VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D868/2005

CATCHWORDS

Domestic building, limitation of actions – s5 of the *Limitation of Actions Act* and s134 of the *Building Act,* builder's duty to subsequent purchaser where no statutory warranty, pitch of plain-tile roof, roof as structural element, builder's duty of care to owners, *Bryan v Maloney*, builder's liability for design failure, builder's claim for costs associated with attempted rectification, uninvited further submission.

FIRST APPLICANT	Jennifer Thurston
SECOND APPLICANT	David Brahe
THIRD APPLICANT	Jennifer Brahe
FOURTH APPLICANT	Body Corporate Members
RESPONDENT	Adrian Campbell
WHERE HELD	Melbourne
BEFORE	Senior Member Lothian
HEARING TYPE	Hearing
DATE OF HEARING	2 and 3 November 2006
DATE OF ORDER	8 March 2007
CITATION	Thurston v Campbell [2007] VCAT 340

ORDER

1 The Application is dismissed.

2 On the Counter-claim, the Applicants must pay the Respondent $1,771.00 forthwith.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	Mr A. Ritchie of Counsel
Witnesses	Mrs J. Thurston
	Mr D. Brahe
	Mr Colin Boucher
	Mr Bryn McMurray
	Mr Shane Jones by telephone
For Respondent	Mr A. Campbell in person
Witnesses	Mr Neal Slattery

REASONS

1 This proceeding concerns a leaking roof, and is a claim by the Applicants against the Respondent for the cost of replacement of the roof and some consequential rectification. There is a counter-claim by the Respondent for the costs associated with attempted repairs to the original roof. The Applicants were represented by Mr Ritchie of Counsel. The Respondent represented himself at the hearing, but had been legally represented until 20 September 2006.

2 The First Applicant, Mrs Thurston, owns and occupies 3 Drake Street, Brighton, the first floor residence of the building the subject of the dispute. She and her husband Richard, now deceased, purchased it from a Mr and Mrs Reid.

3 The Second and Third Applicants as described in the Points of Claim dated 13 April 2006 ("Points of Claim"), Mr and Mrs Brahe, own and occupy 5 Drake Street, Brighton, the ground floor residence in the same building. In the Application they were described collectively as the Second Applicant.

4 Mrs Thurston and her husband moved into the building in late 1996. The parties agree that Mr and Mrs Brahe purchased their home in late 2002 and have lived there since February 2003. The evidence of Mr Brahe did not indicate from whom he and his wife purchased, but it is accepted that there was no contractual relationship between any of the Applicants and the Respondent.

5 The Fourth Applicant according to the Points of Claim describes Mrs Thurtson and Mr and Mrs Brahe in their roles as members of the body corporate which owns the common property in the building, collectively described as "the premises". In the Application, the Third Applicant was Body Corporate SP343084C. Item 2 of Schedule 1 to the Application pleaded at the third bullet point that the premises includes:

> The common property under the control of the Applicants' Body Corporate SP343084C operated by the Applicants Jennifer Thurston and David Brahe and Jennifer Brahe – the entrance driveway of the underground carpark, the entrance foyer including lift and stairwell of the premises and the roof area of the premises.

6 In the Points of Claim the Body Corporate is not a party. The Points of Claim also omit the roof in the description of the common property. Nevertheless in answer to a question from me, Mr Brahe stated that the roof is part of the common property and I treat it as such. From a practical point of view it is accepted that the owner of the roof is at least one of the Applicants and that any loss has been suffered by one or more of them.

7 The building was constructed by the Respondent pursuant to a building permit granted to him on 30 June 1993. A certificate of Occupancy was issued on 12 June 1996.

8 The exact arrangement regarding the construction of the premises was unclear, but it appears that the Respondent entered an agreement with Mr and Mrs Reid, who owned a substantial block of land, including the land upon which the premises is built. The Respondent's evidence is accepted that the Reids were to supply the land and he was to finance and build five quality dwellings. The Reids would receive one and he would be entitled to the proceeds of sale of the remaining four, which included the premises. His evidence is also accepted that the five dwellings were designed by the architect Nicholas Day.

9 Neither the Applicants nor the Respondent provided copies of the drawings or specifications for the premises to enable a determination of whether construction was faithful to the design, however the Respondent said that he built in accordance with the plans and specification provided by Mr Day. The Respondent said that he no longer has the drawings. I have no reason to doubt the accuracy of his statements.

