

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D348/2010

CATCHWORDS

Domestic Building – implied warranties – Domestic Building Contracts Act 1995 – s.8 - materials to be good and suitable for the purpose – work to be carried out in a proper and workmanlike manner – door frame unsuitable for position where it will be constantly exposed to weather – design requiring it to be installed without any fall

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| APPLICANT | Ailsa Page |
| FIRST RESPONDENT | Russell Allen |
| SECOND RESPONDENT | Peter Durham |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member R. Walker |
| HEARING TYPE | Small Claim Hearing |
| DATE OF HEARING | 27 July 2010 and 2 August 2010 |
| DATE OF ORDER | 4 August 2010 |
| CITATION | Page v Allen & Anor (Domestic Building) [2010] VCAT 1262 |

ORDER

1. South Bay Properties Pty Ltd is substituted as the Second Respondent herein.
2. Order the Second Respondent South Bay Properties Pty Ltd to pay to the Applicant \$9,154.20.
3. The claim against the First Respondent is struck out.

SENIOR MEMBER R. WALKER

APPEARANCES:

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| For the Applicant | In person |
| For the Second Respondent | Mr Ferguson from the Housing Industry Association and Mr Peter Durham, Director |

REASONS

Background

- 1 The Applicant (“the Owner”) is the Owner of a townhouse in Yarraville. The Second Respondent is and was at all material times a registered Builder and is a director of South Bay Properties Pty Ltd (“the Builder”).
- 2 The Builder constructed the townhouse as well as the two adjoining townhouses between September 2003 and May 2004. An occupancy permit was issued on 24 May 2004.
- 3 The Builder constructed the townhouse for the First Respondent, Mr Allen. Mr Allen rented it to tenants for approximately 4 ½ years and then in January or February 2008 he sold it to the Owner.

The complaint

- 4 At the back of the townhouse, which is on the south, the Builder installed bi-fold doors. The Owner has been complaining since August 2008 about water penetration which, it is now clear, has caused rotting to one side of the frame of the bi-fold doors and to an external weatherboard and deterioration to the adjacent skirting boards inside the townhouse.
- 5 On 7 April 2010 the townhouse was inspected by an architect, Mr Begg to ascertain the cause of the problem. The Builder was not present at the inspection.
- 6 The threshold for the bi-fold doors has a door track rebated into the top face which is lined with plastic. This is to allow the guides that are affixed to the bottom of the bi-fold doors to slide, keeping the doors in position as they are opened and closed. The problem is that this rebate is exposed to the weather coming from the south and collects rainwater. Three 10mm diameter holes have been drilled in the threshold in order to provide drainage to the tracks, one towards each end and one in the centre. These slope slightly to the outside.
- 7 Mr Begg’s comment as to this arrangement is as follows:

“The holes expose raw timber to prolonged wetting and the water slowly drains away from the track rebate at either end after rain and this provides ideal conditions for wet rot to take hold.

The problem is exacerbated because it is almost impossible to clear accumulated debris out of the holes.

A brass or similar track channel that does not require support on both sides and which incorporates regular drainage is required to allow water to drain out over the top of the timber threshold.

The configuration of the track rebate is unsatisfactory for an exposed location and does not comply with the standard”.
- 8 The Applicant complained to Mr Durham but despite visits to the site by Mr Durham and correspondence the dispute could not be resolved. Mr Durham

claimed and still maintains that the rotting problem in the door frame was due to the failure of the tenants to keep the drain holes clear. It is, he says, a maintenance problem.

