

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1441/2017

CATCHWORDS

Agreement to sell house for removal; agreement to transport a house; agreement to restump a house and associated works; house purchased by applicants from respondent; respondent arranged for transport of house to applicants' property; house cut into sections prior to transporting; delays; applicants unhappy with condition of house after delivery to their property; applicants terminated agreement with builder to restump house and associated works prior to commencement; applicants selling property without building works being undertaken; claim for damages.

FIRST APPLICANT	Trevor Reed
SECOND APPLICANT	Josephine Reed
RESPONDENT	Peter Weis
WHERE HELD	Ballarat
BEFORE	B. Josephs, Member
HEARING TYPE	Hearing
DATE OF HEARING	21 June 2018
DATE OF ORDER	17 September 2018
DATE OF REASONS	17 September 2018
CITATION	Reed v Weis (Building and Property) [2018] VCAT 1440

ORDER

- 1 The Principal Registrar is directed to amend the register to show the address of the respondent as his email address.
- 2 The application of the applicants is otherwise dismissed.
- 3 Liberty to apply is reserved to the respondent to make an application for costs.

B. Josephs
Member

APPEARANCES:

For First Applicant: Mr T. Reed, in person.

For Second Applicant: Mrs J. Reed, in person.

For Respondent: Mr P. Weis, in person.

REASONS

- 1 The applicants owned a property (“the property”). They had purchased the property with the intention of putting a house on it. They wanted a house which was older in structure but with an appearance of being a farm house. In the meantime, they lived at the property in a caravan with their two daughters.
- 2 An application was filed in November 2017 by the applicants claiming damages from the respondent. They allege that he breached agreements signed between them relating to the sale of an existing house which was removed and transported to the property. I heard the proceeding at Ballarat Magistrates’ Court on 21 June 2018 and reserved my decision. Each of the parties gave evidence in person and the applicants’ expert witness, Cameron Colley, of Colley’s Engineering and Building Consultants, gave evidence by telephone.
- 3 In May 2015, Mrs Reed read an internet advertisement for a house described as follows:

[T]his home has been expensively built with wide verandahs, sunroom, huge lounge and large windows throughout allowing lots of light into each room. From the entry the unique design has larger than usual proportions with original features including crystal light glass, three panel doors, skirting boards and architraves. The roof and gutters have been replaced with corrugated colorbond. The main bedroom has its own verandah and there is plenty of scope to make changes to suit your requirements. The sunroom leading off the lounge is both functional and an outstanding feature of the design. Ceilings are 11 foot and there is plenty of storage space around the home. Priced from \$38,000. Can also relocate to your land by registered builder with removal permits, plans, assistance with permits for your land, energy report, condition report, insulation, plaster. For more details call Peter on (mobile number supplied).
- 4 According to their Points of Claim, the applicants contacted Peter, who is the respondent, and shortly after viewing the house which was situated at an address in Canterbury, they decided to purchase it for relocation to the property with a laundry extension to be added. They initially paid \$5,000 on account of a deposit by instalments of \$2,000 in May 2015 and \$3,000 in June 2015.
- 5 Photographs of the house in situ in Canterbury provided by the applicants showed an impressive older home which gave an appearance similar to that which they stated they were seeking.
- 6 The respondent’s evidence was that he is a sole trader who arranges, buys and sells houses and then relocates and reinstates them. He has undertaken this business for some period of time.

- 7 The applicants refinanced the mortgage they had obtained to purchase the property in order to buy the house, relocate and reinstate it. Their refinancing was effected through Goulburn Murray Credit Union.
- 8 On 5 August 2015 they signed Agreement 1 - "Agreement to Sell House for Removal", Agreement 2 - "Agreement to Transport a House", and Agreement 3 - "Agreement to Restump a House and Associated Works."
- 9 Agreements 1 and 2 were with the respondent and Agreement 3 was with a registered domestic builder, Brian Siemering, whom, according to the respondent, undertook considerable work for him.
- 10 Agreement 1 included the house as shown on a sketch plan attached to the agreement, plans and elevations, a building surveyor's report which would in part at least state that the house is suitable for relocation (if required by the relevant building surveyor), all curtains, drapes, floor coverings, light fittings and all external and internal fixtures, and energy rating. The full selling price was \$38,000 GST inclusive, payable by \$15,000 upon signing, \$19,000 upon the respondent providing the applicants with the house plans and \$4,000 upon the house sections arriving at the property. This agreement also provided that the applicants (as purchasers) would attend to their own removal of the house and further would remove it within 30 days of them "being granted vacant possession or such later date as is mutually agreed to between the parties."
- 11 Agreement 2 provided that the respondent as transporter agreed that he, or his nominees, would transport the house from its Canterbury address in several pieces to the property. The purchase price for these works was \$52,000 GST inclusive, payable by a deposit of \$3,000 upon signing the agreement, a further \$8,000 upon the transporter commencing the work on site and further payments up to \$41,000 for the loads to arrive at the property.
- 12 Additionally, under Agreement 2, the respondent was to engage the services of a registered builder to obtain any necessary permits and carry out works required to legally remove the house from its site. Other items included in Agreement 2 were all costs associated with the legal transportation of the house such as transportation permits, cost of tarpaulins for transportation and escorts, and it was specified that the transportation cost included covering the house sections during preparation, transportation and reinstatement of the sections until the existing roof had been refitted. Finally, under Agreement 2, the applicants were responsible for directions to the correct siting of the house at the property and to arrange, at the transporter's request, for any additional machinery or equipment necessary to position the house sections.
- 13 The applicants, by signing Agreement 3, agreed to engage a contractor to assist them to carry out the following works: - stumping and joining the house, refitting the existing roof and gutters including replacing battens if required and the supply and fitting of sisalation, refit existing verandahs,

