VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D202/2004**

CATCHWORDS

Domestic Building Insurance – indemnity by remedial work not given until work performed - remedial work offered must be adequate to indemnify insured – Domestic Building (HIH) Indemnity Fund – nature of entitlement of insured – builder bound by decision of insurer if no appeal but liability extraneous to the policy of insurance must still be established- liability to builder to build according to plans – builder not responsible for damage arising from defective plans– builder not generally liable to check sufficiency of plans – defective plans provided by builder not generally defective workmanship under the building contract – any liability usually outside the contract – breach of statutory duty – s.30 Domestic Building Contracts and Tribunal Act 1995 – builder must obtain foundation data before entering into contract – builder liable to owner in damages for failing to comply with the section.

APPLICANT:	Noreen Cosgriff
FIRST RESPONDENT:	Housing Guarantee Fund Ltd (as Administrator of the Domestic Building (HIH) Indemnity Fund)
SECOND RESPONDENT:	Omega Construction Pty Ltd
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Walker
HEARING TYPE:	Hearing
DATE OF HEARING:	24-27 October 2005
DATE OF ORDER:	16 November 2005

[2005] VCAT 2909

ORDERS

1. Order the Respondents to pay to the Applicant the sum of $39,231.50.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:	Mr A. Dickenson of Counsel
For the First Respondent:	Mr S. Stuckey of Counsel
For the Second Respondent:	Mr J. Lewis of Counsel

REASONS FOR DECISION

Background

1. The Applicant is the owner of a brick veneer dwelling house ("the House") built on strip footings and situated at 61 McLaughlin Crescent, Mill Park ("the Property"). She and her husband ("the Owners") purchased the Property in 1986. At the time of purchase, the House was 13 squares in area.

2. At all material times the Second Respondent ("the Builder") was a builder carrying out domestic building work. Its director is Mr McArthur who was, but is no longer, a registered builder. It does not appear that the Respondent is presently conducting any sort of business, although Mr McArthur is in partnership with another man who is a registered builder.

3. The Applicant's husband, Mr Cosgriff, transferred his interest in the Property to the Applicant in 2000. At the time the work, the subject of these proceedings, was carried out he was Mr McArthur's accountant and the parties were on friendly terms. He was also a joint owner of the Property at that time.

The Application

4. In this proceeding the Applicant seeks damages against the Builder alleging defective workmanship in the construction of a two storey extension ("the Extension") to the property at the rear of the existing house ("the House"). The slab upon which the Extension has been constructed has dropped on the side furthest from the House causing the whole extension to tilt slightly to the rear. As a consequence, there is a small gap between the House and the Extension from a maximum of about 20-25 mm at the roof line and gradually diminishing towards the floor level where the two elements remain joined.

5. Domestic Building insurance for the work was provided by HIH Insurance Limited ("HIH") through the agency of Bovill Risk & Insurance Consultants Pty Ltd ("BRIC") and the Applicant claimed on the Domestic Building (HIH) Indemnity Fund administered by the First Respondent ("the Fund"). After investigating the matter the Fund decided to accept the claim and direct the Builder to rectify the problem. Neither the Applicant nor the Builder appealed against this decision. What then occurred is the

subject of considerable dispute but in the end, no remedial work was carried out. The Fund then made a decision to "finalise" the claim on the ground that it considered the Applicant had refused the Builder access to rectify the work. Refusal of access was asserted by Mr McArthur but is denied by the Owners. The Applicant then brought these proceedings claiming indemnity from the Fund and damages for defective workmanship from the Builder.

The hearing

6. The matter proceeded over four days. Mr Dickinson of Counsel appeared for the Applicant, Mr Stuckey of Counsel appeared for the Fund and Mr Lewis of counsel appeared for the Builder.

7. Lay evidence was given by the Owners, by the Director of the Builder, Mr McArthur and, on behalf of the Fund, by Mr Turner who handled the file. In addition, numerous expert witnesses were called. For the Applicant I heard from Mr Brown, a structural engineer, Mr Lees, a building expert and there was also tendered without objection a report from another engineer, Mr Casamento although he was not called. For the Fund I heard from Mr Neill, a structural engineer, and Mr Dobell, a building consultant. For the Builder I heard from Mr Lawrance, a geotechnical engineer.

8. As to the lay evidence, I have some misgivings about the reliability of the evidence of the Owners. They insisted they made a claim on HIH or its agent, BRIC and in support of this evidence relied upon an inspection of the property carried out by a Mr Patterson on behalf, they said, of HIH. I find that this is a reconstruction. It is clear from Mr Patterson's report and the date of the inspection that the real claim they made was upon their ordinary household insurer, CGU Insurance ("CGU"). Also from the report it appears that, in making the claim, the Owners blamed *"extremes in weather conditions"* for the subsidence, not bad workmanship by the Builder. In the claim form to the Fund they acknowledged that they had not previously made a claim upon HIH. Despite this they both gave sworn evidence, not only that they had made a claim but that it was rejected because the cracks were small. Indeed, Mr Cosgriff says the claim was rejected because the cracks were less than 15 mm. Under cross examination, the Applicant acknowledged that she could not recollect having completed the claim form but Mr

Cosgriff was firm that it was completed and sent in. According to the report by Mr Patterson, the claim was rejected because he found that the problems were due to *"…maintenance / construction…"*. I do not accept the evidence of the Owners that they ever made a claim on HIH although, as will be seen, it does appear that they obtained a claim form from BRIC.