The hearing

- 9 The matter came before me for hearing as a small claim on 27 July 2010. During the course of the hearing considerable emphasis was placed by Mr Durham and his representative, Mr Ferguson from the Housing Industry Association, upon the construction of a timber deck that has been constructed adjacent to the threshold by the Owner that, he says, impedes the escape of water through the drain holes and makes them difficult to clear.
- 10 The Builder relied upon the report from a building expert, Mr Joseph Borg. On page of his report Mr Borg said as follows:
- “The extent of building distress can be isolated to the east end of the bi-fold door units, the lowest timber weatherboard adjacent to the bi-fold door frame exhibits substantial timber fungus (wet rot). The bi-fold door track/sill has dislodged from the doorframe stile due to excess timber rot. The doorframe sill has split at the plastic rebate used to accommodate the sliding door track.
- Further timber damage is evident in the stud wall beside the bi-fold door and skirting and architraves.
- The doorframe has incorporated into the design, 3 drilled 10mm diameter holes, one at each end of the sill and one at the centre of the sill and to the ground. This would require regular maintenance by way of cleaning the track and ensuring the holes are free of dirt, grime and debris. Access to the drain holes can be achieved internally or externally with a simple coat hanger to ensure that the holes are not blocked.
- When drainage of rainwater through the drain holes is not possible due to dirt and debris restricting water egress, then water will find the lowest level to accumulate. Water will travel to lowest level of the frame and this can be as little as 2-3mm. A level was used to determine whether a fall in the bi-fold door frame does exist to the east end of the frame where the timber rot to the frame and weatherboards are evident”.

- 11 He then goes on to his conclusion:

“I do not agree with the inspection report by Andrew Begg where he criticises the design of the bi-fold door. Door and window designs that incorporate drainage slots and weep holes such as the timber bi-fold doors or aluminium sliding doors and windows require regular cleaning of tracks and drainage slots. The writer has seen many situations where in aluminium windows water has not been able to drain due to blocked weepholes causing tracks to fill with water and damage plaster walls and skirting below windows and doors. The cleaning of weepholes is even more critical on timber sills.

There is a responsibility for occupiers to carry out regular maintenance to ensure that not only weepholes are maintained and allowed to function as

designed, but all aspects of the home are properly maintained to assure longevity of their living environment and health and safety as assured.

The extent of the timber rot to the bi-fold doorframe and weatherboards is considered by the writer to have been in evidence for a number of years. Although it is not possible to estimate the number of years accurately, I am confident that the bi-fold doors would not have function as designed and that wet rot was present in the track and the weatherboards were visible for at least 4 years prior to this report and was not a recent find". (My emphasis).

- 12 Mr Borg concluded that the Builder had not failed to install the bi-fold doors as per the manufacturer's installation procedures.

The nature of the door unit

- 13 The Builder also provided some literature from the manufacturer of the door unit to the effect that it was suitable for external use and also tendered a section of the track and stile obtained from the manufacturer. A careful inspection of this shows that where the track is lined at the bottom and sides with a hard plastic extrusion that might be expected to give some protection to the timber in the rebate from the effects of water, this protection is compromised because water can penetrate between lining and the rebate because, although it fits snugly, it has not been sealed in position. Further, water can penetrate between the rebate and the lining where the lining has been drilled out to allow water to enter the drain holes. Finally, as Mr Begg pointed out, there is no lining at all for the three drain holes. The water simply flows through these. The sill appears to be kiln dried hardwood and there is no suggestion that it has been treated to protect it from the effects of prolonged wetting. The sample given to me to examine is stapled at the bottom into the timber which would also afford some possibility of water ingress but I saw no indication of that on site and so I assume that it was just to hold it in place in the sample.
- 14 At the end of the groove at each end where it meets the stile of the door there is no protection at all for the stile. Any water that entered the groove in that position would be against the stile and allow it to get wet.

The site inspection

- 15 I went out to the townhouse and inspected the work and found it to be as described by the experts. The deck constructed by the Applicant does not sit firmly against the sill of the doorframe as to prevent water from draining through the drain holes and I poked a length of wire through the two holes that were still extant I was unable to detect any blockage in them.
- 16 Since the deck was constructed away from the sill, albeit leaving only a very narrow gap, since it was constructed relatively recently and since the expert opinion is that the rot in the frame is longstanding, I find that the deck is not a contributing factor to the deterioration of the doorframe.