10 The roof as originally built was (and remains) at a pitch of 30°. The original roof was clad in "plain tiles" underlaid by Sisilation sarking. "Sisilation" is the brand name of aluminium-coated paper-based insulation sheet which also acts as a moisture barrier in roofs and walls.

11 Plain tiles are fired clay tiles, approximately 260mm long by 165mm wide and 10 mm thick. There is a nib along the length of one end, making the tile at that point 25mm thick. The purpose of the nib is to hook over the roof battens, and thereby attach the tiles to the roof. When laid, the tiles overlap so that, with the possible exception of edges and penetrations, there is no point on the roof where there are less than two layers of tiles and for a substantial proportion of the roof there are three layers.

12 The Applicants alleged that from at least the date Mr and Mrs Thurston moved into their apartment the roof has not been water-tight and has leaked continually, and has damaged 3 Drake Street in particular. They said that Mrs Thurston and her late husband "constantly complained" to the Respondent that the roof was not water-tight and that damage was being caused to 3 Drake Street and to the common property. Mr Brahe gave uncontradicted evidence that the first he and his wife knew of the water ingress problem was the first time it rained after they moved into their new home.

13 The Applicants alleged that the Respondent agreed to rectify the problem on numerous occasions and attempted to do so himself, or by agents, culminating in the appointment by the Respondent of Tre Tempo Project Consultants in 2005. They said Tre Tempo ascertained that the roof tiling would need to be re-laid and that the sarking had been shredded, but the Respondent withdrew instructions for Tre Tempo to undertake the works. Mr McMurray, formerly of Tre Tempo, gave evidence for the Applicants.

14 Instead, the Applicants alleged, the Respondent had scaffolding erected in April 2005 (and left it in place until August 2005), a small number of

replacement tiles were delivered to site but were not used and work was undertaken by two workmen for about a day and a half, but it did not fix the leaks. The Applicants said they advised the Respondent that they would seek quotes and have the work done by another roofer, and seek recompense from the Respondent. They alleged they obtained advice from two roofing contractors that the roof was not water-tight and quotations were obtained, the lowest of which was from Mr Shane Jones.

15 In contrast, the Respondent alleged there had been minimal leaking around a sky-light, which was rectified from inside the roof by George Smith Roofing and that no complaint was "formally" received from Mr and Mrs Thurston. He said there was only one isolated area of sarking which was torn and this was replaced by George Smith Roofing during the course of construction. The Respondent said that Tre Tempo did not undertake further works and replacement roof tiles were not laid because Mr Brahe refused access to the site.

16 The Respondent alleged that any leakage to the front entrance area, which is part of the common property, was caused by the installation of air-conditioning by "the Applicant's contractor … which required holes to be drilled through the roof for the compressors."

17 The parties agree that Mr Jones undertook roofing work, for which he was paid $28,750.00; half by Mrs Thurston and half by Mr and Mrs Brahe. The roofing work undertaken by Mr Jones was replacement of the plain tiles with Swiss Patterned tiles - a shape that calls for less layers of tiles to achieve a water-tight roof, as it is specifically designed to exclude wind-driven rain. The work was undertaken in or about August 2005.

18 The Applicants alleged there was water damage to the interior of Mrs Thurston's property, which cost her $3,520.00 (inclusive of GST) to rectify. The Respondent denied this in his pleadings but did not provide evidence to contradict it. In contrast, Mrs Thurston gave evidence that she had incurred this cost by reason of water ingress and her evidence is accepted.

LIMITATION OF ACTIONS

19 In the absence of legal representation for the Respondent, I asked the parties whether the Respondent has a defence under the *Limitation of Actions Act* 1958 ("LA Act") or s134 of the *Building Act* 1993 ("Building Act").

20 Mrs Thurston's evidence was that at the date upon which the proceedings commenced she had been aware of water ingress from the roof since "shortly after" she and her husband moved into their home, approximately nine years earlier. Mr and Mrs Brahe said they became aware of the roof leaks at the first rain storm after moving into their home, which would not have been earlier than February 2003.

