

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D822/2006

CATCHWORDS

Domestic builders' warranty insurance – claim initially accepted by Housing Guarantee Fund Limited in 2001 – subsequent complaint in 2006 treated by VMIA as if part of initial claim – subsequent complaint rejected – whether VMIA able to resile from initial decision.

APPLICANTS	Mark Cilia, Toula Cilia
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Morgan Jensen t/as Jensens Extensions Build Oz
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	25 May 2007
DATE OF ORDER	5 June 2007
CITATION	Cilia v Victorian Managed Insurance Authority (Domestic Building) [2007] VCAT 967

ORDER

1. Insofar as it is necessary to do so I extend time for the making of this application until 22 November 2006.
2. The Housing Guarantee Fund Limited having accepted the Applicant's claim on 17 October 2001, the decision of the First Respondent dated 1 March 2006 is reversed.
3. Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants

In person

For First Respondent

Mr B Powell of Counsel

For Second Respondent

Mr M. Jensen in person

REASONS

- 1 The Applicants ('the owners') moved into their new home in September 2000. It is common ground that the owners made their own arrangements for all painting works, and polishing of the timber floor. In May 2001 they lodged a claim with the Housing Guarantee Fund Ltd as administrator of the HIH Indemnity Scheme, having previously lodged a claim with HIH in January 2001. It is relevant to set out the description of their complaint in relation to the timber floor, which they stated they first noticed on or about 15 December 2000:

We noticed our floorboards splitting down the middle with wide cracks, also they have a wave like appearance, with many knots and black lines throughout.

There is a high volume of vibration when walking over the floor. ...

- 2 On 17 October 2001, the HGFL wrote to the Second Respondent ('the builder') advising they had accepted a claim from the owners, enclosing a Schedule of Works. Item 2 directed the builder to carry out the following works:

provide and engineers report certifying the structural integrity of the timber floor system throughout the dwelling and rectify cracking and gapping of floorboards; doming of flooring and excess movements with the structure, then re-polish as necessary to achieve a satisfactory finish.(sic)

- 3 The builder arranged for another registered building contractor to attend to the rectification works. As I understand it, six floorboards were replaced, stained and individually polished. At the view, it was apparent that this has resulted in an uneven finish and appearance. The whole floor was not sanded and repolished. The builder did not carry out any rectification works to the 'timber flooring system'. Instead, he provided a letter from the Registered Building Surveyor confirming that the frame inspection was carried out on 20 June 2003 at which time the frame, including the sub-floor framing was approved. The HGFL wrote to the owners on 19 March 2002 advising they were satisfied that *'the floor structure complies with the framing code, therefore it is considered that all issues have been rectified.'* It is perhaps surprising that the HGFL, having required the builder to provide an engineer's report certifying the structural integrity of the timber flooring system, was prepared to accept confirmation from the Registered Building Surveyor that the sub-floor framing had been approved as part of the frame inspection. This would seem to have been self-evident as an Occupancy Permit had been issued in respect of the home.
- 4 The owners subsequently obtained a report from Foundation Exploration, Civil & Geotechnical Engineers, in January 2002 and, acting upon the recommendations in that report, arranged and paid for the installation of 22 concrete stumps in the areas they were most concerned about. I am not sure why, having obtained a report which indicates that the sub-floor structure

does not comply with AS 1684.4 – 1999, Table A, the owners did not make a further approach to the HGFL at that time. Nor is it clear why HGFL seemingly ignored the contents of the report when they received a copy. I note that HGFL/VMIA did not engage an engineer to provide an expert report.

- 5 On 3 January 2006, some five years after their initial claim to HIH, Mr Cilia contacted HGFL and wrote the following letter, having been advised by the HGFL that it was not necessary to make a new claim:

Further to our telephone conversation I would like to outline the ongoing problem we have with our floorboards...

As advised by you the details and reports for the claim #900086 ...are on file at your office.