9. Further, the Owners swore that they complained to Mr McArthur about the cracking about one year after completion and that *"he continually said he would fix the problem"* but never did. They also allege that, on 22 July 1999, he advised them that his registration had expired and they should claim on his insurance. Mr McArthur denies these allegations and I have difficulty reconciling them with the Owners' statement in the claim form to the Fund that they had not notified the Builder of the defects. It would also seem to be inconsistent with the claim the Owners made on their household insurance in 2001 where they blamed the movement on extremes of weather conditions and not on the Builder.

10. Mr McArthur frankly admitted that there were things he could not remember. He did not seem to have a particularly good recollection of events but he impressed me as an honest witness and in any conflict with the evidence of the Owners I prefer his evidence although it is lacking in precision and, on that account, some reliability.

The work

11. In about early 1996 there were discussions between the Owners and the Builder about the construction of an extension to the House on the Property. Mr McArthur drew a plan for a second storey extension but this was not proceeded with due to cost. Mr McArthur then drew another plan for a two storey extension to be constructed at the rear of the House and a domestic building contract was subsequently entered into between the Owners and the Builder for the construction of the Extension in accordance with those plans. Neither the Builder nor Mr McArthur made any charge for the preparation of either set of plans.

The plans

12. The plans are for a brick veneer extension to be constructed on a raft slab. The slab was

designed without first obtaining any soil tests or engineering advice. Mr Cosgriff said that he questioned Mr McArthur about a soil test and engineering plans and was told that all that had been taken care of but I think it unlikely that this occurred. No charge was made by the Builder for engineering fees or soil testing and Mr McArthur said that no engineers were engaged.

13. According to the preponderance of expert evidence, apart from the presence of trees, the design was sufficient for soil with an "H" classification which, Mr McArthur considered, was the soil the Extension would be built on. The geotechnical engineer, Mr Lawrance, confirmed that this was an appropriate classification for the site although a structural engineer, Mr Brown said it should have had a "P" classification due to the presence of the trees. The difference is more apparent than real. Even if it should be classified as an "H" site, Mr Neill and Mr Casamento agreed that the slab does not comply with the appropriate standard because no account was taken of the trees. I conclude from this that, had the trees been removed or a root barrier been constructed, the slab would have been adequate. The plans do not show any join between the slab and the footings of the house but Mr McArthur's evidence is that there is such a connection and the absence of any differential movement between the levels of the floor of the House and the floor of the Extension where the two join would support this evidence.

14. Within about 6 months of the construction the Owners noticed cracks appearing in the walls where the Extension joined the House.

15. On 22 July 1999, BRIC sent a claim form to Mr Cosgriff. There is no copy of any completed claim form nor is there evidence of any action by BRIC or HIH such as an acknowledgement or inspection that would indicate that a claim was subsequently made. There is nothing in the letter from BRIC to say what it was that the Owners wanted to claim for. I am unable to make any finding as to why this form was sent and feel that I have not been told the full story about this by the Owners.

16. In early 2001 the Owners made a claim on their household insurance company, CGU. CGU sent out an inspector, a Mr Patterson, whose inspection report has been tendered

(Exhibit 3). In the report, Mr Patterson states:

> *"Mr/s Cosgriff extended dwelling in October 1997. As a result of extremes in weather conditions the extension has moved approximately 15 mm.*
>
> *This movement has caused hardiplank abutting brickwork to open and a downpipe not to align correctly. The upper level downpipe now allows water to overspill the gutter below".*
>
> *Taken that the concerns of the client are maintenance\construction he has been advised and accepts claim denials.*
>
> *We have also arranged to rectify the gutter concern for him at his expense.*
>
> *For the reasons stated above, we find no claim coverage under the policy hence recommend claim denial."*

Mr Patterson was not called by any party but his report is in evidence and speaks for itself.

The claim

17. In early October 2002 the Owners were sent notification of the HIH support scheme and their ability to claim on the Fund. On 8 January 2003 they made such a claim. In the claim form they stated that they had not notified the Builder of any defects and they had not lodged any complaints or claims with the Fund or HIH. The form is signed by both Owners, although by this time the property was solely owned by the Applicant. The Fund rejected the claim on the ground of insufficient information. The missing information was provided by letter on 12 March 2003 and on about 24 March a fresh claim was lodged. The Builder was notified of the claim and an inspection was arranged by the Fund.

18. On 8 April 2003 the Fund received an undated letter from Mr McArthur which, in essence, denied liability on the ground that the design was adequate and the Builder relied upon the Council inspectors who passed the work.

