

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDINGLIST

VCAT REFERENCE NO. D590/2010

CATCHWORDS

Defective floor, responsibility between builder and flooring sub-contractor, identity of sub-contractor, novel material supplied by the builder, rectification or replacement, Wrongs Act Part IVAA

FIRST APPLICANT	West Meadows Homes
SECOND APPLICANT	Roslyne Chetcuti
THIRD APPLICANT	Joseph Chetcuti
FIRST RESPONDENT	Orion Kitchens Pty Ltd (ACN: 117 868 283) (De-registered)
SECOND RESPONDENT	Bradley Cuffe
WHERE HELD	Melbourne
BEFORE	Senior Member Lothian
HEARING TYPE	Hearing
DATE OF HEARING	15 February 2011
DATE OF ORDER	16 March 2011
CITATION	West Meadows Homes and Ors v Orion Kitchens Pty Ltd (ACN: 117 868 283) (De- registered) and Anor (Domestic Building) [2011] VCAT 415

ORDERS

- 1 The First Applicant must pay the Second and Third Applicants \$35,032.11 forthwith.
- 2 The Respondent must pay the Second and Third Applicants \$1,000 forthwith.
- 3 Costs are reserved with liberty to apply until 22 April 2011.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the First Applicant: Mr A. Dickenson of Counsel

For the Second and Third Applicants: Mr P. Lithgow of Counsel

For the Second Respondent Mr B. Cuffe in person

REASONS

- 1 All parties agree that Mr and Mrs Chetcuti's timber floor is defective. They disagree about who is responsible and how it should be rectified.

HISTORY

- 2 Mr and Mrs Chetcuti are the second and third applicants. By a contract dated 30 August 2008 they agreed to buy their home from the first applicant-Builder. The slab had been laid. The agreement provided that the Builder would complete the home. The home was apparently completed successfully and the Owners moved in.
- 3 The contract as varied required the Builder to install Kempas solid timber flooring over a plywood base laid on the concrete floor. Before the variation, the contract had specified Tasmanian oak.
- 4 The Builder supplied either all or most of the materials for construction of the floor and sub-contracted installation to the respondent-Floorer. The question of whether the Respondent should be Orion Kitchens Pty Ltd or Mr Cuffe in person is discussed below. The application was against them both.
- 5 The Builder paid the whole sum charged by the Floorer, which was \$2,536 inclusive of GST.
- 6 The Builder and the Floorer agree that the Builder supplied the Kempas flooring, plastic vapour barrier and plywood underlay. They disagree about who supplied the polyurethane glue, but as nothing turns on this issue, it is unnecessary for me to decide it. They agree that the vapour barrier was not installed. The Builder returned the vapour barrier plastic for a refund - he said this was after the plywood was laid.
- 7 It is unusual to use the plywood supplied by the Builder as an underlay. It is approximately 14mm thick, consists of seven laminations of plywood and both sides are coated with a very thin lamination of printed plastic or paper that looks like timber grain. The plywood appears to be impervious to water. A droplet of water placed on it is not absorbed. The Floorer said that it is the material used to construct the internal parts of caravans, and its appearance is consistent with that use.
- 8 On the recommendation of the Builder, the Builder and Owners both commenced the proceeding against the Floorer before the Owners were legally represented. The claim was for \$23,769.90 to replace the floor.
- 9 As ordered by the Tribunal on 8 November 2010, the Owners issued a cross-claim against the Builder on 9 December 2010. The Owners allege that the flooring was not performed in a proper and workmanlike manner. Both the original application and the Owner's cross-claim refer to the Australian Timber Floor Association ("ATFA") report by Mr Stringer, discussed below. The cross claim estimated the quantum of the claim at

\$32,500 and stated that more precise particulars would be provided prior to the hearing. Particulars were not provided, but the Owners' expert report of 6 January 2011 includes a schedule by Longbow Constructions Pty Ltd giving the costs of works and moving and storage of household furniture as \$36,546.21

- 10 The Builder's revised claim against the FLOORER of 28 November 2010 was for \$10,510.
- 11 On 8 December 2010 "Bradley Cuffe ORION KITCHENS PTY LTD" counterclaimed against the Builder for \$2,300, all of which is costs and expenses associated with this proceeding.
- 12 On 7 February 2011 the Builder filed a defence to cross-claim, in which it did not admit that there are defects or a breach of the contract between the Owners and Builder. It denies that it owes the Owners a duty of care, claiming rather that the work was done by Mr Cuffe or Orion Kitchens Pty Ltd. The Builder also pleads that if its "acts and omissions" caused loss to the Owners, it is an apportionable claim under Part IVAA of the *Wrongs Act* 1958.