We need to bring to your attention that we have continuously had floorboards breaking and splitting in half and nails popping up. This is more apparent in the warmer weather with new boards splitting all the time.

Following is a brief List

<i>Lounge Room</i>	<i>3 floorboards split</i>
<i>Kitchen</i>	<i>6 floorboards split</i>
<i>Familyroom</i>	<i>2 floorboards split</i>
<i>Hallway</i>	<i>3 floorboards split</i>
<i>Bedroom 2</i>	<i>4 floorboards split</i>
<i>Bedroom 3</i>	<i>3 floorboards split</i>
<i>Laundry</i>	<i>2 floorboards split</i>

As advised you have on file an engineers report stating that the floor was not satisfactory, also when an inspector came he stated that we would not have this problem again but we still do and it is getting worse.

- 6 By letter dated 1 March 2006, VMIA (which assumed the responsibilities of HGFL in February 2006) advised the owners that their claim was rejected, because a re-inspection revealed that damage to the floorboards was as the result of bonding/adhesion of the boards caused by the polishing process, which works were arranged by the owners. Therefore, any distress to the floorboards was therefore not attributable to any works carried out by the builder.
- 7 Although this decision is dated 1 March 2006, the owners did not make application to this Tribunal seeking a review of that decision until 22 November 2006. At the commencement of the hearing Mr Powell of Counsel, who appeared on behalf of VMIA, indicated that no issue was taken with the application having been lodged outside the twenty eight day appeal period but suggested that time should be extended insofar as it was necessary to do so. Appropriate orders will be made extending time.

The owners' position

- 8 The owners obviously find it difficult to understand why their further complaint has been rejected. Mr Cilia was advised by the HGFL that it would be treated as part of their initial claim, and that it was not necessary for the owners to lodge a new claim. The owners are quite adamant that the problems that are apparent in the floor now, are simply a deterioration of those that were the subject of their original claim, which was accepted by the HGFL in October 2001. The owners rely on a report they obtained in February 2001 – from A N Rozsa and in January 2002 from Foundation Exploration, Civil & Geotechnical Engineers (referred to above), copies of which they have filed and served. I understand that a copy of the 'Rozsa report' was provided by the owners to the HGFL in support of their original claim. Mr Rozsa identified that a number of boards were cracked or split and noted *'There were also some boards that showed extensive drying checks through the surface finish'* and concluded *'In my opinion, the cracks in the boards were caused by the timber drying'*.

VMIA's position

- 9 VMIA has engaged Mr Hay to provide an expert report. Mr Hay concludes that the splitting in the timber is caused by edge bonding resulting from the application of the protective coating (by a contractor engaged by the owners). I note that although he has confirmed that at least two of the gaps are in excess of the suggested tolerances set out in the 1999 *Guide to Standards & Tolerances* which provides that a *'gap of more than 2mm between adjacent boards will be considered a defect'* there is no explanation as to how the gaps are or might be caused by edge bonding rather than shrinkage of the timber or why it is therefore not the responsibility of the builder.

- 10 Mr Hay also observed at paragraph 7.1 of the Inspection Report:

During examination of the floor it was noted that in vicinity of the West wall that a number of floorboards vibrated when walked upon. In this area of the floor no edge bonding was sighted.

and at paragraph 10

However, with floor vibration and nail popping sighted, suggests that a small number of subfloor members connections may require adjustment. As stated in clause 8.2 this is only an observation, for at time of this inspection no structural details (plans/specifications) were sighted.

- 11 I am unaware whether the nail popping observed by Mr Hay is in only in the area where the new stumps were installed by a contractor engaged by the owners. Once again I was referred to the 1999 *Guide to Standards & Tolerances* which provides that nail popping is not a defect unless it occurs within 24 months of construction and then only where the builder was responsible for polishing the floor, and

Where owners have polished exposed flooring...after completion of the Builder's works, due consideration shall be given by the owners in regards to the effects of shrinkage of the floor frame and the subsequent effects of nail popping.