19. The inspection subsequently took place on 20 May 2003 but Mr McArthur did not attend due to ill health. The inspector noted that further investigation was required and the Fund then engaged a consulting engineer, Mr Roderick Neil to investigate the matter. Following the receipt of Mr Neil's report the Fund sent a letter to the Builder on

4 August 2003. The document, which constitutes the Fund's decision, is very brief. It states:

> *"This list describes the work to be rectified (not method) and should include associated damage"*.

The "list" is a single phrase:

> *"Cause of foundation movement and related distress"*.

20. The decision was sent to the Builder with an accompanying letter requiring it "… *to complete these works by 03\09\03"*. The letter sets out the right of appeal to the Tribunal and various other matters that are not now material. On the same day, the Applicant was advised of the decision. Neither party has appealed this decision.

21. Various communications, verbal and written, then followed. The Fund and the Builder assert that I should find from these that the Applicant refused to allow the Builder to rectify the work. The Owners argue that I should find that the Builder has failed to carry out the work and that it is not reasonable that it should be permitted to do so in any event.

The communications between the Builder and the Owners

22. Following the decision, the first communication appears to have been a handwritten letter from Mr McArthur to the Fund dated 25 August 2003 to the effect that Mr McArthur and his son, who worked on the job with him, had no recollection of any trees of significance being in the backyard. He then goes on to say that he has engaged the services of an engineer to investigate the matter and they will need 3-4 weeks to respond.

23. It is fairly clear from this letter that it does not amount to any request by the Builder for access to carry out any work nor is it a request for an extension of time to carry it out. The extension of time requested appears to be for the purpose of obtaining an engineer's report to see if he is responsible.

24. In response to this letter the Fund wrote back approving the extension of time to complete the works to 6 October 2003 and suggesting the Builder should engage an

engineer able to provide a report more promptly. The Applicant was notified of the extension.

25. On 23 September 2003 Mr McArthur wrote a letter to the Fund stating that his engineering advice was that the trees below the Extension would have to be removed and then, after waiting 18 months for the ground to stabilise, the gaps which had not closed would be filled. He denied that there were any trees of significance near the Extension at the time of construction and said:

> "*I suggest that you need to inform whoever planted the trees that they need to remove them"*.

He added:

> *"This situation is not my fault. I believe it is due to the trees and all the dry weather we have had over the past 5 years. However, I do have sympathy for Brendan and family. We were friends for years and I will see what I can do to help with the cracks after the stabilisation period"*.

26. This letter is not an indication by the Builder that it has any intention of complying with the Fund's direction. Rather, it suggests that someone else should remove the trees and then the Builder would *"…see what I can do to help with the cracks after the stabilisation period"*. That is not what the Fund's decision required.

27. The Fund wrote back on 2 October 2003 denying that the trees were planted after construction and pointing out that, at the time of construction, no allowance had been made for the effect of the existing trees by means of their removal or the installation of root barriers. The letter also reminded the Builder that rectification was to be completed by 6 October 2003.

28. On a date that is not established on the evidence, Mr McArthur wrote to Mr Cosgriff an undated letter which should be set out in full. It is as follows:

> *"I was very sorry to hear of the movement and subsequent damage to your extension and even though I am not responsible for the trees and 5 years of drought conditions I do feel obliged to help (we were friends once). I spoke to Charles at CW Lawrance Soil Engineers in Warrandyte about the problem and he told me the trees need to*

come down and the soil needs to stabilise for 12 months or so and then you repair the damage. I passed this information onto HGF and said if someone cuts the trees down I would be willing to repair the damage. I have never seen this happen before, especially on any work I have done and I am a little bewildered by it all. Again I am sorry for all the anguish you and your family must feel".

29. Although the absence of a date or any evidence as to when this letter was sent or received makes it impossible for me to fit it precisely into the sequence of correspondence it does not seem to me that this is a request for access to the property or an indication of willingness to comply with the Fund's direction. At most, the Builder is offering to "repair the damage" if somebody else cuts down the trees. It is an offer to help rather than an attempt to follow the Fund's direction.

30. On 11 January 2004 the Applicant notified the Fund that she had not heard from the Builder apart from that the last letter referred to which she referred to (wrongly, I think) as a letter of apology. On 16 January 2004 the Fund wrote to the Builder requiring the direction to be complied within 10 days *"… or we will have no option but to proceed with the matter as a formal claim"*. It is uncertain what these words I have quoted mean. There had already been a claim and a decision had been made to accept it and provide indemnity in the form of rectification by the Builder. The letter goes on to indicate that the Fund would propose to direct the Owners to obtain quotations for the work to be carried out by someone else. A copy of this letter was sent to the Applicant.

