VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D232/2011

CATCHWORDS

Alleged breaches of the warranties under s137C the *Building Act* 1993, earlier proceeding, res judicata, issue estoppel, abuse of process

APPLICANT	Bruce Graham
FIRST RESPONDENT	Jadranka Marinovic
SECOND RESPONDENT	Engin Eralp
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	14 October 2011
DATE OF ORDER	2 December 2011
CITATION	Graham v Marinovic & Anor (Domestic Building) [2011] VCAT 2264

ORDER

The respondents must pay the applicant $3,368.26 forthwith.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr B. Graham in person
For First Respondent	Ms J. Marinovic in person
For Second Respondent:	Mr E. Eralp in person

REASONS

1 The respondents, Ms Marinovic and Mr Eralp, built a two-storey brick and timber house that the applicant, Mr Graham, subsequently purchased. The occupancy permit was issued on 28 September 2007. The purchase of a house was in early 2009. The respondents built the house as owner builders.

2 On 2 December 2009 the applicant issued proceedings against the respondents for the alleged failure to install insulation and for the absence of a drip or drain tray to the spa bath pump. The proceeding number was D888/2009 ("first proceeding"). The first proceeding was heard and determined on 14 May 2010 and the respondents were ordered to pay the applicant $1,520 plus costs of $302.20.

3 On 24 March 2011 the applicant issued fresh proceedings ("this proceeding") against the respondents for three defects. He now claims four defects. They are an alleged fault in the gutter at the highest level of the roof, ponding on a first-floor balcony, the failure to seal internal and external doors and alleged drainage defects in the courtyard. The applicant's total claim is for $14,824.88.

4 Evidence was given by the applicant, by both respondents and by Mr Smallman who appeared as an expert witness called by the respondents. Mr Smallman describes himself as a building consultant but did not provide the information required under VCAT Practice Note PN2: Expert Evidence. In particular, he did not provide details of his qualifications and experience. A written report by architect, Mr Trevor Scott, was filed by the applicant but Mr Scott did not attend the hearing. Although Mr Scott's details were provided, the report was on the letterhead of "Houspect". It was not signed by Mr Scott but was signed by Philip Kennedy, whose qualifications were not provided and who appears not to have inspected the property.

THE BASIS OF A CLAIM AGAINST AN OWNER-BUILDER

5 Section137C of the *Building Act* 1993 gives purchasers from owner-builders certain rights:

> **137C Warranties for purposes of homes under section 137B**
>
> (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.

6 Section 137B applies to each contract to sell a home constructed by other than a registered building practitioner. "Domestic building work" has the same meaning that it has under the *Domestic Building Contracts Act* 1995 ("DBC Act"), being construction of a home, with a number of express inclusions. Building the house was undoubtedly domestic building work.

CAN THE CLAIMS BE MADE?

7 During the hearing, the respondents expressed concern that the applicant could keep raising claims against them. The first question is therefore whether the applicant is too late to make some or all of the claims in this proceeding because, perhaps, they could and should have been raised in the first proceeding.

8 It is clear that if the applicant was not aware of the defects of which he now complains, and could not have been aware with reasonable inspection, he is not prevented from making a further claim.

9 In the High Court case of *Port of Melbourne Authority v Anshun Pty Ltd* 147 CLR 589 Justice Murphy said at page 605:

> These notions of res judicata and issue estoppel are founded on the necessity, if there is to be an orderly administration of justice, of avoiding re-agitation of issues, and of preventing the raising of issues which could have been and should have been decided in earlier litigation. [Emphasis added]

Res judicata

10 "Res judicata" means "the fact has been decided". If the applicant was seeking to make an identical claim concerning the insulation or the drip tray, he would be prevented from doing so by the principle of res judicata. The question is whether the matters now complained of are sufficiently close to the original claims to also be defeated by res judicata.

11 Res judicata was described in the English case of *Henderson v Henderson* (1843) 3 Hare 100 at 114-115, (1843-60) All ER 378 at 381-382 by Wigram VC:-

> In trying this question I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertent, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to

> form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. [Emphasis added]

12 *Henderson* was further considered by Stuart-Smith LJ in another English case, *Talbot v Berkshire County Council*, (1993) 4 All ER 9 at 13:

> The rule is thus in two parts. The first relates to those points which were actually decided by the Court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second, is not a true case res judicata but is rather founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the Court will stay or strike out the subsequent action as an abuse of process. [Emphasis added]

13 However, the distinction between res judicata and issue estoppel given in the *Encyclopaedic Australian Legal Dictionary*:

> Issue estoppel differs from res judicata in that res judicata relates to the entire claim, rather than just one issue: *Hoystead v Cmr of Taxation (Cth)* (1925) 37 CLR 290.