21 Section 5 of the LA Act provides in part:

> (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued-
>
> (a) Subject to sub-sections [concerning personal injuries], actions founded on
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> simple contract (including contract implied in law) or actions founded
>
> on tort including actions for damages for breach of a statutory duty;

22 Section 134 of the Building Act provides in part:

> Despite anything to the contrary in the Limitation of Actions Act 1958 or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work …

23 As mentioned above, it is accepted that the occupancy permit was issued on 12 June 1996, therefore the proceeding was commenced nine and a half years after the date of the occupancy permit.

24 It was submitted by Mr Ritchie, and there was no submission to the contrary, that the nature of this claim is a "building action" within the meaning of s129 of the Building Act. His submission is accepted, as is his submission that it is wide enough to encompass an action in contract, tort, or for breach of warranty under s8 of the *Domestic Building Contracts Act* 1995 ("DBC Act").

25 The question is whether s134 of the Building Act replaces the provisions of the LA Act, or supplements them. Does the Building Act give a plaintiff or an applicant extra years in which to commence a proceeding, or does it just act as a long-stop?

26 A cause of action in tort does not accrue until all three elements exist – duty, breach of duty and, for pure economic loss, manifest damage (*Pullen v Gutteridge Haskins & Davies Pty Ltd* [1993] 1 VR 27). Damage might not become manifest for many years after a building project is complete, and before the introduction of s129 of the Building Act there was never certainty that all potential liability arising out of a building project had accrued. The point is made to demonstrate that both interpretations are capable of producing a sensible result.

27 Mr Ritchie's submission supported the view that the Building Act replaces the LA Act. His view is supported by an article by Mr James Morgan-Payler in the April 2003 edition of the *Australian Construction Law Bulletin*, and it also appears to have been the intent of the then Minister for Planning who said in his Second Reading speech for the *Building Bill* on 11 November 1993:

> The Building Bill defines a clear starting date – the date of issue of an occupancy permit – and a clear conclusion date of 10 years after the date of issue. This will remove the existing ambiguity surrounding the

time during which the building owner retains the right to issue proceedings.

This will provide property owners with additional protection in terms of years beyond the very short number of years that now exist.

28 Mr Ritchie also referred me to s33 of the LA Act which provides:

> The periods of limitation prescribed by this Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment including, without affecting the generality of the foregoing, and except as provided in Part IIA, the provisions of section twenty-nine of the Administration and Probate Act 1958 and section twenty of the Wrongs Act 1958.

29 If Parliament's, as distinct from the then Planning Minister's intention was to replace the LA Act limitation with a ten year period, it is arguable that it could have been expressed more clearly. Section 134 only says that a building action cannot be brought *more* than ten years after the issue of the certificate of occupancy. It does not expressly replace the pre-existing provisions in the LA Act. Section 33 of the LA Act is of limited assistance because it only becomes relevant if "a period of limitation is prescribed" – I am not convinced that this is the case under s134. Its obvious meaning is to amend rather than prescribe the limitation period.

30 The only aspect of the LA Act which is, on plain reading, clearly "to the contrary" to s134 of the Building Act is that the cause of action might accrue at a date which would take the limitation period beyond ten years from the issue of the occupancy permit. I brought to the attention of the parties an article by Mr Craig Harrison and Mr James Greentree published at (2006) 22 BCL 243. The authors considered this question and concluded by expressing a preference for the long-stop interpretation, just as Mr Morgan-Payler said that the Second Reading speech "indicates that the second view [replacement rather than long-stop] is to be preferred."

31 I consider the "long stop" interpretation does less violence to plain English than the "replacement interpretation", however I acknowledge that the latter is tenable. There is mention of the LA Act in s134 of the Building Act, and the provision that a building action "cannot be brought more than 10 years" after the issue of the occupancy permit is similar in grammatical structure to the provision in s5 of the LA Act that "actions shall not be brought after the expiration of six years" from accrual of the cause of action.

32 As there is clear doubt about the interpretation of the Building Act, s35 of the *Interpretation of Legislation Act* 1984 ("IL Act") becomes relevant. It provides:

> In the interpretation of a provision of an Act or subordinate instrument-
>
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or

subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(b) consideration may be given to any matter or document that is relevant including but not limited to-

(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;

(ii) reports of proceedings in any House of the Parliament;

(iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and

(iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.

33 The Second Reading speech thus becomes relevant and it is found that the "replacement" interpretation is the correct one. At the date of commencement of the proceeding any rights of the Applicants were not statute-barred.