31. Following receipt of this letter, Mr McArthur made a number of attempts to contact Mr Cosgriff. I am satisfied on the evidence that Mr Cosgriff avoided these calls and refused to speak to Mr McArthur about the matter. I am also satisfied that neither he nor the Applicant had any wish for Mr McArthur to carry out any work. Mr Cosgriff had sued the Builder for unpaid accountancy fees some years earlier but whether his refusal to speak to Mr McArthur arose from that, from the state of the house, from the absence of any rectification work or a combination of these and perhaps other matters is not established. In subsequent correspondence the Owners raised, in support of their objection to him doing the work, the fact that Mr McArthur was no longer a registered builder, that the scale of the work was substantial and that he had not sought access nor

provided them with any indication as to what he proposed to do.

32. In his oral evidence, Mr McArthur said that he was prepared to come back 18 months after the trees were removed. He said that when he first spoke to Mr Cosgriff by telephone on 27 January 2004 he wanted to go and see what had to be done to rectify the problem. He said that he thought it was quite a minor job and would involve him patching up bits of plaster, filling a few holes and fixing the spouting. Mr Cosgriff told him to ring his solicitor, Mr Jamieson who in turn told Mr McArthur to sort it out directly with Mr Cosgriff. Mr McArthur also said that, a month or so before this telephone conversation of 27 January (which would place it in about December 2003), he had spoken to Mr Cosgriff and was told by him that it was out of Mr McArthur's hands and in the hands of the Fund. Although Mr McArthur now says in evidence that he was prepared to go back and fix the problem, it does not seem to me that he made that clear to the Owners. It seems to me that he wanted to discuss the matter.

33. Shortly after this conversation with Mr Cosgriff on 27 January, Mr McArthur rang the Fund and said that the Owners were not prepared to remove the trees or to allow him sufficient opportunity to rectify. He confirmed this by a handwritten letter the same day which for the first time stated clearly, at least to the Fund, that he was willing to go back and carry out the rectification work. However on the basis of his evidence it is quite unclear just what it was that he was proposing to do and whether, if he did it, that would have indemnified the Applicant with respect to the loss. It seems to me that all he was proposing to do was remove the trees, wait for 18 months and then carry out cosmetic repairs. On the basis of the expert evidence I do not think this would have been sufficient.

34. On 29 January 2004 the Fund wrote to the Applicant requiring her to notify the Fund in writing within 14 days of her intention to allow the Builder necessary access to rectify. The Applicant responded on 2 February 2004 denying that the Builder had ever requested access, stating that the Builder had not provided to her a plan or details of the method of rectification, suggesting that access could be given to a "third party" and pointing out that the Builder's registration was suspended and that he was not legally in a position to do the work. I conclude from this letter that the Applicant did not want the

Builder back and indeed, that was her evidence.

35. Finally, on 26 February 2004 the Fund wrote to the Applicant informing her that the Builder had notified it that she had refused to communicate with him in order "*…to discuss commencement arrangements*". The letter continues:

"It is now clear that you have denied the builder due access an opportunity to carry out the rectification works, and the basis for such denial is unreasonable.

As a result HGF has no option but to finalise your claim accordingly".

The letter goes on to inform the Applicant of her rights to appeal to the Tribunal.

Has indemnity been offered?

36. It is perhaps trite to say that where an insurer seeks to provide indemnity by means of rectification of the defective work it is the carrying out of the remedial work that provides the indemnity not a mere direction to the Builder that the work be rectified. Until rectification has taken place, the Insured is not indemnified. Where indemnity is offered and the insured refuses to accept it, the insurer might argue that it is not in breach of the policy but the evidence here falls well short of that. Although I am satisfied that the Applicant did not want the Builder to come back and do the rectification work I am also satisfied that neither the Builder nor the Fund has demonstrated that the Builder was willing to do so. What the correspondence does show is a denial of liability by the Builder and a desire by Mr McArthur to negotiate a resolution of the matter. What the Fund's decision required was that the Builder rectify the problem with the building and it has neither done so nor demonstrated a willingness to do so. Accordingly I do not believe the Fund, after accepting the claim, has then provided indemnity to the Applicant.

The Nature of the Fund's Liability

37. The claim against the Fund is made pursuant to the provisions of the ***House Contracts Guarantee Act 1987***. The relevant provisions are as follows:

"37. Indemnity

(1) Subject to this Part, the State must indemnify any person who is entitled to an indemnity under a HIH policy to the extent of the indemnity under that policy.

……..

38. What is not covered by the indemnity?

(1) An indemnity under section 37 does not apply-

(a) to the builder or owner-builder covered by the HIH policy; or

……

(5) If-

(a) a builder is entitled to an indemnity under a HIH policy in relation to building work; and

(b) the HIH policy was issued to comply with an order made before October 1998 under section 135 of the Building Act 1993; and

(c) the building owner of the building work to which the HIH policy applies is not entitled to an indemnity under the HIH policy; and

(d) the builder is not entitled to an indemnity under section 37 in respect of the indemnity under the HIH policy because of sub-section(1)(a)-

the building owner is entitled to an indemnity under section 37 in respect of a loss to the same extent that the builder would have been entitled under that section in respect of that loss if sub-section (1)(a) had not been enacted." (emphasis added)

38. The relevant policy entered into by the Builder is a "Claims Made" policy, indemnifying the Builder against any claim made against it during the period of insurance. The present claim falls within the run off cover of the policy.

