VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST VCAT REFERENCE NO. D204/2006

CATCHWORDS

Goods fit for the purpose – borer infestation in windows - Burden of proof on applicant – source of infestation unknown burden of proof not discharged

[2006] VCAT 1064

APPLICANTS	Sergey Sizenko
RESPONDENT	Unique Windows & Security Doors
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	7 June 2006
DATE OF ORDER	8 June 2006

ORDER

The application is dismissed.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr Sizenko in person
For the Respondent	Mr Chiriano, Director

REASONS FOR DECISION

1. This proceeding concerns the purchase of windows from the Respondent for a unit being constructed by the Applicant as an owner-builder. The Applicant claims that, when the windows were supplied, they were infested with Lyctus borers which have caused substantial damage to the reveals. He claims the cost of replacing the windows and damages.

2. The windows, including a sliding door, were constructed of aluminium with reveals made from laminated kiln dried meranti timber imported from Singapore. They were supplied pursuant to a quotation dated 9 October 2003 and installed shortly after that.

3. When they arrived on site the reveals were primed on all faces but the cut ends of the components were not primed or sealed. The windows were installed into the frame and the brick veneer external wall was then constructed around them. The windows were painted by the Applicant in about December 2003.

4. The issue at the hearing was the source of the infestation. The Director of the Respondent, Mr Chiriano produced the shipping documents for the timber from which the reveals were constructed which indicates that it was both fumigated and kiln dried. He said that the timber in the shipment was sufficient for windows for up to thirteen houses and there had been no other reports of borer infestation with these. He suggested that the cause of the infestation is more likely to have been other timber used in the house by the Applicant. He referred particularly to the roof battens as being a likely source.

5. The Applicant said that the problem was first noticed about 11 months after the windows were installed. Various people attended on site, including the Respondent's timber supplier and a Pest exterminator who identified the species of borer. The respondent and its timber supplier denied responsibility and so this proceeding was brought.

6. At the hearing both parties referred extensively to literature produced by the CSIRO and off the Archicentre site on the internet about the Lyctus borer and its life cycle. At the conclusion of the hearing I told the parties that I would read all of that literature and provide them with written reasons, not because there was any difficulty in the case but because it would take me some time to read it all and properly consider it.

7. In the Archicentre article it states:

> *"In the southern states, Lyctid attack to the sapwood of framing timbers is common. But the amount of sapwood in a framing timber is usually small, so borer attack will not seriously affect the timber's strength. And being out of sight the borers will rarely be noticed. However, within 3 to 5 years of the house being built, Lyctids could be found in skirting boards and architraves and these are highly noticeable timbers."*

This passage suggests that, over time, the borers can migrate from framing timbers, where they are not seen, to fixing timbers where they will be noticed. That is what the respondent suggests has happened.

8. Mr Sizenko referred me to a number of passages in the CSIRO leaflet and I have read them all. The most relevant passage is to be found on page 11 which says that, once the outside of the timber has been sealed with paint, varnish, polish or waxes, it cannot become infested. He said the windows had been deliver primed and so I ought to infer that they had already been infested. However the cut ends were not primed or painted and so infestation after installation would have been possible. Even when they were painted in December, the cut ends of the reveal timbers would have been within the brickwork and not accessible to the painter.

9. Mr Sizenko also referred me to a passage on the last page that suggested that the borer attacks only living timber. However it is clear from the context that the passage refers to a separate species of borer. The passage states that, where timber is kiln dried, there will be no living larvae.

10. Further, another passage on page 11 relating to the Lyctid borer states:
"Susceptible sapwood may be attacked by lyctid borers once the timber dries out to a moisture content of about 20-25 per cent."
It is clear from this passage that timber does not have to be living to become infested with Lyctid borer.

11. The onus of proving his case lies upon Mr Sizenko and it is not discharged. It is impossible for me to be satisfied on the balance of probabilities that the window reveals supplied by the Respondent were the source of the borer infestation. Accordingly the application is dismissed.

Rohan Walker
Senior Member