THE QUALITY OF THE ROOF

34 The Applicants submitted that the roof, as designed and constructed, was never sufficient to keep out the rain. Mr Boucher gave expert evidence for the Applicants, and Mr Slattery gave expert evidence for the Respondent. The Applicants' evidence is accepted that the roof leaked, which led them to replace it with Swiss patterned tiles. The question remains of whether the Respondent is liable for the cost of replacement.

35 Mrs Thurston's evidence is accepted that from 1996 water was entering her apartment through lights in the en suite bathroom to bedroom one and making yellow stains on the bathroom ceiling. It is accepted that further leaks occurred, particularly on the south side of the building, entering through the ceiling and down the walls.

36 Mrs Thurston was so concerned about the leaks by April 2004, that she obtained an Archicentre Report, which is exhibit JBT2 to her witness statement. Mr Lear, who prepared the report, noted signs of extensive leaking along the south side of the premises, and remarked that height of the roof made exceptional height equipment necessary for any inspection or maintenance of the building. He suggested that a possible cause of the leaking was that "the spouting is planted onto the wall, having potential to back-flood into the roof or ceilings if blocked (maintenance)" or that the council drains might not be adequate for higher density re-development in an older, geographically flat suburb. He suggested that provision be made for large rain-heads with pop outlets, and that there should be a full roof-tile check. Mr Lear made no mention of the possibility that there could be a design issue regarding the use of plain tiles on a roof with a pitch of 30°.

37 Mr Boucher did not inspect the property until September 2006, after the plain tiles had been removed and replaced by Swiss patterned tiles. He acknowledged that he could not say, from his own observation, what problems were apparent before the roof was replaced.

38 He expressed the opinion that a plain tile roof should either be built at a pitch of no less than 35°, 5° steeper than the pitch at which the roof was built, or it should be built using a system of a roof constructed of ply and bituminous or other waterproof tanking, overlaid by plain tiles as cladding. His opinion that the Sisalation should not be expected to function as more than a moisture-proof barrier is accepted.

39 Mr Boucher provided copies of information from seven manufacturers of plain tiles, one of whom is an Australian company. He was unable to say who manufactured the tiles of the original roof and therefore could not provide the manufacturer's recommendation. Nevertheless none of the manufacturers recommended a minimum pitch of less than 35° and some recommended a minimum pitch of 40°. Mr Slattery for Mr Campbell said that 26° is the minimum pitch for plain tile roofs, but he provided no documentary evidence to support his assertion.

40 Mr Boucher's evidence is accepted that a plain tile roof should not normally be pitched at less than 35°. In particular, his evidence is accepted that during strong winds, roofs pitched low have significantly lower air pressure on the lee side of the building, which allows rain to be sucked into the roof space.

41 Mr Boucher said he believed that the building, including the roof, was designed by Nicholas Day. At paragraph 5(a)(xxiv) of his report of 25 September 2006, Mr Boucher said:

> In carrying out the client brief, during the [first] week of Sep 2006, I attempted to discuss the roofing tile specification, selection and installation issues with the architect, Nicholas Day, by telephone. … Nicholas Day did not discuss the matter with me personally. A woman who answered the telephone advised me on instruction from whom she said it was Nicholas Day in the background [sic] that I should speak to the builder to obtain information relative to the roof installation. I have not done this. I felt this was odd that the architect would not speak to me as I am sure he would have known about the roof leaking issues and its consequences.

42 It is noted that the original architectural drawings and specifications were not produced by either party and it appears Mr Day or his firm was probably engaged either by the Respondent or by a group including him. The Respondent said in his witness statement that the specifications were provided by Mr and Mrs Reid. In answer to my question, the Respondent said Mr Reid engaged the architect and he was paid by "the bank". In answer to Mr Ritchie's question, the Respondent denied that the architect effectively worked for him. I am not able to draw any conclusions about who engaged the architect.

43 Mr Boucher said he was told by others that the Sisalation used on the original roof had shredded along the southern side of the existing roof, and was too light to provide an effective water barrier. He had no photographs or samples of the allegedly shredded Sisalation, which is surprising as the work was undertaken relatively recently.

44 Mr Boucher also asserted that the aluminium layer on the surface of Sisalation might have been damaged by salt-laden sea spray and possibly by acid rain, but no proof was provided that this had occurred or is likely to occur in positions which are located near the sea.

45 Mr Boucher reported a conversation that was alleged to have taken place between Mr Bryn McMurray and Mr Brahe where Mr McMurray said the Sisalation was damaged by a storm in the course of construction and not repaired. He correctly said that the conversation would have to be the subject of further evidence. Although Mr McMurray was called as a witness by the Applicants there was no mention of this alleged conversation in his witness statement or in his oral evidence. This allegation is therefore not taken into account.

46 Mr Boucher's conclusion was that the Applicants had no alternative other than to embark on re-roofing the premises, rather than attempting further repairs. A matter of concern with Mr Boucher's evidence is that he did not discuss the roof above the entrance area on the East side of the premises. It is, apparently, not roofed in tiles and has box guttering behind the front parapet. It was the area that brought the roof leaks to the attention of Mr and Mrs Brahe.

47 In answer to my question, Mr Boucher replied that he saw no evidence that there were building faults, as distinct from design faults.

48 Mr Bryn McMurray said Tre Tempo, the firm for which he worked, had been engaged by the Respondent to attempt to rectify the leaking roof in 2005. He said he had recommended stripping off all tiles, installing new Sisalation, re-battening where necessary and re-installing the tiles. He said that when he inspected beneath the tiles he saw no evidence of cracked or broken tiles, but that the Sisalation was torn to the point where it was "virtually non-existent on the entire southern side of the roof."

49 Mr McMurray admitted under cross-examination that he was instructed by the Respondent to remove all tiles and battens, and replace the Sisalation and battens then re-install the tiles, replacing any broken ones. He agreed that the Respondent provided two rolls of Sisalation and that his instructions to repair were never revoked by the Respondent. He was not asked by the Applicants or the Respondent whether two rolls of Sisalation were sufficient to cover the whole roof.

50 In answer to my question, Mr McMurray said his inspection was undertaken by looking at the under-side of the roof from the man-hole in Mrs Thurston's ceiling. He used a torch and said he could see "about six to

eight meters in total". The southern side of the building is a long side, and considerably greater than "six to eight meters". I conclude that his comment about "the entire southern side" cannot be justified, which also calls into question the independence of the remainder of his evidence.

51 I prefer the evidence of Mr Jones who provided a witness statement and gave evidence by telephone for the Applicants. He said that he replaced the roof and that the Sisalation was torn along the bottom of the southern side.

Possible post-building damage to the roof

52 Much was made by the Respondent of the possibility that there might have been other tradespeople on the roof, and the difficulty of walking over a plain tile roof without damaging it. The evidence of Mrs Thurston is noted that there had not been anyone over the tiled section of the roof other than the Respondent or tradespeople engaged by him. It is accepted that Mrs Thurston was unaware of any such person.

53 Mr Slattery inspected the roof on or about 20 May 2005 before the original plain tiles were replaced. He reported "broken shingle tiles and damaged sarking membrane under these tiles" and mortar which was "predominantly in its original condition (approx 10 years old) with some repairs evident."

54 The Respondent asked Mr McMurray whether he saw "200 to 300 broken tiles over bed-room 2". Mr McMurray said he did not see the broken tiles. Mr Jones also denied seeing 200-odd broken or cracked tiles.

55 Mr Smith who gave evidence for the Respondent said that he saw about 40 broken or cracked tiles.

56 The Respondent mentioned installation of air-conditioners which, it is accepted, occurred after the building work was complete, however he gave no evidence about where they were or where the roof would have been accessed to enable them to be installed. Mrs Thurston said, and her evidence is accepted that the air-conditioners were over the front entrance (the untiled section) behind the parapet and that access to the roof was gained by ladder.

57 However it is also noted that there was at least one significant storm in or about 2002 which dislodged a number of tiles - a matter reported by Mr Boucher and admitted by Mrs Thurston in answer to my question. She said that about nine tiles blew off the roof.

58 The evidence regarding the cracked or broken tiles does not assist me because even if I accept this damage existed, it does not prove who caused it. It could have been caused by one of the Respondent's sub-contractors or it could have occurred subsequently. The evidence for leaks being caused by storm damage is also unclear. The fact that tiles blew off does prove that the roof no longer had the integrity it should have had, but does not prove that other damage was done to the roof during the storm. Further, there was no indication of where the tiles were lost from, whether that area

was the source of leaks and it fails to answer the question of whether, if the roof had been built at a pitch of 35° or more, it would have been vulnerable to storm damage.

Building fault, design issue or both?

59 I am satisfied that a plain-tile roof should not have been pitched at less than $35^{o,}$ which I find is a design failure. On the balance of probabilities I find that Applicants have failed to prove any other defective workmanship by the Respondent. In particular, the Applicants have failed to prove either that the sarking had been damaged during construction and the Respondent continued to build without rectifying it, or that the Respondent was responsible for the choice of sarking. The issues of whether the Respondent is liable for the pitch of the roof or the adequacy of the sarking is discussed below.

THE BASIS UPON WHICH THE APPLICANTS CLAIM THE RESPONDENT HAS A DUTY TO THEM

60 The Applicants alleged that “at all relevant times” the Respondent had a duty to them to provide a roof which was good and workmanlike and watertight, and that by his actions – his attempts at rectification - and promises he acknowledged responsibility for the roof and rectification of it.

61 In his opening statement, Mr Ritchie said that the Applicants would rely on s9 of the *Domestic Building Contracts Act* 1995, (DBC Act) to give the Applicants the benefit of the warranties provided by s8 of that Act, and in particular s8(f) that the works would be fit for purpose. On the second day of the hearing Mr Ritchie announced that the Applicants would rely on the rule in *Bryan v Maloney* (1995) 128 ALR.

62 It was submitted by the Respondent that the relevant legislation at the date of the building permit was the *House Contracts Guarantee Act* 1987 (HCG Act) and that by virtue of the definition of “dwelling house” contained in s3, the statutory guarantee, as it was described in s5, did not apply to:

> a separate residence that is a portion of a building containing two or more separate residences if any part of a separate residence is above or below any part of the first-mentioned residence.

63 The Respondent’s submission was not answered by the Applicants and is accepted.

Bryan v Maloney

64 Bryan v Maloney is a decision of the High Court of Australia, and is authority for the existence of a duty to take reasonable care owed by the original builder to the current owner of a house.

65 The Respondent submitted that the defect complained of was not ‘structural’, and therefore Bryan v Maloney does not apply. While leaving aside the question of whether the Respondent is correct in his assertion that

Bryan v Maloney only applies to "structural" defects, I am not satisfied that a failed roof is "non-structural". In common building parlance a structural element of a building is one which supports not just itself, but other elements of the building as well. However a failed roof threatens the integrity not just of itself, but also of the remainder of the building. In his minority judgment, Brennan J said:

> … structural defects in a building could be classified as physical damage where the defects posed a danger to health and safety and foreseeability of such defects was sufficient to cast a duty of care on the builder.

66 Of more importance is the fact that in Bryan v Maloney, one of the matters which was common ground between the parties at the appeal was that Mr Bryan was negligent in building the house with inadequate footings. The Respondent has not admitted that he was negligent.

Builder's responsibility for a design fault

67 The question is whether the Respondent bears liability for the design under the principle in Bryan v Maloney. It is not a case of "res ipsa loquitur" or, the only possible reasonable explanation for the failing roof being the negligence of the Respondent.

68 If the Respondent had built to plans provided by the Applicants, I would have no hesitation in finding that he was not responsible for a failure of this design. As Senior Member Walker said in *Cosgriff v HGFL and Omega Constructions* [2005] VCAT 2909:

> In general I do not think that a builder is under any duty to detect deficiencies in the plans. He is paid to build, not check the designer's work. There may be cases where a deficiency in the plans is so obvious that it might be negligent of a builder to ignore it but that is not established here.

I do not find that a pitch difference of 5° is an obvious deficiency in a plain tile roof.

69 If, on the other hand, it had been proved that the Respondent were the designer, it is likely that I would have found him liable.

70 My hesitation in these proceedings is because of the uncertainty of the Respondent's degree of responsibility for the design. Merely engaging an architect does not prove negligence unless the architect should have been known to be incompetent. The Applicants bore the onus of proving the Respondent's responsibility for design of the roof and they failed to do so. The mere fact that the Respondent's behaviour was, at some points, consistent with a belief by him that he might have been liable falls short of proving that he was.