39. The right of the building owner from time to time to the indemnity is conferred by Clause 9 of the policy which provides that the building owner may recover from the insurer an amount equal to the company's liability under the insuring clause. The clause goes on to say:

"However this right shall only be exercised once the building owner can demonstrate to the company that they have made every reasonable attempt to either locate (in the case of an insured who has disappeared) or resolve their dispute with the insured and that the insured has refused to make a claim against this policy".

40. The term "insured" refers to the Builder, which has clearly not made a claim against the policy. However, the Applicant did not make any claim on the Builder but claimed directly on the Fund. Nevertheless, the decision has already been made that the claim be accepted and I do not need to consider this potential difficulty.

41. By Clause 16 of the policy, the Builder, if requested by the insurer, shall attend the relevant building site for the purpose of (inter alia) rectification or completion of the

domestic building work. The Fund claims that it made such a request and that the proffered indemnity was refused by the Applicant. It also argues that she failed to notify the insurer of the loss within 180 days as required by Additional Exclusion 2 on page 7 of the policy. The consequence, according to the clause, is that the insured is denied indemnity. Clause 3 of the policy provides that the insured shall, as a condition precedent to its right to be indemnified under the policy, give to the insurer immediate notice in writing of any claim which could reasonably be expected to exceed an amount of $5,000.00. As Mr Stuckey acknowledged (and indeed, pointed out) the rigour of such clauses is reduced by s.54 of the ***Insurance Contracts Act 1984***. That section (where relevant) is as follows:

> ***"54. Insurer may not refuse to pay claims in certain circumstances***
>
> (1) *Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.*
>
> (2) *Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim."*

42. Mr Stuckey submitted that this section operates to allow the Fund to reduce the claim to what it would have cost it to indemnify the Applicant if she had made a claim within the period of 180 days. This argument is dealt with below.

The cause of the problem with the Extension

43. Although it was initially suggested by Mr Brown that some part of the slab had been laid on filled material, this point was, sensibly, not pursued. Mr Brown in cross-examination acknowledged that the amount of fill was very small and would not have

had any effect. The difficulty is that, as the soil investigation has revealed, the slab is laid on stiff, highly reactive clay. Beneath the clay is rock sloping towards the back of the site. The slab was laid horizontally and so there is much more reactive clay beneath the downhill edge of the slab than there is beneath the slab where it is in contact with the House.

44. The evidence has also established that, at about the time the slab was poured, there had been a wet winter and since then, the weather has been very dry. The experts agree that the cause of the tilting of the slab is the loss of moisture in the highly reactive clay that supports it. Since there is more clay under the downhill edge of the slab, it has dropped in that area and since there was little clay beneath the uphill edge of the slab and it is also connected to the footing of the House, it has not dropped where it joins the House. The consequence is that the whole extension has tilted downhill so that it has separated from the top by a maximum of about 20-25 millimetres.

45. All the experts seem to agree that the slab has performed well in the sense that it has not cracked or deformed, apart from some superficial drying cracks on the top surface. The problem is not with the slab itself but with the ground upon which it was laid. As to the construction of the building erected on the slab the only criticism seems to be a failure to install an articulation joint in the northern wall. This may have contributed to some very minor cracking in that wall that I saw during the site inspection.

46. The soil engineer called on behalf of the Builder, Mr Lawrance, said that, if he had done a soil test before construction commenced, he would have recommended either that the building be constructed on a pier and beam footing with piers extending to the rock beneath the clay or that a root barrier be installed to isolate the trees at the foot of the site. Neither of these was done.

Rectification

47. Apart from demolition and reconstruction, there are three methods of rectification proposed. The first, advocated by Mr Brown, is to lift the Extension and underpin it down to the rock, cut out sections of the slab and reconstruct it as a suspended slab so that it is supported on the rock and not on the reactive clay. The advantage of this

course is that, being founded on rock, the extension would then not move regardless of any changes in moisture content of the reactive clay underneath. In support of his concerns in this regard Mr Brown said that, even if the trees on the site are removed, other trees from neighbouring properties might enter the site and take moisture from beneath the extension. He referred in particular to a cypress in a property to the rear but this was some distance away and his concerns in this regard do not appear to have been shared by the other experts. Mr Lawrance said that the drying effect extends to a distance equivalent to the full mature height of the tree and shrub and this opinion is supported by literature from the CSIRO referred to in Mr Neill's report. Mr Brown also said that the construction of a root barrier was not a permanent solution because it creates an ongoing maintenance problem and roots tend to find their way around them.

48. There are two problems with the solution proposed by Mr Brown, as pointed out in the evidence of Mr Neil. The first is that the solution requires the cutting of the slab. Mr Neil says that the slab is already under considerable stress and cutting it now to convert it into a suspended slab would have unknown consequences. The other problem is that, although the extension of the house would be founded on rock, the house itself, to which it has been attached, would not be. They might be subjected to different stresses with again, unknown consequences. In addition, the scope of the works did not require the Builder to go to the expense of building piers down to rock and the Owners never paid for that.