Issue estoppel

14 In *Groeneveld Australia Pty Ltd v Wouter Nolten & Ors (No 4)* [2011] VSC 512 Davies J said at paragraph 5:

> The test for … issue estoppel … is whether the precise question of fact or law sought to be litigated in a later proceeding was decided in the earlier proceeding as a fundamental basis for the decision; [Emphasis added]

15 In *Siddals v Housing Guarantee Fund Ltd* [2004] VCAT 701, Deputy President Macnamara considered a claim by owners, against the then equivalent of the current warranty insurers, for dry rot that arose in part from dampness and poor ventilation. The same parties had been aware of the dampness and poor ventilation when the proceeding was initially before the Tribunal, but neither had been aware of the consequence, namely dry rot, complained of later in the reinstated proceeding. At paragraph 39 he said:

> In my view the dry rot represents a new and separate or 'discrete' defect. It comes from the same underlying cause but nevertheless represents a further and distinct stage

16 Like DP Macnamara, I consider that a claim for a different breach of a warranty or contractual obligation is not the "precise question of fact or law" described in *Groeneveld*, although if the applicant were aware of a potential claim at the time of the first proceeding but chose to bring it in this proceedings, such behaviour would be vexatious.

ALLEGED DEFECTS

Guttering

17 The applicant claims $750 for rectification of the upper roof gutter (or spouting). Houspect reports:

> There is extensive algae staining at the underside of the gutter at the north-east corner, indicating that the gutter retains stormwater and is leaking. The lack of downpipes and the restrictive size of the blocked spreader pipe, are contributing factors to the leaking spouting. *(please refer to Photograph 033 to 035 and 038 to 040 ...)*

18 I note that photographs 33, 34 and 39 show small areas of algal growth on both sides of the strap covering the mitre joint at the corner of the gutter. I accept the applicant's evidence that he did not become aware of this algal growth until shortly before he made the application in this proceeding. I find this is caused by a building defect which was neither known to the applicant, nor could he reasonably be expected to know about it, at the time of the first proceeding.

19 The Houspect recommendation is:

> Remove the existing downpipe and spreader. Flush out downpipe and re-install. Install new larger spreader with more outlet holes. Install additional downpipe and spreader approximately half way along. Repair leak to the gutter at the north east corner. Provide falls in gutters towards the outlets to ensure no stormwater is retained. Estimated cost $2,000 to $2,200.

20 I am not satisfied that the blocked spreader pipe is a building defect as distinct from a maintenance matter for the applicant. I note in particular that there is no allegation of water entering the house by reason of the allegedly defective spreader; there is no allegation of water entering the house at all.

21 I also accept Mr Smallman's evidence that the gutter is draining properly. However, I do find that there is an inadequate seal to the mitre joint of the gutter.

22 The applicant relies on a quotation by Leak Proof Roofing for $750 for:

* Gutter repairs
* Repoint
* Glue and seal gutter

23 Mr Smallman gave evidence that repairing just the mitre joint might take two hours at $70 per hour, because of the difficulty of gaining access to this part of the roof. The Leak Proof Roofing quotation includes two items – gutter repairs, and repoint, that I do not allow. However, I allow $500 to take into account the possible need for cranage to reach the defective part of the roof, as discussed by the applicant and Mr Smallman during the hearing.

24 The respondents must pay the applicant $500 for this item.

Balcony ponding

25 The applicant claims $2,789 to rectify alleged ponding on the balcony. The balcony is to the west of bedroom 1 and the lounge-room is below it. The Houspect report states:

> **Bucket test on balcony floor – see 3.1.8 above**
>
> At the time of the inspection, a bucket of water was emptied on to the floor at the southern end of the balcony. Some of the water found its way to the outlet near the NW corner and disappeared, presumably draining into the stormwater system. A large quantity of water remained and ponded on the surface to a depth of 20-25mm. After 30 minutes, the water was still there. This demonstrates that the fall on the balcony floor was insufficient to drain the water towards the outlet.

