VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D170/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building appeal against VMIA decision, when defective, Owner's obligation to control heat, evidence of cause of defect, onus of proof, Owner's instruction to use material, warranty under s8 of the House Contracts Guarantee Act, materials "supplied by the builder".

APPLICANT	Mackie & Staff Pty Ltd (005 653 378)
FIRST RESPONDENT	John Paul David Frederick
SECOND RESPONDENT	Victorian Managed Insurance Authority
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Small Claims Hearing
DATE OF HEARING	31 May 2006
DATE OF ORDER	18 July 2006
CITATION	Mackie and Staff v Frederick (Domestic Building) [2006] VCAT 1421

ORDER

1 The application is dismissed.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr Bingham of Counsel
For the First Respondent	In person
For the Second Respondent	Mr Powell of Counsel

REASONS

1 The proceeding concerns an appeal by the Applicant ("the Builder") against a decision of the Second Respondent ("VMIA") regarding the holiday house of the First Respondent ("the Owner").

2 Warranty insurance had been provided by HIH Insurance, and under Part 6 – Domestic Building (HIH) Indemnity Scheme to the *House Contracts Guarantee Act 1987* ("HCG Act"), VMIA administers the indemnity provided by the State. On 15 February 2006 VMIA made a decision in the form of a schedule of works issued to the Builder, stating:

> "Item 1 – rectify the delaminating of the vinyl wrapped doors, drawers and fixed panels to the kitchen cupboards."

3 The Builder appealed on the grounds that:

> "It is not a builders defect but an environmental situation that has caused the problem."

THE APPLICANT'S CASE

4 At the hearing Mr Bingham of Counsel for the Builder submitted that in addition to the Builder's assertion that the delamination was caused by environmental factors not under the Builder's control, VMIA had failed to establish the terms of the warranty policy which applied to the house and that VMIA had the capacity to order the Builder to rectify the delaminating cupboards under section 44 of the HCG Act. A copy of a policy had been provided to Mr Bingham by Mr Powell of Counsel for VMIA, but Mr Bingham said there was no evidence that the policy provided related to the house. On 30 June 2006, solicitors for the Applicant wrote to the Tribunal and admitted, for the purpose only of this proceeding, that the relevant policy entitled VMIA to issue a direction to the Builder. The remaining question is thus whether the delamination is a defect caused by a breach of a warranty under section 8 of the *Domestic Building Contracts Act 1995* ("DBC Act").

5 The evidence of Mr Mackie for the Applicant was that the house was built in 2000 for the then owner of the land, Mantello Holdings Pty Ltd ("Mantello"). The site is sand dunes near the beach and it is a depression between dunes, so, he reasoned, the air would be still and the house could become very hot. He said that another neighbouring house, also built for Mantello, does not suffer from the same problem, and he concluded that this is because the other house is on a ridge which allows air to circulate and cool the house.

6 Mr Mackie said "Laminex Swiss" cupboards had been specified, but Mantello sought a variation to use vinyl shrink wrapped MDF. The vinyl was shrunk onto the panels by use of heat. The Applicant did not manufacture the cupboard doors and panels, but purchased them from a sub-contractor who in turn had a sub-sub-contractor do the shrink-wrapping. He stated that the house, when he inspected it on 8 February 2006, was very dry. A moisture test on the floor indicated that the timber

was 8% moisture, when normal moisture in a timber floor is 12%. There was also no moisture in the MDF panels which had delaminated. He said that he did no test on any adhesive on the MDF panels and that no defect was apparent when the panels and doors were installed.

7 Mr Mackie asserted, but did not prove, that the delamination was caused by high temperatures within the house. He reasoned that, as a holiday home, it would be vacant and thus temperatures might be higher than an occupant would tolerate. He submitted that a reasonably competent home owner should ensure that their property does not become very hot and that this can be achieved by running sweep fans, using black-out blinds to minimise heat gain and purging the heat at night. He agreed that he had not advised the original owner to do this and that there are no Australian Standards or other generally recognised authorities that require a home-owner to control heat levels within an unoccupied house, but said "It's a matter of common sense". He said that he believed the vinyl shrink-wrap would be sound up to 50^{o}, but provided no support for his view.