49. The next solution proposed and that advocated by the preponderance of expert evidence is that the trees be removed and a waiting period then follow to see what happens when the soil regains its moisture content. According to Mr Lawrance some indication of the final result should be apparent within about three months but it might be necessary to wait for 18 months to 2 years before the soil recovers to the full extent. What this will be cannot be predicted with any certainty but the preponderance of expert opinion is that it is more likely than not that some jacking and levelling will then be required. If it recovers sufficiently the levelling might be able to be done internally and the rectification work would then be relatively small. Otherwise, the slab will need to be raised mechanically and grouted underneath. The latter of these two scenarios is, according to the evidence, the more likely. Once levelled, the construction joint can be

built in the north wall and the rectification work carried out.

50. Mr Stuckey and Mr Lewis criticised the Applicant and Mr Cosgriff for having failed to take the advice of their own experts and remove the trees or construct the root barrier to allow the soil beneath the extension to recover. I think there is some force in this criticism insofar as, had they done so I would now have a better idea of the extent of recovery. In the end, I must do the best I can on the evidence that I have. It is has not been demonstrated by the Applicant that the problem warrants the construction of the pier and beam system advocated by Mr Brown and I think the potential dangers of such a course are such that it is not the preferred option. I therefore consider that the appropriate rectification method is to either to remove the trees or install a root barrier, wait 18 months or such other time as the Applicant might be advised, and then mechanically level the extension to the extent necessary and grout any gap. This will of course mean that the Extension continues to be founded on reactive clay but that is what the building contract required. There was no contractual obligation on the Builder to construct a pier and beam slab down to rock. If it had contracted to do so that would no doubt have been reflected in the contract price which, considering the scope of the work, was very low and may have been due to the close relationship between the parties at the time. Similarly, if the option of a root barrier is chosen, this should not be at the cost of the Builder, first, because it was not within the scope of work to be done and secondly, it has not been shown on the evidence that it would be any more efficacious than simply removing the trees. Indeed, the experts suggest that it would present a problem of continuing future maintenance.

Costing

51. As to the cost of this alternative there was general agreement between Mr Dobell and Mr Lees although there was some criticism made by Mr Dobell of Mr Lees's calculation which I now turn to.

52. Mr Lees costs the various steps required and arrives at a figure of $47,539 including GST and builder's margin of 30%. Mr Dobell accepts that the margin of 30% would be reasonable but says that it should not be applied to the soil test and investigation figure of $1,800. In this regard, I agree with Mr Dobell. I think it is unlikely that this expense

would be incurred by the rectifying contractor ("the Contractor") because it would be most unwise for the Applicant to enter into a contract with the Contractor before this information had been obtained because the greater element of risk in contracting without the information would no doubt be reflected in the price she would have to pay for the rest of the work. I now turn to the other items.

53. As already stated, I do not think it appropriate to add the cost of a root barrier. The deep grout injection system is agreed at $12,000. For the demolition of the brickwork Mr Lees has allowed $7,780 whereas Mr Dobell has allowed $6,066. The cracking in the brickwork was difficult to see and the full extent of the work is unknown because the extent of recovery is unknown. The onus of proving her loss lies on the Applicant and she has made no attempt to address the underlying problem in the several years she has known about it by removing the offending trees. I think I should accept the lower figure of Mr Dobell, there being no reason to find that the higher figure will need to be incurred. Mr Dobell's figure also takes account of the saving to be made by using a cheaper form of scaffolding. For similar reasons, I accept Mr Dobell's figure for the repairs to the eaves and linings and the plumbing, which is $480.00 and his figure for adjustment of windows, doors, trims, shelving and architraves, which is $1,952.00. Mr Lees' figures for plaster repairs ($1,080) selected painting ($1,472) and contingency ($3,000) are agreed. The total of all these is $27,850, to which needs to be added the Contractor's margin of 30% on all items except the first. This brings the total to $35,665.00. When a further 10% is added for GST the final figure becomes $39,231.50.

54. These figures represent the cost of rectification if the work were to be done now. Mr Stuckey submitted that, because the Applicant failed to notify the Builder or HIH of the loss within 180 days as required by the policy of insurance, I should only allow what it would have cost to rectify the work if she had notified HIH of the loss in time. The basis of the argument is stated above and although I agree that there is nothing wrong with the logic, the Fund has already accepted the claim and agreed to provide indemnity for the full present cost, albeit it expected that the Builder would have to bear that cost. I agree with Mr Lewis' submission that the time to have sought to read down its liability in the manner described was when the claim was received. The Applicant would then have had the opportunity to appeal that decision. Having made the decision and there

having been no appeal I think it is now too late to change it. The assessment should therefore be on present cost.