RESPONSIBILITY BETWEEN THE OWNERS AND BUILDER

- 13 As between the Owners and Builder, the Builder is responsible. The contract was between them and under s8 of the *Domestic Building Contracts Act* 1995 ("DBC Act") the Builder warranted that the work would accord with standards of reasonable workmanship. The Builder is liable to the Owners for breach of contract if the floor is not in accordance with standards of reasonable workmanship. The contractual responsibility is strict; it does not depend on the Builder being negligent. The only question is whether the floor the Builder delivered to the Owners was of a reasonable standard of workmanship.
- 14 It is not necessary to also consider whether the Builder owes the Owners a duty of care and whether that duty has been breached.

IDENTITY OF THE FLOORER WHO CONTRACTED WITH THE BUILDER

- 15 Mr Galea and Mr Cuffe agree that there was no discussion about the identity of the FLOORER. I accept Mr Cuffe's evidence that the only discussion was that the floor would be laid for \$20 per square meter, with nearly all the materials to be provided by the Builder.
- 16 The only document between them put in evidence was the invoice of 16 December 2008 from Orion Kitchens Pty Ltd and Mr Galea agreed that his company, the Builder, paid Mr Cuffe's company. I find that the FLOORER was Orion Kitchens Pty Ltd, not Mr Cuffe personally.

DEFECTS AND RECTIFICATION

- 17 The floor has cupped and peaked extensively. The FLOORER has replaced some boards, particularly along the south side of the family room and study.

Others have been top nailed to prevent movement and a section approximately 300mm square has been removed down to concrete at the east end of the floor in the family room, near the rear windows, to enable the parties and their experts to inspect.. The Owners' expert witness, Mr Marius Schreuders, reported that there are two sections in the hall where the original boards have been removed by sawing the boards and removing the fixing tongue between the boards.

- 18 Mrs Chetcuti said she still perceives movement, but it was not apparent at the site inspection that preceded the hearing on 15 February 2011. I accept her evidence that the boards in the study and second bedroom doorways peaked to the point where her husband had to "bash them down" to allow the doors to be opened and closed.
- 19 Mr Schreuders also reported a number of gouge marks along the south wall where the floor has been replaced. He assumed they have been caused by the FLOORER's carelessness with the flooring or tools during the attempted repairs. I consider his assumption reasonable.
- 20 In the initial claim, Mr Galea of the Builder wrote in the section "I apply to the Tribunal for the following orders":

The total cost of rectification of timber floors which need to be replaced as Bradley Cuffe failed to lay down plastic moisture barrier, which will cost minimum \$14,769.90 to replace and to relocate the owner ...

- 21 In the section "On the following grounds" he wrote:

Bradley Cuffe was hired as a sub-contractor to lay down timber flooring on plastic barrier and plywood. Bradley failed to first lay down the plastic, which was on site. He's work was of a generally poor workmanship as he also failed to leave expansion gap on all walls, to allow timber to move, resulting in unacceptable standard. Attached is a AFTA Floor Report and quotes for replacement. [sic]

- 22 Mr Cuffe said that he had arranged for the AFTA report, and the report dated 23 June 2009 is addressed to him. The author, Christopher Stringer, said that he observed some hollow or drummy spots and cupping and peaking. He said:

The floorboards exhibited signs of movement throughout the floor. Some areas of the flooring were not directly adhered to the substrate and as such were buckling. The lack of expansion gap [around the perimeter of the floor] was also noted with no expansion gap particularly in the section that had failed and had been removed.

- 23 The first AFTA report gives the average moisture readings for the tops of the Kempas boards as 10%, from the middle as 10.75% and from the bottom as 11.2%. It recorded the moisture of the plywood underlay as 18.45%. Mr Stringer did not give a firm opinion as to the source of the moisture:

From the testing undertaken the readings were higher the closer they were to the concrete this may indicate moisture ingress from outside sources or moisture/vapour transfer from the concrete or the plywood being delivered on site with a higher than required moisture content. However, as the readings are higher towards the lower surface this suggests that it should be checked by more accurate means (ie oven dry test method).

- 24 Mr Stringer did not state unequivocally whether the higher moisture observed at the bottom of the boards came from the floor through the plywood, or from the plywood itself. It also does not say unequivocally that the lack of a vapour-proof barrier caused the problem:

It is more than likely that sections of this floor will need to be pulled up and replaced and the extent of this will be determined by how far the moisture has spread. Once this has been identified the concrete in these areas may need to have an appropriate vapour barrier (builders plastic) laid prior to re-fixing plywood to the concrete. [Emphasis added]

The report included:

Mr Geoff Galea reported that the installation of the plywood was direct to concrete and had no plastic installed between the plywood and the concrete. He reported that he knows this for a fact as he was charged for the plastic and it was delivered on site with the other materials and was not used. As a result he returned to the flooring shop to obtain a refund. He also reported that he was informed that the plywood was moisture resistant because it had a paper film on both faces and as such plastic was not required.