refit and/or replace eave linings, and then, as referred to in attached plans, continue passage wall and remove recess, remove wall between storage area and meals area, remove chimney and wall between kitchen and meals area and construct laundry and kitchen extension. The works were to be carried out in a workmanlike manner and be inspected and approved by the relevant building authorities. The works did not include reinstatement or re-erecting of any brick work, plumbing, plaster work, electrical, floor and wall coverings, or rectifying any existing structural or other items including rotted timbers which did not comply with current building standards (excepting those structural timbers in the roof and subfloor) or carrying out any additional works as required by the relevant building surveyor to make the dwelling comply with the bushfire attack level.

- 14 Agreement 3 also provided that all works in connection with the existing structure of the house were to be completed within 120 days (plus allowance for holidays and 'wet' days) of the applicants providing a cleared site, the house being placed in position on the site at the property, and a building permit. Mr Siemering agreed to supervise the works required to have a certificate of occupancy issued and to obtain the appropriate builders warranty insurance for all works on site at the property totalling \$90,000. Evidence was given that the applicants did obtain the relevant planning and building permits and Mr Siemering did obtain the warranty insurance cover.
- 15 Finally, the payment schedule under agreement 3 provided that the total cost of the works would be \$37,000 GST inclusive payable by \$10,000 on placing the house sections onto stumps, \$5,000 when the roof was re-erected, \$7,000 on the existing roof and gutters being refitted, \$5,000 on the refitting of the verandahs, \$6,000 on the erection of the laundry extension and \$4,000 on completion of the works.
- 16 The evidence of Mr Weis was that the three agreements were standard agreements he has used for some time.
- 17 Copies of the Agreements were provided by the applicants to the Credit Union which provided the refinancing loan.
- 18 Mr Weis gave evidence that he had agreed with the owner of the Canterbury property to buy and relocate the house and to clear the remainder of the property. The owner was developing the property by the construction of townhouses.
- 19 According to their Points of Claim, the applicants, when signing the Agreements expected the house to be relocated to the property by November 2015. However, final relocation did not occur until 26 July 2016. Due to this delay of 8 months, Mr Weis reduced the amount payable under Agreement 2 by \$4,800. This amount was calculated by allowing \$600 for each of the 8 months, which amount more than covered the extra mortgage costs incurred by the applicants because of the delay. Mr Weis denied liability for the delays but had agreed to the discount after the applicants obtained some legal advice. However, Mr Weis maintained that the owner

of the Canterbury property had caused the delays by failing to promptly evict tenants.

