VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP471/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

Sale of a renovated house – vendor had made cosmetic improvements prior to sale – vendor not a registered building practitioner – purchaser complains of two categories of alleged defects – the first category misconceived – the second category is relevant to this proceeding – Building Act 1993 section 137C

APPLICANT	Kimberly Hanrahan
RESPONDENT	Victoria Suzanne Best
WHERE HELD	Melbourne
BEFORE	Deputy President I. Lulham
HEARING TYPE	Hearing
DATE OF HEARING	12 June 2015
DATE OF ORDER	17 June 2015
CITATION	Hanrahan v Best (Building and Property) [2015] VCAT 981

ORDER

The Respondent shall pay the Applicant $16,454.21 plus the filing fee on this application of $525.60.

DEPUTY PRESIDENT I. LULHAM

APPEARANCES:

For the Applicant	Ms K. Hanrahan in person
For the Respondent	Ms V. Best in person

REASONS

1 Ms Hanrahan sues Ms Best for $16, 454.21 in respect of defects in the house that Ms Hanrahan purchased from her in 2012.

2 Ms Best had bought the house in 2001. The house is a pre-World War 2 weatherboard, which had been renovated in the mid 1990s by the addition of a second storey.

3 Ms Best considered doing some renovations and for that purpose she applied for a Planning Permit in 2002. However, indicative building costs were such that she decided not to proceed. Instead, she carried out some "cosmetic improvements" which are relevant to this case, in particular –

(a) in the years 2004-2005 she added a front wall and an electrically operated door to the garage [1]

(b) in the years 2004-2005 she used the existing electrical supply in the garage to power that door, literally plugging it in to the existing power point

(c) in the years 2004-2005 she improved the 'sun room' at the back of the house, by removing some unattractive wall panelling and replacing it with plaster, installing downlights, tiling the pre-existing concrete slab floor, installing across the back 4 double French doors, and painting the room [2]

(d) in 2008 she removed the brick paving that had been there when she bought the house, and laid new grey pavers in the same area. The slab of the sunroom protruded beyond the back wall of the sunroom. The old bricks had been laid over this part of the slab and then on the ground, creating a level area of paving. Ms Best laid the new grey pavers in the same way: some on top of the protruding slab, and some on the ground.

4 Ms Hanrahan attended the auction of the house in 2012, and bought the house privately after the auction. She did not negotiate to buy the house 'subject to a building inspection' or the like. Ms Best had made the house and the garage fully available for inspection during the sale campaign. The contract of sale was signed on 24 June 2012 and settlement took place on 18 September 2012.

5 Ms Hanrahan sues over these items:

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[1] On the plans of the "existing" house lodged with her application for a Planning Permit, this structure is called a "carport". However, as it had three enclosed sides as well as a roof, it is appropriate to say that even in 2002 it was a garage

[2] The photo of this room in Ms Best's estate agent's marketing material from 2012 shows a modern rectangular room, with clean lines, white walls, grey tiled floor and bright down lights, with the French doors opening on to a paved patio. The room is now a contemporary open plan living area, quite different in character from an old fashioned sun room

(a) there are exposed wires in the garage. As I see it this is a rather trivial issue. "Exposed wires" creates a vivid mental image but what Ms Hanrahan means is that the garage has not been internally lined with plaster board, so that the electrical cable which runs from the power point to the door's motor, along the frame of garage wall, is visible. She is not complaining about dangerous live wires. Ms Hanrahan would have seen that the garage did not have internal plaster board walls, before she contracted to buy the house

(b) the back wall of the former sunroom, and the French doors, have been damaged by water caused by the paving not directing water away from the house. The wall cladding and the doors have had to be replaced.

6 Ms Hanrahan relies on two invoices of Jarad Klemm, numbers 584285 and 584296, dated 17 March 2014 and 21 May 2014, in the sums of $9,849.78 and $6,604.43 respectively to verify her claim for $16,454.21. Whilst the two invoices are very brief and lack detail, other evidence establishes the following. The invoice for $9,849.78 was the cost of replacing the exterior walls of the back room, and the $6,604.43 was the cost of building a lightweight roof over the paved area closest to the back wall, to keep the water off the paving ($6,004.43) and lining the garage with plasterboard ($600.00).

7 Ms Hanrahan is also carrying out some improvements on the property and she is not claiming any of these costs as she sees them, correctly, as not being an instance of "damages". Indeed, she obtained a building consultant's report from Mr Trevor Scott which identified other defects (such as wiring issues internally) and estimated the cost of rectification of all issues at $41,080.00 or more, and she stated for the record that she only wanted to claim $16,454.21[3].

8 In substance Ms Best denied liability on the basis that she had not made any "structural" alterations to the house. She did not deny that the wiring in the garage could be seen, and was as depicted in the photographs in Mr Scott's report. She did not deny Ms Hanrahan's allegation that the back wall and French doors had been damaged. Nor did she contest the amounts paid to Jarad Klemm. Ms Best relied on legal principles, to say that she was not liable at all.

9 The following provisions of the *Building Act* 1993 are relevant.

10 Section 135 empowers the government to require registered builders to be covered by insurance in respect of domestic building work. Section 137A describes the scope of such insurance. When these laws were introduced, insurance was perceived as protecting consumers.