26 Paragraph 3.1.8 was irrelevant to this alleged defect, but recited that Mr Trevor Scott is a registered architect. The relevant item appears to be the first bullet point under "Inspectors comments":

> Due to lack of fall to the outlet, water is ponding in the gutter, making use of the balcony difficult and making the building materials vulnerable to seepage. This in turn can cause moisture damage to tiles and grout and rot to the timber weatherboards. Note: The reflection on the balcony floor shows the presence of water and water stains with rot to the door sill and weatherboards under it. *(please refer to Photograph 001 to 003...)*

27 Assuming that the photographs provided by the applicant are numbered in accordance with the Houspect numbering, there is no clear indication of rot, the applicant neither gave evidence of rot nor applied for rectification of rot, and photographs 7 and 8 show the area of and beneath the door sill, which appears to be sound and recently painted.

28 The Houspect recommendation is:

> Repairs to the balcony, including tiles, removal of the sub-strata and weatherboard and wall plate where there is rot damage. Installation of new waterproof membrane, plus new flooring and skirting tiles to the base. Ensure all tiles are laid to recommended falls to the outlet. Estimated cost $2,800 to $3,000.

29 Mr Smallman's report was that there is minimal fall to the drain, but no evidence of ponding in the gutter and no sign of rot. He remarked that after the floor has drained, the ponding is limited to 1.5mm. He also reported that there is no evidence of water penetration into the house; evidence with which the applicant agreed. Mr Smallman stated in his report that:

> We did detect a depth variation in the surface of the balcony tiled floor … [1]

---

[1] Mr Smallman's report was printed out with text flaws. Certain words appear to have been printed over other words. It was not possible to read by how much.

> This variation in level is attributed to drying of the timber frame used to construct the [balcony] floor.

30 The applicant said he first noticed some ponding when he took possession of the house, but that he did not realise it might be a defect.

31 I prefer Mr Smallman's evidence that the degree of ponding is very slight, but I note Mr Smallman's admission during the hearing that the water should drain within 30 minutes, and that ponding needs to be addressed. I am concerned that the applicant noted a potential defect and did not investigate further, but if it has been exacerbated by shrinkage of the house frame, it has characteristics of a defect that the applicant cannot be criticised for failing to pursue in the first proceeding.

32 Mr Smallman agreed that if work needed to be undertaken, the work described by Houspect is reasonable and $2,789 is a reasonable amount.

33 The respondents must pay the applicant $2,789 for this item.

Failure to seal internal and external doors

34 The applicant claims $335.78 for weather-strips to internal and external doors. He said that the 5-star energy rating was not in the section 32 statement that was an annexure to the contract of sale. The amount he claims is for $100 for labour and $237.78 for various materials that he has costed but not yet bought. He claims the cost of sealing 5 external and 10 internal doors.

35 I accept the evidence of Mr Smallman that sealing internal doors is not necessary for energy rating. I accept the evidence of the applicant that he looked at the energy certificate for the first proceeding, but did not realise that sealing exterior doors was necessary until just before commencing this proceeding.

36 I allow the applicant one third of his claim of $237.78 for the materials, as an estimate of the cost of materials for the external doors only. He has not proven the basis upon which he claims $100 for labour, and I make no allowance for it.

37 The respondents must pay the applicant $79.26 for this item .

Courtyard drainage

38 The applicant seeks $10,850 for this item. He claims that the paved courtyard at the rear of the house should drain to storm water outlets. He gave evidence that the paving adjacent to the garage drains in the wrong direction – away from the waste outlet - and there is no waste outlet in the paving behind the kitchen. I note that although the paving adjacent to the garage appears not to drain to a waste outlet which is close to the garage, all the paving is either level or drains away from the house towards garden beds. I note in particular that photographs accompanying the Houspect report show that the pavers closest to the house are dry, while those further

from the house appear to be damp. As suggested by Mr Smallman, the dampness of the pavers could be explained in part by those areas being shaded for much of the day.

39 The parties agree there is no evidence that there has been flooding into the house, towards the house or that there is any damage to the house consistent with failure of the drainage.

40 The applicant submitted that in accordance with P3.123 of the Building Code of Australia, surface water should be directed away from a class 1 building – such as the house – and that at the end of construction there should be a fall of at least 25mm over the first metre.

41 I accept the applicant's evidence that he was not aware of the potential drainage problem until he obtained the Houspect report. This tends to support Mr Smallman's evidence that after 4 or 5 years, some movement in garden paving is to be expected. I am not satisfied that any current defect in the paving arose from a breach of the s137C warranties.

42 I make no allowance for this item.

CONCLUSION

43 The respondents must pay the applicant $500 for the gutter, $2,789 for the balcony floor and $79.26 for sealing external doors; a total of $3,368.26. Payment must be made forthwith.

SENIOR MEMBER M. LOTHIAN