- 17 Another thing that I noticed was that there was no debris to speak of in the two drain holes that I poked a wire into and the track itself had only very minor debris. The Owner said that she had never cleaned out the track because there was no need. I am not satisfied that I can infer that the drain holes were blocked through lack of maintenance as was suggested on behalf of the Builder. No obvious source of debris was present. When closed, the doors would prevent anything of any substance from being blown in and the floor inside the door frame is tiled.

Implied warranties

- 18 By s. 8 of the Domestic Building Contracts Act 1995 there is implied into every domestic building contract the following warranties:
- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
 - (b) 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 and that, unless otherwise stated in the contract, those materials will be new;
 - (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act;
 - (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
 - (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;
 - (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

Was the door frame fit for the purpose for which it was used?

- 19 The instructions received from the manufacturer of the frame suggest that it is intended to be used externally and that is reinforced by the presence of the drain holes.

- 20 According to Mr Begg's report the design of the doorframe is such as to permit prolonged wetting of the frame which, he says, provides ideal conditions for wet rot to take hold. This is clearly what has happened.
- 21 Looking at the sample track that has been tendered it seems to me that Mr Begg is right and that this is a defective design, given that it was intended to be exposed to rainwater. The designer of the track has contemplated that water will be collected in it and so has provided for three drainholes. However, as Mr Begg has pointed out, these are through unprotected wood. Further, the plastic insert has not been siliconed in position to avoid water penetration between the insert and the sides and bottom of the rebate. There is nothing to prevent water from passing between the insert and the rebate from the top or through the three drain holes cut into the insert. It is also open at both ends allowing any water that is collected by the track to wet the unprotected stile at both ends and seep below and along the sides of the insert.
- 22 A similar sample track was also tendered which I was told was made by another manufacturer and that has a similar arrangement except that the drain hole instead of being 10mm is 8mm. Again, the stile at the end of the track is unprotected and it has all the faults of the other.
- 23 Mr Ferguson suggested that the stile should be painted and that this is a maintenance issue. I do not agree. The groove performs very much as a sub-sill would in an aluminium window where water is intended to collect in the sub sill and exit through drain holes to the outside of the building. However in the case of a sub-sill it is always designed to have end stops to protect the other building elements from deterioration caused by contact with water. There is no such arrangement in the design of either of the sample tracks that were tendered.
- 24 It seems to me that if such a track is to be used would have to be in a protected area where it would not attract any water. The manufacturer has clearly not contemplated that and has intended it to be used in an area where it will collect water. As such, it seems to me that the design needs to be improved for the reasons given by Mr Begg in his report.

Was the work done in a proper and workmanlike manner?

- 25 Mr Borg states in his report that there is a fall in the frame towards the corner where the rot has occurred. This would allow water to pond in that area below the level at which it could be drained by the nearest drain hole. There was a spirit level on site during my inspection and the fall was demonstrated.
- 26 I put this to Mr Durham and he suggested that perhaps the position of the frame had changed due to degradation since it was installed. There is no indication in the internal linings that the frame as a whole has subsided and the only explanation for the rot occurring in one side rather than the other is that something has caused water to be attracted to that side.

27 On this basis, I find that the fall was there when the frame was installed. Mr Ferguson said that such a fall would be within tolerance and that may well be so if one is talking about a fall in the floor or other building element but in this particular instance it has caused water to pond against the unprotected timber stile by the mechanism described by Mr Begg.

Conclusion

28 For these reasons I am satisfied that the back door frame used in the construction of the house was not, in the above respects, sufficient for the purpose for which it was used and the work was not done in a proper and workmanlike manner because the door frame was so installed as to allow water to pond on one end with the consequences referred to . There has therefore been a breach of the implied warranties set out in s8 of the *Domestic Building Contracts Act 1995* which is answerable in damages.

29 The Owner has produced quotations for the repair of the damage. One of these, with GST, was for \$9,154.20 and the other, with GST, was \$9,418.20. I will allow the lesser quotation.

SENIOR MEMBER R. WALKER