- 25 Mr Stringer concluded that factors contributing to the problem were:

The cupping and peaking in the floor is an obvious defect and is considered to be the result of the floor boards reflecting the in-service conditions where there has been moisture uptake most likely from the sub-floor.

Therefore with regard to this floor it is considered that the contributing factors are:-

- Wet sub-floor from either
 - Concrete moisture through lack of moisture/vapour barrier
 - Moisture entering the timber floor boards via the plywood which may have a higher moisture content.
- Lack of nails or fixings holding the boards to the plywood as no nails were observed in any of the boards removed.
- Paper on the face of plywood is not conducive to adhesive fixed flooring as the weakest point will be the adhesive holding the paper face to the plywood.
- Application of the adhesive in rows approximately 450 mm apart.

- Or a combination of all or some of the above.

26 The Owners’ cross-claim against the Builder relied on the first AFTA report of 23 June 2009, and listed the defects as caused by:

- a failure to install a plastic moisture barrier between the concrete base of the townhouse [sic]
- inadequate plywood subfloor material; and/or
- defective installation techniques.

The causes of the defects are explained in detail in the first AFTA report and a subsequent report prepared by [AFTA] following further tests undertaken on a sample of the floor.

27 The second AFTA report dated 17 September 2010 is signed by D.B Hayward and is headed “Oven Dry Testing. It was addressed to Mr Cuffe and filed by the FLOORER.

28 Excluding the formal parts, Mr Hayward states:

You provided 2 samples of Kempas flooring (indicated to be 85 x 14) and a piece of plywood sub-floor for moisture content testing by the oven dry method. The testing was carried out in accordance with AS/NZ 1080.1:1997 Timber – Methods of Test – Method 1: Moisture content.

The table below outlines the oven dry moisture contents.

Sample	Oven dry MC	Initial board width
Flooring 1	11.8%	(not a full board width)
Flooring 2	11.4%	84.91
Plywood	9.9%	-

Based on the board width and moisture content of sample 2 it was considered to meet the requirements of AS2796 Timber – Hardwood – Sawn and milled products at the time of manufacture.

With regard to our questions we reply as follows:-

The plywood sample provided for testing was a decoratively coated product. What is recommended for sub-floors is structural plywood which has raw timber surfaces. The reason for this relates to structural integrity and that it is known to bond well with flooring adhesives. The structural and adhesion properties of the product provided are not known.

When black plastic is laid over a slab as a moisture barrier with plywood sub-floor above, the plywood is mechanically fixed to the slab. As such ‘bonding’ is not relevant.

As discussed previously species identification of the flooring could be carried out by others on the flooring but unlikely with the plywood due to the thin veneers.

- 29 Mr Simpson of Building Check Pty Ltd provided a written report for the Builder dated 2 February 2011 and attended the site inspection on the morning of the hearing. The list of documents upon which he based his report does not include the second AFTA report. Mr Simpson gave evidence that although there is cupping throughout the timber floor, that the moisture percentage appears to now be acceptable and said, somewhat surprisingly:

It was noted, that there is some residual moisture in the ply substrate, with readings of around 20%, however, it is considered that this will not have a significant effect on the timber flooring.

- 30 Mr Simpson did not say how he came to this conclusion. When he took Penetrometer readings at the site inspection, the wood in the family room ranged between 9.2% and 10.5%, whereas the only accessible plywood – the cut ends in the inspection hole – had a noticeably higher reading of 15-17%.
- 31 Mr Schreuders and Mr Simpson gave evidence concurrently at the hearing. They agreed that the cupping has been caused by excessive moisture beneath the boards. Mr Simpson said he believes the source of the moisture is the slab and that this could have been prevented if the moisture barrier had been laid.

Secret nailing

- 32 The experts suggested that the floor might not have been secret-nailed, only glued. When Mr Cuffe gave evidence that he did secret-nail the floor but not right beside the skirtings and walls for fear of damaging them, Mr Schreuders and Mr Simpson agreed that this was a reasonable explanation.