71 The claim for repair of the roof is therefore dismissed.

THE COST OF RECTIFICATION

72 It is not necessary for me to rule on the question of whether the cost of rectification is reasonable, however I note that had it been so, I would have found that the amount actually paid by the Applicants was reasonable. I would have been assisted by the uncontradicted evidence of Mr Boucher that the amount paid by the Applicants to replace the tiles was reasonable. The Applicants chose a tile type which was economical compared to the original tiles and although the Respondent gave some evidence that might have led to the conclusion that he was always ready and willing to repair the roof, he did not provide evidence of the cost to him of replacing it.

WATER DAMAGE TO INTERIOR OF 3 DRAKE STREET

73 While Mrs Thurston's evidence is accepted as to the existence, extent and cost to rectify water damage suffered by her, her capacity to recover depends upon the liability of the Respondent for damage to the roof. This claim is therefore dismissed.

THE RESPONDENT'S COUNTER-CLAIM

74 The Respondent has claimed $14,480.00 as the cost to him of hire of scaffolding ($9,240.00) cost of sarking ($240.00) and fees of Tre Tempo, the Respondent's contractor ($5,000.00).

75 The Respondent said that Mr Brahe would not allow him to continue with repair work and also would not allow removal of the scaffolding. In Mr Brahe's witness statement he admitted that he refused to give permission for removal of scaffolding. Two facsimiles passing between the parties are of particular relevance. On 13 July 2005 the Respondent sent Mr Brahe a facsimile, of which states in part:

> I refer to my recent correspondence to which I have had no reply.
>
> I confirm my view on a without prejudice basis that the issue is one of repair rather than a complete re-roofing which seems to be your intention.
>
> …
>
> I should also like to now make arrangements to remove the scaffolding that has been provided to date at my expense. It seems pointless leaving this on site, as you are not prepared to accept my view on the appropriate resolution of any difficulty that you have.

76 On 15 July 2005 Mr Brahe responded by facsimile, the relevant parts of which are:

> I have received your facsimile of 13 July 2005.
>
> In view of the fact that the scaffolding to which you refer has been erected since April I can hardly believe that its cost is being born by you.

> As roof works are due to commence when weather conditions are favourable and should extend over a period of probably about 4 days, it would be preferable to leave the scaffolding in place for the moment.
>
> The scaffolding was erected on land which is owned by me and my wife, Jenni, without our permission – it therefore will not be removed until I give permission for you or your contractors to enter upon the land. Once I have given permission I expect it to be removed immediately.

77 The Respondent has not given evidence as to the circumstances under which the scaffolding was erected and there has not been any indication that there was an express or implied agreement between the parties. In accordance with section 97 of the *Victorian Civil and Administrative Tribunal Act* 1998, and section 53 of the DBC Act, I find it is reasonable that the Applicants should pay the cost of scaffolding from 15 July 2005 to 15 August 2005, during which time the scaffolding was on site for the convenience of the Applicants.

78 An invoice from Perimeter Scaffolding for 18 July 2005 to 15 August 2005 is for $1,540.00, inclusive of GST. At the same rate, a further three days is $231.00. The allowance for scaffolding is therefore $1,771.00.

79 I was not given evidence about the ultimate fate of the further two or three rolls of sarking and I make no allowance for them. The Respondent has also failed to prove a basis upon which the Applicants should pay the $5,000.00 which he apparently charged by Tre Tempo, and no allowance is made for it.

80 On the Counter-claim, the Applicants must pay the Respondent, Mr Campbell, $1,771.00 forthwith.

RESPONDENT'S FURTHER SUBMISSION

81 It has been brought to my attention that on 6 February 2006 the Respondent sent further material to the Tribunal concerning these proceedings. He had neither sought nor been granted leave to make any further submissions. It is clear that the Tribunal cannot have regard to such submissions in the absence of exceptional circumstances that were not apparent at the hearing date – see *Stockdale v Alesios & Ors* (1999) 3VL 169, *M Hill and G P Williams v Rural City of Wangaratta & Ors* [2000] VCAT 2593 and *Wharington v Vero Insurance No 3* [2006] VCAT 639. In circumstances where leave of the Tribunal has neither been sought nor granted, there is no indication that the consent of the Applicants has been sought and there is no indication that there are exceptional circumstances, I have neither read the further submission, nor had its contents communicated to me.

SENIOR MEMBER M. LOTHIAN