THE RESPONDENTS' CASE

8 VMIA called its inspector Mr Peter Stoate to give evidence. Mr Stoate is a registered building practitioner whose apprenticeship was in carpentry. The relevant evidence in his report was:

> "Writer concludes that a defect exists as the vinyl has delaminated due to a failed adhesive and does not consider being the result of excessive heat. It would be reasonable to expect the product to be suitable and perform regardless of environment."

9 Mr Bingham objected to this evidence on the basis that Mr Stoate has purported to answer the ultimate question in the proceeding, which is the role of the Tribunal. Mr Bingham's objection is valid. Further, Mr Stoate has reasoned from the result, rather than finding a cause: the vinyl should not fail but has failed, therefore there is a defect. Under cross-examination Mr Stoate agreed that he does not have qualifications in thermo-lamination or in chemistry, and when asked by me whether he saw the glue he said he did not. When asked in re-examination if he knew what adhesive or glue was used, he said: "Mr Mackie would know more about it than I would." While Mr Stoate gave evidence clearly and honestly, it was of limited assistance to me.

10 The Owner gave evidence that he bought the house and obtained possession on 6 April 2005, and that he noticed the problem in the first month and that the house has not reached anything like 50^{o}. Under cross-examination the Owner agreed that he noticed the problem the first time he had a good look and that it might have been there before that. If there were evidence that the Owner or his predecessor in title had been aware of the problem before the sale of the house, the Builder's claim would have succeeded because the price of the house could be assumed to take into account the defect, and

therefore the new Owner would not have suffered a loss. That evidence was not before me.

SUBMISSIONS

11 Mr Powell submitted that there are implied warranties under section 8 of the DBC Act that the materials supplied will be "good and suitable for the purpose for which they are used", that the vinyl had failed to adhere, therefore the warranty and the policy respond and the appeal must be dismissed.

12 Mr Bingham submitted that the sufficiency of the materials must be tested at the time of supply (in 2000) in accordance with *Lexmead (Basingstoke) v Lewis* [1982] AC 225 at 276. The particular passage to which I was referred was:

> "The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear."

13 He said that it hasn't been shown that there was a defect at delivery date, and the mere fact of delamination is not evidence of a defect at the relevant time. In particular, there was no evidence of how the house had been treated in the five years before the Owner took possession. Mr Bingham also submitted that the Builder's liability cannot extend to an instruction from an owner that a particular product be used.

BULDER'S WARRANTIES

14 Under section 8(b) of the DBC Act:

> "the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used…"

15 Delaminating kitchen joinery is clearly not suitable for that purpose, and although the Builder obtained the joinery from a sub-contractor, who in turn had the vinyl been applied by a sub-sub-contractor, the joinery remains "materials supplied by the builder".

Owner's obligation to control heat?

16 The Builder has failed to establish that there is a standard or generally accepted practice that the owners of houses must take steps to control the temperature of the house.

Previous owner's instruction to use the material

17 Mr Bingham's submission that the Builder's liability cannot extend to an instruction from an owner that a particular product be used, is rejected. There may be exceptional circumstances where a builder makes an owner aware of the risks of a particular material or building technique and the owner at the time agrees to bear the risk, but there is no such general limitation under the warranties imposed by section 8 of the DBC Act.

Date of defect

18 Mr Bingham's submission that the product must be defective at the time of supply is accurate, but only if "defective" is taken to include "doomed to fail". The warranties under section 8 of the DBC Act include warranties for latent as well as patent defects, so proof that there was no apparent defect at the date of delivery and installation is insufficient. Further, *Lexmead* itself contemplates that defects might not be apparent at the date of supply where Lord Diplock said: "I do not doubt that it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery". No evidence was given regarding the reasonable time during which kitchen cabinets should remain in good condition (fair wear and tear excepted) so I am unable to draw the conclusion that it is six years or less, particularly where the policy of warranty insurance is for six and a half years.

Onus of proof that defect breaches a warranty

19 There is certainly a defect. The question is who is responsible for it.

20 The evidence is unsatisfactory of both the Applicant and the Respondent regarding whether the defect was due to poor workmanship of the Builder. Mr Mackie for the Builder said that the house might have been shut up and might have got hotter than 50^{o} which might have caused the problem. On the other hand, VMIA's inspector has concluded from the existence of the defect that it is the Builder's responsibility.

21 The application is an appeal by the Builder against a decision of VMIA, and therefore the onus of proving that VMIA's decision is wrong lies with the Applicant-Builder. It has failed to do so, therefore the appeal is dismissed.

SENIOR MEMBER M. LOTHIAN