- 20 In various stages between 27 May 2015 and 26 July 2016, the applicants paid a total of \$85,198 for the house being the payments required under Agreements 1 and 2 less the deduction of \$4,800.
- 21 The house sections had been delivered to the property by means of three separate deliveries. However, due to the wet conditions, they could not be placed on the site at the property.
- 22 The real concern to the applicants, however, in addition to the delays was the manner in which the house sections and materials had been left by the transporter. According to them, timber was either just dumped off the side of a truck or stacked with other items in the house sections, the floors of which were inadequately supported. Additionally, there was incomplete coverage of the sections by the tarpaulins leaving them exposed to the poor weather.
- 23 After the applicants received Mr Colley's report which raised numerous concerns and issues, and obtained legal advice, they terminated Mr Siemering and Agreement 3 by hand-delivering a letter to him personally in late August 2016. This letter had been drafted by their lawyers. Unfortunately, I was not provided with a copy of the letter at the hearing. However, no further works have been undertaken at the property since the delivery of the house sections.
- 24 The applicants claim \$80,000. They have added legal fees incurred of \$5,000 and building inspection fee of \$300 to the amount paid to Mr Weis of \$85,198. These items together total \$90,498. From that they have deducted \$10,498 which they maintain that they can "reclaim" from selling the clear lead light windows and door from the house and using the timber for other projects at the property.
- 25 In his evidence, Mr Colley confirmed his report. He has had at least 35 years' experience in the building industry. He confirmed that the applicants had requested him to carry out a structural adequacy inspection at the property on 20 August 2016 and his report contained notes from his inspection.
- 26 On his arrival at the property, Mr Colley noted that there were three distinct drop off points for the transported house. The roof structure was not attached and while the three pods were tarped to try to prevent weather damage, he noted some damage where the floor sections had been left open. He also noted damage to bearers, joists, wall studs, wall bracing, roof timbers, plaster, external cladding and weatherboards. He believed that structural integrity had been compromised and the house would require complete sub-floor structure straightening and re-building, complete re-plastering, electrical wiring and fit – out, plumbing connections and fittings and new roof trusses and cladding.

- 27 Mr Colley questioned the financial viability of the project. Not only was he critical of the transporting process and how the relocated items were then placed and left at the property, he also maintained that he would not have cut the house into sections in the manner that Mr Weis had. According to Mr Colley, when stumps were in place and the house sections placed onto them, there would be a number of gaps between the sections. He did not appear to regard the project as a total loss but did estimate, depending upon the works required, that they may well cost around \$70,000 for a proper reinstatement, any extension and extras now required by virtue of more recent changes in regulations.
- 28 In response to my direct enquiry of him about the accuracy of the 'salvage' figure of \$10,498, Mr Colley did not directly dispute it but I formed a view from his evidence that it may well be somewhat low as he indicated that quite a lot of the timber would be of sufficient quality to attract good prices even as used materials.
- 29 Mr Weis relied on a letter from Victorian Building Authority (VBA) dated 9 December 2016 to both him and Mr Siemering after an inspector had conducted an examination of building work at the property. The inspection had been undertaken at the request of the applicants as complainants. The inspection had been undertaken on 25 November 2016. Mrs Reed and Mr Weis had also attended. It also noted the building surveyor as Mr Donald Sherwell.
- 30 The VBA inspector had recorded that the house had been cut into 4 pieces to aid transporting. At the time of the inspection, each section of the dwelling was sitting on temporary supports prior to the construction of the footings. The roof frame and roof cladding had been removed prior to transporting. The four sections of the dwelling were covered in tarps to reduce the exposure to the elements, however, there were sections that the tarps did not cover. The eight items inspected were the concerns specifically noted by the applicants.
- 31 To all the concerns raised, the inspector noted that the builder's works were incomplete. In response to six items he recorded that the frame should be completed to a stage where it can be inspected and approved by the relevant building surveyor. His other recommended works were the provision of stumps/footings in accordance with the scope of works detailed in Agreement 3, the secure fixing of flooring to floor joists, and the reinstatement of weatherboard cladding when the frame has been re-erected.
- 32 Most importantly from the report, according to Mr Weis, the inspector, in his concluding comments and recommendations opined that a lead time of three weeks may be required to procure labour and materials, obtain approvals and arrange access but it is otherwise anticipated that a further twelve weeks is sufficient to complete the recommended rectification works.

- 33 Section 5 of the *Domestic Building Contracts Act 1995* provides that, among other matters, building work to which the Act applies includes the demolition or removal of a home. Section 6, however, confirms that the Act does not apply to the transporting of a building from one site to another.
- 34 Regulation 26 of the *Building Regulations 2018* sets out what is required for an application for a permit to remove a building. Among other matters, the application requires an outline and a description of the building to be removed, a written description of the removal procedure and such additional documentation as the relevant building surveyor reasonably requires.
- 35 In correspondence with Mr Weis, lawyers for the applicants asserted that they had been advised by Mr Siemering that he did not conduct or supervise any works in removing the house and, as such, this was in breach of Agreement 2 which stated that Mr Weis as transporter was responsible for engaging the services of a registered builder (at his own cost) in order to obtain any necessary permits and carry out works required to legally remove the house. Additionally, Mr Colley likewise maintained that a registered builder should also have been so involved.
- 36 The evidence of Mr Weis was that he had obtained all necessary permits and the required building surveyor's report for removal of the house. Copies of these documents were not available at the hearing but their alleged existence was otherwise unrebutted. Mr Weis also deposed that in line with his usual practice, he had cut the house into the various sections as had been recommended by Mr Siemering upon him having viewed the plans before the removal process had begun.
- 37 Mr Weis also provided a letter to the Tribunal at the hearing from Express Permits, Building Surveyors and Consultants, signed by a director of Building Solutions Services (Aus) Pty Ltd. This letter stated that there is no requirement in the *Victorian Building Regulations* with respect to the removal of a dwelling that it must be accompanied by a plan showing where it will be cut/has been cut approved by a registered building practitioner.
- 38 The applicants had enquired of other local builders after terminating the services of Mr Siemering and it had become apparent that the cost of now reinstating the house would be considerably higher than the fixed price of Agreement 3. Indeed, it appeared that at best from their perspective, for around that price of \$37,000, they would be able to have only the stumps put in and the house sections placed on the stumps.
- 39 In his evidence and submissions, Mr Weis displayed a strong knowledge of building practice. He had been a builder in the past but was no longer registered. I found his cross-examination of Mr Colley to be robust and resulted in concessions being made by Mr Colley.
- 40 Mr Weis argued his case denying liability on a number of grounds. He stated that throughout the dispute and still at the hearing he could assist the