Liability of the Builder

55. The liability of the Builder is a more difficult question. Not having appealed the Fund's decision it is bound by it but that does not have any other consequence. In particular, it does not raise any estoppel against it in regard to the facts upon which the Fund's decision might have been based. The claim against the Builder must still be established and the onus of doing so is on the Applicant. The only claim raised in the Points of Claim was for defective workmanship in the slab. It was said to be structurally deficient in that there was no edge beam along the north wall and it was not adequately dowelled to the house. Neither of these allegations was proved. However this is not a court of pleading and the evidence and submissions raised the issues of the failure of the Builder to obtain foundation data as required by s.30 of the ***Domestic Building Contracts and Tribunal Act 1995***, as it was at the time of construction ("the Act"), and the Builder's failure to put a construction joint in the north wall of the house. Both these allegations were proved. Otherwise, there is no evidence of defective workmanship. The Builder built what was in the plans. The main problem occurred because the plans did not take account of the presence of the trees. That was a failing of the plans but the Builder was contractually bound to build what the plans showed.

56. As to the s.30 claim, there are two matters to be considered. First, does the failure of the Builder to obtain foundation data give rise to a civil liability and did the contract impose on the Builder any responsibility to alert the Owners about any deficiency in the plans? Dealing with the second question first, the contract imposed no obligation on the Builder in regard to the plans. It simply required the Builder to carry out the work in accordance with them and the other contract documents. It did not require the Builder to prepare the plans. Clause 3 of the contract provided that the contract was complete in itself and at the time the contract was signed the plans were already in existence and formed part of the contract documents. It must be therefore be a nonsense to say that the scope of work under the contract included the plans. Provision was made in clause 17 of the form of contract used as to a warranty by the owner where the owner provided the plans but there was no provision for any express warranty where they were supplied by

the builder (even if, and I do not need to decide, that the plans in this case were provided by the Builder and not by Mr McArthur personally). In some cases where a builder prepares plans and then enters into a contract to carry out work in accordance with them, the evidence might permit the Tribunal to find that there has been a collateral warranty by the builder that the plans are properly prepared and accurately record what the parties agreed was to be done, provided that the warranty asserted to have been given was not inconsistent with the written contract. I do not need to consider whether that occurred in this case because it was not asserted on behalf of the Owners that such a warranty was given.

57. Clause 18.1 of the contract required the Builder to promptly notify the owners in writing if it found any deficiency in the plans. The contract also provided what should then occur. In this case it does not appear that the Builder found any deficiency. I think the plans were deficient because they should have specified one of three alternatives, namely, that the trees were to be removed, that a root barrier was to be installed or for piers to support the structure. The failure to provide for any of these three alternatives meant that the Extension would not be built upon a sufficient foundation.

58. 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. Mr McArthur is not an engineer.

Statutory duty

59. Turning now to s.30 of the Act, at the time construction commenced that section provided as follows:

> *"**30. Builder must obtain information concerning foundations***
>
> *(1) This section applies if proposed domestic building work under a major domestic building contract will require the construction or alteration of the footings of a building, or may adversely affect the footings of a building.*
>
> *(2) Before entering into the contract, the builder must obtain foundations data in relation to the building site on which the work is to be carried out.*
>
> *Penalty: 50 penalty units.*

(3) In this section "foundations data" means-

(a) the information concerning the building site that a builder exercising reasonable care and skill would need to prepare-

(i) a proper footings design for the site; and

(ii) an adequate estimate of the cost of constructing those footings; and

(b) any reports, surveys, test results, plans, specifications, computations or other information required by the regulations for the purposes of this section.

(4) In deciding whether he, she or it has obtained all the information required by sub-section (2), a builder must have regard to-

(a) the relevant standards published by Standards Australia; and

(b) the need for a drainage plan or engineer's drawings and computations; and

(c) the need for information on the fall of the land on the site.

(5) It is not necessary for a builder to commission the preparation of foundations data under this section to the extent that such data already exists and it is reasonable for the builder to rely on that data.

(6) A builder must give a copy of any foundations data obtained by the builder to the building owner (unless the building owner supplied the data to the builder) on payment by the building owner of the amount owing in relation to the obtaining of that data by the builder.

Penalty: 10 penalty units.

(7) After entering into a major domestic building contract, a builder cannot seek from the building owner an amount of money not already provided for in the contract if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section.

(8) Nothing in this section prevents a builder from exercising any right given by this Act to the builder to claim an amount of money not already provided for in the contract if the need for the additional amount could not reasonably have been ascertained from the foundations data required by this section."

60. Apart from imposing a fine, and protecting the building owner from claims by builders for extra payment for foundations, this section does not expressly provide for any other consequence of a failure by a builder to obtain the necessary information before entering into a contract. In particular, it does not say that a builder who fails to obtain foundation data is civilly liable for any damage that might have been avoided if it had been obtained. Should such a consequence be implied?