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[3] Ms Hanrahan made this statement after the Tribunal drew the parties' attention to the principles of res judicata, issue estoppel and "Anshun" estoppel, and questioned whether Ms Best would seek an adjournment if, having arrived to defend a claim of some $16,000.00 she found Ms Hanrahan seeking some $40,000.00. The Tribunal proceeded with the hearing on the basis of Ms Hanrahan's clear and informed statement that she limited her claim to $16,454.21

11 Sections 137B & 137C extend this notion of consumer protection to those who purchase from owner builders.

12 Section 137B provides amongst other things that an owner builder (who is not a Registered Building Practitioner) who "constructs a building" must not enter into a contract of sale in respect of the home within a prescribed period (generally 6 years after the construction works are carried out), unless:

(i) the owner builder has obtained a report on the building works from a prescribed building practitioner ("s137B report"); and

(ii) the s137B report is obtained not more than 6 months prior to the contract of sale in respect of the home; and

(iii) the s137B report is provided to the prospective purchaser prior to entering the sale contract.

13 Sub section 137B(7) defines the word "construct" for the purposes of s137B. The definition includes to "make alterations to the building" or to cause any other person to do so.

14 Section 137C provides that there are warranties in "every contract (of sale) to which section 137B applies". These warranties are similar to those which a registered builder gives to its client, and which pass on to a new purchaser under the *Domestic Building Contracts Act* 1995. The warranties include -

(a) 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) 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) that the 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.

15 Again, the contract of sale was signed on 24 June 2012. The contract was more than 6 ½ years after completion of the building works on the garage and the sunroom, but was less than 6 ½ years after completion of the paving. Ms Best says that s137B does not apply to the paving works because they were not "structural" works. However, I do not accept this submission, for these reasons:

(a) section 137B is not expressed to only apply to "structural" works; and
(b) even if it had been, work which created paving which caused serious water damage to a load bearing wall could be called "structural" work.

16 As well as Ms Best not denying that the back wall and French doors had been damaged, the report of Mr Scott proves that the damage was sustained because of the paving not being constructed in a proper and workmanlike manner. The wall and French doors had rotted, requiring their replacement. Briefly, the paving does not direct water away from the house. It causes

rainwater to flow towards the house. The level of the paving is equal to or higher than the level of the internal floor. By spilling water in several areas of the paving near the house and observing and photographing the result, Mr Scott proves that the water does not flow and that the slope of the paving does not meet the "1 in 20" fall which is required by the Building Code of Australia. Ms Best has breached this warranty, in relation to the paving. The consequence of the breach is the water damage and rotting of the back wall and French doors.

17 Section 137C does not create a statutory remedy. It inserts warranties into the contract between Ms Best and Ms Hanrahan. Ms Best has breached the contract of sale in that by constructing paving which caused serious water damage to the back wall of the house and the French doors, she failed to carry out that work "in a proper and workmanlike manner" using materials which "were good and suitable" for their purpose, and in a way which accorded "with all laws and requirements" in relation to drainage of paved areas.

18 This proceeding was issued on 14 April 2015. Lest it be thought that Ms Hanrahan's claim in respect of the paving is "statute barred" because the paving work was done more than 6 years before 14 April 2015[4], the warranty was given in the contract of sale dated 24 June 2012. Less than 3 years had passed between the giving of that warranty and the issuing of the proceeding.

19 It follows that Ms Best is liable for damages in respect of the breach of warranty. The damage caused by the breach is to be assessed by reference to the repair of the back wall and the replacement of the French doors. I do not consider that the cost of building a lightweight roof over the paved area closest to the back wall to be part of Ms Hanrahan's damages, because she concedes that it is a temporary measure at most that will not rectify the drainage issue, and also because, once that concession is recognised, it is work which is an improvement to the home. As a result, $6,004.43 of the invoice for $6,604.43 is not recoverable. The other $600.00 of that invoice is not recoverable either, because properly understood the defect is not "exposed wires in the garage" but rather "internally unlined walls in the garage", which is not a defect at all.

20 Ms Hanrahan's evidence was that replacement of the back wall cost $9,849.78. In the absence of any evidence to the contrary from Ms Best, I accept that evidence.

21 Ms Hanrahan has a quote for new French doors in the sum of $7,610.00. She did not proceed with that quote, though, because she improved the

4. Section 5(1) (a) of the *Limitations of Actions Act* 1958 says that "actions founded on simple contract (including contract implied in law) or actions founded on tort including actions for damages for breach of a statutory duty" "shall not be brought after the expiration of six years from the date on which the cause of action accrued".

property by acquiring double glazed doors. Properly, she does not claim the extra cost of double glazed doors.

22 As Ms Hanrahan capped her claim at $16,454.21, and as the quote of $7,610.00 for normal French doors exceeds Jarad Klemm's second invoice of $6,604.43, it is appropriate to award Ms Hanrahan a total of $16,454.21.

23 Ms Hanrahan also claimed costs, of $425.00 in respect of Mr Scott's report, and $1,000.00 for a solicitor's letter of demand.

24 The Tribunal's power to award costs, and the limits of that power, are contained in section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998. Costs do not "follow the event" as in Court proceedings. Section 109(1) provides that "each party is to bear their own costs in the proceeding", but sections 109(2) & (3) empower the Tribunal to order that a party pay "all or a specified part of the costs of another party" in a proceeding "only if satisfied that it is fair to do so, having regard to" stated criteria. The criteria mainly relate to misbehaviour, such as a party "prolonging unreasonably the time taken to complete the proceeding". Having heard both parties' submissions, I do not consider that there are any factors of the kind stated in section 109(3) which could empower the Tribunal to award costs.

25 The filing fee paid on the issuing of the proceeding is, however, another matter. Section 115B of the *Victorian Civil and Administrative Tribunal Act* 1998 empowers the Tribunal to order a respondent to reimburse the filing fee paid by an applicant. When considering whether to make such an order, section 115B(3) requires the Tribunal to have regard to, amongst other things, the nature of the proceeding; and "the result of the proceeding, if it has been reached". That last criterion is similar to the notion of costs "following the event", and applying that criterion I will order Ms Best to reimburse the filing fee of $525.60.

DEPUTY PRESIDENT I. LULHAM