applicants to restump and rejoin the frame consistent with both the VBA and Colley reports. He maintained that these works would have been completed under Agreement 3 if it had not been cancelled, with the agreement requiring all structural timber/frame in the roof and subfloor to be completed to current building requirements which was specifically in accordance with the conclusions reached by the VBA inspector after having conducted his inspection three months after Mr Colley. He also noted, with reference to the recommendations in Mr Colley's report, that Agreement 3 excluded liability for plumbing, plaster, electrical and wall coverings.

- 41 Mr Weis further argued that he had performed Agreements 1 and 2 properly with ownership of the delivered items having passed to the applicants who had accepted his discount for any delays. He also maintained that at the time of delivery the conditions were too wet to relocate onto the correct position at the property without damage to the site or risk to workplace safety and these had been matters agreed to with the applicants at the time. In further argument against the Colley report, he noted that while it recommended new roof trusses and new roof cladding, the house had been sold with existing roof cladding that was accepted on delivery and was not a truss roof but a conventional pitched roof which the VBA simply required to be constructed to current building standards as obligated by Agreement 3.
- 42 By cancelling Agreement 3, Mr Weis contended that the applicants had been "masters of their own demise" as Agreement 3 had contained all the contractual obligations to reconstruct to current building standards, the cancellation being one month after delivery of items. He maintained that as soon as weather permitted, the works pursuant to Agreement 3 would have commenced and likely been completed by November 2016 in line with the time period for works estimated by the VBA inspector. Mr Weis also argued that when calculating the fixed price, any matters such as potential requirements to rectify gaps between sections of the house had been factored into calculations. Finally, Mr Weis submitted that the undertaking of the works pursuant to Agreement 3 would have been in accordance with usual "practice", that is, by Mr Weis and carpenters with Mr Siemering supervising the works prior to each progress and inspection stage. He also argued that in not appointing another registered builder in the last two years, the applicants had taken no proper steps to mitigate loss.
- 43 Numerous photographs taken by the applicants and Mr Colley were also examined during the hearing. Again, Mr Weis cogently argued that perceived problems identified in them would have been rectified during the reinstatement works.
- 44 Throughout the morning of the hearing, considerable focus when examining damages was on reinstatement costs of the house. However, after re-commencement of the hearing in the afternoon, the applicants informed the respondent and the Tribunal that they were moving interstate in the following week, having instructed an estate agent to market and sell the

property as expeditiously as possible. They had not as yet sought to sell the items and materials from the house but would do so to recover money and what was left would be cleared from the property.

- 45 The applicants indicated that the Credit Union had changed its policies and practices and funds were no longer available for the project. This change in circumstances had occurred since the filing of the application. I raised the possibility of an adjournment for them to consider their position but they made it clear that they did not want an adjournment.
- 46 I find that the applicants did not establish, on the balance of probabilities, that any works of the respondent associated with the removal would have frustrated the undertaking and completion of Agreement 3 or any part of it. As noted earlier, the issue of transportation is not for consideration in the determination of this domestic building application but even if it had been, I would also have found that the applicants had again not established on the balance of probabilities that any works of the respondent associated with the transportation would have frustrated the undertaking and completion of Agreement 3 or any part of it.
- 47 Finally, I accept the respondent's argument that the applicants could not, in the circumstances, succeed in their application once they had terminated Agreement 3 before its commencement. It is also appropriate to record that the applicants, all other considerations aside, had no evidence to offer on quantum. Although I have formally granted liberty to apply to the respondent on the issue of costs, I do not currently see any basis for him to seek any costs order.

B. Josephs
Member