61. In "*Law of Torts" (3rd Ed)* by ***Balkin & Davis*** the learned authors summarised the basis of an action for breach of statutory duty as follows (at paras.16.10:

> *"The existence of a right of action in any particular case depends solely upon the interpretation of the legislative provision relied upon by the plaintiff. Because the very existence of the tort is so dependant on the words of the particular enactment, it has been acknowledged that it is difficult if not impossible, to formulate general principles as to the availability of an action. Two propositions may, however, be accepted as incontrovertible. First, the action depends, not upon the statute imposing a duty on the defendant but upon the legislative intent to protect a specified class of persons. Secondly, and following therefrom, the action may lie even though the conduct of the defendant is neither intentional nor negligent. Once it is found that a statutory provision was intended to protect a class of person, it is necessary to show only that the defendant's conduct was contrary to the legislative command or prescription, without further classification of that conduct as intentional, negligent or accidental."*

The learned authors then set out some helpful guidelines as to the application of the basic principle which I adopt in the following paragraphs.

62. The statutory requirement imposed by s.30 to obtain the foundation data is clear and unequivocal. It is also imposed upon the Builder. The only question is whether the Act intended to give persons such as the Owners a cause of action in tort. The task is one of statutory interpretation but there are a number of guidelines used in the cases.

Other consequences of the breach provided in the Act

63.

64. Section 133 of the Act provided, at the relevant time, that a failure by a builder to comply with any requirement of the Act in relation to a Domestic Building Contract did not make the contract illegal void or unenforceable unless the contrary intention should appear in the Act. This would suggest that Parliament turned its mind to the possible effect a breach of a requirement might have on the contract. However, I am not here concerned with the contract itself but with a requirement to obtain information before the contract was entered into. Moreover, an owner under a Domestic Building Contract with respect to which a builder is in breach of the Act might well want to rely upon the contract and would not want it avoided or rendered unenforceable. I therefore derive no assistance from this section.

The state of the existing law

65. Where the law already provides an adequate remedy, the statute will not usually be interpreted as intending to confer an additional cause of action in damages. The requirement of the Act to obtain foundation data before entering into a building contact seems quite novel. Such an obligation is neither imposed by the general law nor, as far as I am aware, by any other enactment. If this section provides a cause of action there would be none without it unless or course a separate contract had been entered into between an owner and a builder predating the building contract that the information be obtained.

Whether the section confers a public or private right

66. An intention to confer a right of action is less likely to be inferred where the duty is owed to the public as a whole. In this case, although there may be some general benefit in ensuring that all buildings that people might enter are built on a sound foundation, this section is only concerned with domestic building work. The person to benefit from the performance of the duty in such a case is the owner and, possibly also, subsequent owners of a residential building.

67. The expressed objects of the provision are also relevant. Section 4 provides that the objects of the Act were as follows:

> *"**4. Objects of the Act***
>
> *(a)The objects of this Act are-to provide for <u>the maintenance of proper standards</u>*

in the carrying out of domestic building work in a way that is fair to both builders and building owners; and

(b)to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness; and

(c) to enable building owners to have access to insurance funds if domestic building work under a major domestic building contract is incomplete or defective." (emphasis added)

68. Subsection (b) would seem to relate primarily to the Domestic Building Tribunal that the Act established and subsection (c) would seem to relate to the scheme for Domestic Building insurance. The purpose parliament mentions first is the maintenance of proper standards in the carrying out of domestic building work. There is no reason to suppose that, in enacting s.30 to require that foundation data be obtained before the contract was entered into, Parliament was concerned only to avoid claims by builders for unforseen claims for extra payment for the foundations. The foundations of a building are a matter of great importance. The section applies not only where the work involves the construction or alteration of a footing but also where it might "adversely affect the footings of a building". The data the builder is required to obtain is all the information concerning the building site that a builder exercising reasonable care and skill would need to prepare a proper footings design for the site. Quite obviously, if he does not have the information to do this before the contract is entered into the parties will enter into a contract to carry out the work without a footings design having been prepared that is tailored to the requirements of the site. The section is designed to prevent this from occurring. I think a major object of the section is to ensure that domestic building work of the nature mentioned is built on proper footings. If it is not and the footings prove inadequate, it is not the builder who will suffer but the home owner for whom the work is being carried out and perhaps also subsequent owners. Hence the section operates to protect the interests of the owner.

The harm suffered is within the risk

69. To recover, the Applicant must show that the harm that she suffered is within the

general class of risks against which the Act intended to protect her. There is no difficulty here. The very thing that has happened is what would not have happened if the Act had been complied with and the loss suffered is one of the things the section was designed to prevent.

Conclusion

70. For these reasons I find that the claim for breach of statutory duty is made out and the Applicant is entitled to damages against the Builder for the cost of rectifying the subsidence of the Extension which resulted from his failure to comply with the Act. She is also entitled to damages with respect to the failure to install the construction joint in the north wall but those damages are for defective workmanship and of a different character. The expert evidence takes account of both losses and does not separate but since both are to be awarded that is of no consequence.

71. There will be an order against both respondents that they pay to the Applicant the sum of $39,231.50. There will be a single award although each has a different basis and does not reflect any joint liability. All questions of costs are to be reserved.

Rohan Walker
Senior Member