuasive evidence as to the issues to which the above references from the Guide relate.

51 Despite the comments in the AWS report, the evidence of Mr Bridgeman, that the original method of the design and construction of the balcony and the use of the tray in particular was a proper means of construction, is not seriously challenged and is accepted by the Tribunal.

52 The comments, in the reports of AWS and Gemcan that there was no adequate fall in the tray to allow a flow to the gutter, can be no more than assumptions based on observations of some ponding of fluids and debris in the tray. There was such ponding but, from the evidence, it is more likely than not that the ponding was dog urine which lay in small but concentrated amounts and positions and as such could not flow away because of volume and debris. If it had been water and not dog urine it is more likely than not that there would have been no problems.

None of the authors of the statements referred to said that there was no fall at all or stated what the fall actually was or should have been; there was no evidence that anyone flow tested the tray at any time or took measurements.

All this is in contrast to Mr Bridgeman's evidence in this regard, evidence which is to be taken as not contradicted.

53 Mr Morgan of APCCo was not called to give evidence; it is not possible to determine whether his reference in paragraph 38 above was intended to refer to the builder's work or to the remedial works carried out by AWS.

54 The material from which the tray was constructed is a compounded material in common use in guttering and other parts of buildings and is designed to carry water and other fluids and designed not to rust under normal conditions. There was no evidence to suggest that ponding of water within the tolerance referred to above in relation to gutters would of itself and alone have adversely impacted upon the tray.

## **CONCLUSIONS**

55 Notwithstanding what the Guide and ASA might require, the Tribunal is not satisfied that the builder's work was defective; it is more likely than not that any ponding of water and lack of fall were not the causes of this balcony leaking but more likely that the accumulation of debris and animal faeces and urine caused corrosion; this the owner and or the tenant could have avoided..

56 In view of the above findings and conclusions, the application is dismissed.

Hugh T. Davies  
**Member**