The plywood underlay

- 33 It is hard to imagine why the Builder would provide this underlay, which has been purpose-made to be seen in a finished product, rather than to be laid beneath timber floors.
- 34 I accept the evidence of Mr Cuffe that he raised concerns with the Builder about the use of the plywood, that he had not seen it used this way before and that Mr Galea told him it was moisture resistant. Both Mr Simpson and Mr Schreuders agreed that they would not use this type of plywood as a substrate for a timber floor.
- 35 I accept Mr Cuffe's evidence that Mr Galea insisted that he telephone a representative of the supplier and that this person told him the plywood would function as a moisture barrier. I note further that around this time Mr Galea decided to send the vapour barrier plastic back for a refund, rather than insisting that the FLOORER take up the plywood and lay it.

- 36 I find that the use of this unusual material without an additional moisture barrier was the Builder's choice and is at its risk.

How to rectify

- 37 The first AFTA report did not firmly state the cause of the defect, nor a method of rectification. The first two paragraphs of the conclusion are:

Based on the information included above it is considered that this floor was not of a standard acceptable by the industry.

As such, it is considered that the only method now of rectification of this floor is to pull up any other affected areas and check the 3 main components of the installation; the concrete, the fixing methods and the plywood. Once the problem and its extent have been identified, that will determine the next course of action. [Emphasis added]

- 38 The report contemplated that the floor could be repaired rather than replaced, as can be seen in the quote at paragraph 24 above.
- 39 Mr Schreuders said that if the floor is sanded back to level, up to 4 or 5mm of the boards will be removed, which risks splitting, particularly near the tongues of the boards.
- 40 Measurements taken by Mr Simpson at the site inspection showed that the greatest difference between the base and edges of the cupped boards was no more than 1.5mm and I accept that, on that basis, it could be expected that sanding would decrease the thickness of the boards by about 3mm.
- 41 I prefer Mr Schreuders' evidence, that it is necessary to remove and replace the timber floors, to that of Mr Simpson, who gave evidence that the floor could be rectified at the cost of \$11,986.04 by the Builder, or \$17,000 if rectified by an independent builder. I am grateful for the candid evidence of Mr Cuffe who said "You can't band-aid this floor – there is too much risk of going through the tongue".

Rectification work by the FLOORER

- 42 I find that the rectification work undertaken by the FLOORER, including top-nailing the floor boards and replacing boards on the south side of the family-room and study, has not been undertaken in accordance with standards of reasonable workmanship. However, I also find that this work has not contributed to or caused the need to remove and replace the floor – the underlying problem that led to that necessity regardless of poor attempts at rectification.
- 43 I accept Mr Schreuders' evidence that the south wall requires repair from damage done during the FLOORER's attempted repairs. Longbow costs "prepare and paint to match all repaired areas" at \$3,565, but there is no description of the costed work. In the absence of evidence of the cost of repairing walls damaged by the FLOORER, I find that the reasonable cost of rectification is \$1,000.

RESPONSIBILITY BETWEEN THE BUILDER AND THE FLOORER

44 The Builder has failed to satisfy me that the failure of the floor has been caused by a breach of contract or breach of duty by the Floorer, rather than by some other cause, such as the Builder's own action in providing at least one unsuitable material – the plywood. I therefore find that the Builder is responsible to the Owners for the failure of the floor.

WRONGS ACT

45 Section 24AF(1) of the Wrongs Act provides:

Application of Part

- (1) This Part applies to—
 - (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care;

46 Section 24AH(1) provides:

Who is a concurrent wrongdoer?

- (1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

47 Section 24 AI(1) provides:

Proportionate liability for apportionable claims

- (1) In any proceeding involving an apportionable claim—
 - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
 - (b) judgment must not be given against the defendant for more than that amount in relation to that claim.

48 I find that the failure of the floor itself is not subject to the Wrongs Act, because the Builder's liability arises out of breach of contract to provide a particular result, rather than a failure to take reasonable care. However I find that damage to the south wall in the course of attempting repairs is subject to Part IVAA of the Wrongs Act, and I find that the Floorer is solely responsible for it.

COMPENSATION

49 In the absence of contradictory evidence, I accept the Longbow estimate of \$36,546.21, with the exception that I do not allow Longbow's overheads and GST on the removal and storage of household furniture and fittings – a sum of \$514.10, giving a total of \$36,032.11.

50 For the reasons discussed above, the Builder must pay the Owners \$35,032.11 and the Floorer must pay the Owners \$1,000.

51 Mr Schreuders said in passing during evidence that the cost to the Owners of accommodation would be approximately \$6,000, but no evidence was presented to me on this point and I make no allowance for it.

COSTS

52 I reserve costs and give liberty to apply until 22 April 2011. Nevertheless, as the hearing occupied no more than a long half day, I draw the attention of the parties to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998.

SENIOR MEMBER M. LOTHIAN