- 12 As I observed in *Webb v Housing Guarantee Fund Ltd* [2004] VCAT 2343, the *Guide* is a guideline document only and is not prescriptive. It would seem appropriate for further investigation into the cause of the nail popping to be undertaken. If it is only in the area where the new stumps were installed, it may well be that this is not something for which the builder could be held responsible.
- 13 Mr Hay states in his report that he was provided with copies of the following reports:
 - Building Assist dated 25 September 2001,
 - Foundations Exploration dated 24 January 2002
 - Mr P Stoate dated 9 February 2006.
- 14 Although the owners have filed a copy of the Foundations Exploration report, VMIA has not filed copies of the Building Assist Report or the report prepared by Mr Stoate, who I understand is one of its 'internal inspectors'. This is unfortunate, as no doubt the HGFL had regard to the Building Assist report when it first accepted the claim. I am concerned that a copy of Mr Rosza's report was apparently not provided to Mr Hay. It seems that Mr Hay has not been provided with a copy of all available relevant information when he was asked to inspect and prepare his report. In the circumstances, particularly where VMIA now seeks to resile from its original decision to accept the claim, I have no alternative other than to apply the rule in *Jones v Dunkel* (1959) 101 CLR 29 and draw a negative inference from VMIA's failure to provide a copy of the Building Assist Report to Mr Hay, or to file a copy of that and Mr Stoate's report.

The builder's position

- 15 The builder relies on a report from Alan Sherard of Alan Nicholas & Associates, Building Consultants, who inspected the property on 22 April 2007. He confirms that there is splitting and shrinkage of floorboards but does not express a definitive opinion as to the cause of the shrinkage and splitting although he suggests they may be attributable to the use of standard grade timber as opposed to select grade, and '*the polyurethane application may contribute to the boards splitting along the length, due to restricting the natural movement to the timber through hydrostatic action*'.(emphasis added)

The view

- 16 At the request of the owners I attended at their home to view the floor. In attendance were the owners, Mr Cilia senior, Mr Powell, Mr Hay and Mr Jensen. The house is well maintained. Mr Cilia pointed out a number of boards of concern and the splitting and gapping complained of is

noticeable. Further, the floorboards which were replaced by the builder when directed to do so by the HGFL are clearly noticeable. There is generally gapping around the new boards and, although not significant, it is noticeable particularly because of the colour/finish differential between those boards and the rest of the floor.

- 17 The owners maintain that the boards continue to split, nails continue to pop and that these are ongoing problems. During the inspection they pointed out a board in the hallway which had apparently split since Mr Hay visited the site in February of this year. Mr Hay expressed some consternation about this and was unable to provide any explanation as to why the floorboards would continue to split. He said that he would have expected the floor to have stabilised many years ago and that the effects of edge bonding are not generally continuing. It may well be that further investigation is required.

Conclusion

- 18 VMIA having accepted the owners' claim in 2001, directed the builder to carry out certain works which he did (notwithstanding my concerns about whether he complied with the direction in relation to obtaining an engineer's certification of the sub-floor). VMIA having advised the owners when they made contact in January 2006 that it was not necessary for them to make a new claim, now seeks to resile from its earlier decision. I asked Mr Powell on a number of occasions during the hearing, and at the view, how the decision the subject of this appeal sits with the earlier decision to accept the owners' claim. Although he conceded that it does not, he was unable to persuade me that anything of significance has occurred since 2001 which would support VMIA's decision to now reject the claim.
- 19 I found the owners to be credible witnesses and accept their sworn evidence that they made it known to Mr Sheldrick (who I understand prepared the Building Assist report) when he inspected in 2001 that they had engaged the contractor to carry out the floor polishing and that these works had not been carried out by the builder. The Building Assist report may have assisted in clarifying the information upon which that report was based, but as I have noted above, a copy of that report was not filed.
- 20 I will therefore order that the decision of VMIA be reversed. I note that I was asked to determine the question of liability only as a decision on quantum has not yet been made by VMIA. I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD