**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D835/2006

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Domestic building – Claim and Counterclaim – House removal and transportation – Proof of loss – conduct of case – damages – costs.

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| **APPLICANT** | Classic Period Homes Pty Ltd (ACN 096 046 105) |
| **RESPONDENTS** | Philip Rattle, Angela Rattle |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member D. Cremean |
| **HEARING TYPE** | Compliance Hearing |
| **DATE OF HEARING** | 23 October 2007, 19 November 2007 and 4 December 2007 |
| **DATE OF ORDER** | 29 January 2008 |
| **CITATION** | Classic Period Homes Pty Ltd v Rattle (Domestic Building) [2008] VCAT 116 |

## ORDER

1 Claim dismissed.

2 Order on the Counterclaim in favour of the Respondents (Mr and Mrs Rattle) in the sum of $37,797.33. Such sum must be paid by the Applicant.

3 I allow interest on such sum in an amount to be finalized.

4 I order the Applicant to pay the Respondents' costs (less the amount ordered on 19 November 2007) on an indemnity basis in an amount to be finalized.

5 By 4.00 p.m. on 4 February 2008 the Respondents must file in writing (by letter) the sum to be specified for interest and the sum to be specified for costs. A copy of such document must be forwarded by such date and time to the Applicant who may, until 4.00 p.m. on 7 February 2008 file in writing (by letter) a response. Thereafter final orders will be made without further hearing from the parties.

**SENIOR MEMBER D. CREMEAN**

## APPEARANCES:

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| For the Applicant | Mr B. Clune, Director in person |
| For the Respondents | Mr D. Pumpa of Counsel |

## REASONS

1 The claim and the counterclaim in this matter I heard over an extended period of 7 days – when the originally estimated hearing time was 3 days.

2 The reason for the delay I consider lies in the cross-examination by Mr Clune (on behalf of the Applicant) of Mr Rattle. I have previously made observations in this regard and orders. See my orders made on 19 November 2007 where I ordered Mr Clune to compensate the Respondents in the sum of $2,200.00. I believe he has in fact complied with my order and I say no more about it except to refer to his cross-examination further, below.

3 Mr Clune is a director of the Applicant and I allowed him to conduct the case of that party because of the difficulties he had had with his legal representation by Mr Glen Thexton, solicitor. This, however, should not be taken to be what will usually be allowed. Normally a company must be represented by legal practitioner. This case shows, in one way, why this should be so. Legal practitioners are skilled in the art of cross-examination. Mr Clune is not. Hence the prolonged hearing in this matter.

4 The application, however, was filed in the name of Mr Thexton on behalf of the Applicant. The Applicant claims the sum of $48,000.00 with interest and costs. This is made up of three component sums. A sum of $20,000.00 is claimed for alleged breach of a "Dwelling Contract". A further sum of $20,000.00 is claimed for alleged breach of a "Transport Contract". Finally, a sum of $8,000.00 is claimed: $5,000.00 for tarpaulins and $3,000.00 for house stands.

5 The Applicant alleges that on or about 4 August 2001 the Applicant and Respondents entered into a Dwelling Contract to purchase a dwelling for $20,000.00 (which sum it alleges has never been paid). It then alleges it entered into the Transport Contract with the Respondents to transport the dwelling to 37 Galleon Crescent, Sunset Strip, Phillip Island for $20,000.00 (which sum it also alleges has never been paid). Finally it alleges it supplied the Respondents with tarpaulins to cover the house while on Phillip Island and stands to support the house (which it alleges also it has never been paid for).

6 The Respondents filed Points of Defence and Counterclaim on 30 April 2007. These are in response to the Applicant's Points of Claim dated 3 April 2007. They deny the Dwelling Contract (and point out there "were various versions of an agreement between the parties which were draft and not finalised"). Although they admit the house was transported to Phillip Island they deny the Transport Contract. They deny they are liable to pay for the tarpaulins or the stands.

7 By their Counterclaim they claim damages not exceeding $40,000.00 with interest and costs. They claim the true contract between the parties was dated 12 October 2001 and under the same "the Applicant agreed to

remove, transport and re-erect an existing dwelling on [their] land for an agreed total contract price of $155,000.00". They allege they were entitled to serve Notice of Default on or about 24 May 2002. For the reasons set out in such Notice they claim they were entitled to terminate the Contract. They claim they have suffered loss and damage – including a sum of $27,797.93 (being completion costs of $180,797.93 less balance of contract price payable of $153,000.00 ($2,000.00 having been paid)). They claim delay losses and damages for inconvenience and the like.

8 The Applicant's Points of Defence to Counterclaim are dated 15 June 2007. I have found them unhelpful. They require the Respondents to produce a Certificate of Title for some strange reason. They admit the contract price included re-erection of the dwelling by way of placement on stumps. But they then go on to say that the Applicant "was not obliged to even commence building work". Alternatively they say – and I have never heard of this before – the Respondents "should be estopped from terminating the Contract". I have no idea what Mr Thexton (who drafted the document) meant by this.

9 At the hearing evidence given on behalf of the Applicant included that given by Mr Clune himself, Mrs Jenkins and Mr Piechatschek. Evidence on behalf of the Respondents was given by them (themselves) and by Mr Guymer. I also heard from Mr Naidoo of my own motion. Each party filed written submissions and addressed them.

10 I have duly considered those submissions in detail together with the evidence given by all – both as to what was said in evidence and the manner in which it was said.

11 In the end I have come firmly to the view that I should find against the Applicant and find in favour of the Respondents. I have no hesitations in that regard.

12 I do so because I am not satisfied I can place any reliance at all on the evidence given by Mr Clune and by Mr Piechatschek. I say this in light particularly of the evidence given by Mr Rattle – who was cross-examined at inordinate length. Mrs Jenkins' evidence, largely, I did not find helpful on any of the material issues. I found her to be very defensive.

13 The evidence given by Mr Clune was vague and unsatisfactory. He seemed to miss the point, at some stages, of what truly were the issues in dispute in the case. This was also indicated by the nature of his cross-examination of Mr Rattle – vague and rambling but concentrating on the same points over and over again to the exclusion or near exclusion of the more important ones. His cross-examination of Mr Rattle had the reverse effect of what it was intended to do – it fortified, to my mind, the case sought to be advanced by the Respondents and convinced me they are honest people.

14 I consider also the evidence given by Mr Piechatchek was unsatisfactory too. I found him at times belligerent and prepared only to countenance a

version of events consistent with that which he wished to advance on his own behalf or on behalf of the Applicant. In effect – *this* was what he wanted to say and he would not be dissuaded from it. I do not believe what he told me in evidence. In particular I am not satisfied he was prevented from removing the dwelling by being blocked from doing so or (as he suggested) that tyres were punctured or let down by someone unidentified (but that a Sheriff's car had been seen in the vicinity – suggesting thereby involvement of Mr Rattle who works for the Sheriff's office).

15 In contrast stands the evidence of Mr and Mrs Rattle. I have no hesitation at all in accepting what they say is the truth. Mr Rattle, in particular, and over a long period of time, impressed me as a careful, truthful man. Also as a man wanting to be able to answer questions asked of him utterly truthfully.

16 It seems to me, accepting his evidence, and that of Mrs Rattle, as I do, that he and his wife have been the subjects of trickery and dishonest dealings by the Applicant. Time and again they were given promises and time and again these were not honoured. This, apparently, has not troubled Mr Clune. Nor has it troubled Mr Piechatschek. It is interesting to note he is recorded as a director of the Applicant – perhaps without knowing this was so. But he at one stage was a registered builder – despite being unable to read or write. His registration, though, at some point, was suspended (or cancelled).

17 I note but do not take into account that Mr Clune, in this very matter, apparently pleaded guilty in the Magistrate's Court to certain charges under the *Building Act* 1993 or under another Act. The Applicant itself also may have pleaded guilty. Mr Clune's pleas of guilty, I would think, could have opened up a possibility of him being separately sued – in person – in the Tribunal. A case could have been pleaded against him personally, I think.

18 I am satisfied I should find the contractual arrangements were as alleged by the Respondents. I am satisfied also that I should find they have been breached in the ways alleged, at length, in the Counterclaim. In other words I find there was a contract dated 12 October 2001 by which the Applicant agreed to remove, transport and re-erect an existing dwelling on the Phillip Island land for a total contract price of $155,000.00. This, the Applicant did not do. No permit even was arranged. Effectively the house was dumped there and left exposed to the elements. The Respondents were entitled to serve Notice of Default and to terminate the contract.

19 As a result of the Applicant's misdeeds, the Respondents have suffered grievously. It was, I think, described to me as a "nightmare". Yet Mr Clune did not seem to flinch at this – which surprised me I must say. He did not seem to care what effect his actions or those of the Applicant had had on the Respondents. Or, how much heartache may have been caused to them.

20 The Respondents' losses I am satisfied, on balance, I should find in the amounts claimed. Mr Clune's cross-examination in this respect of Mr Rattle did not persuade me – except in respect of some inconsequential items – that any of the expenditures being claimed by him might possibly be erroneously claimed or would have been losses in any event. Any point which was being sought to be made by Mr Clune in this regard was, I think, lost somewhere in the multiples of convoluted, confused and vague questions he advanced.

21 Initially, I must indicate, I was troubled about allowing the claims (or some of them) on the Counterclaim because original receipts could not be produced. The documents in the Respondents' List of Documents – I learned – had gone missing following a change in partnership in their Solicitor's firm. Let me make this very clear: they should have been taken care of and they should not have gone missing. This is unprofessional. However, having heard Mr Guymer's evidence via telephone (and to a lesser extent, informing myself on the basis of what Mr Naidoo said via telephone) I am satisfied that those documents did exist (and may still do, somewhere). I am satisfied the List accurately depicts the claims. Further, having heard Mr Rattle (and seen him go through his cheque butts) I am satisfied that the items listed in Exhibit R22 – all of them – should be allowed. I am not satisfied I should subtract any. Mr Clune's cross-examination has not helped me to any extent in that regard.

22 Allowing them, as I do, they total a sum of $27,797.33.

23 I order in favour of the Respondents on the Counterclaim in the first place in that sum. Each of its component items, it seems to me, on the balance of probabilities, is attributable to the Applicant as a contractual loss suffered by the Respondents. The Applicant, I accept, has acted deceitfully in their case. The evidence as a whole justifies me in having this view.

24 I did consider whether I should allow the Applicant the value of the house (at about $10,000.00 so I was told by Mr Clune from the Bar table) on some sort of unjust enrichment basis. That is, that the Respondents gained the value of the house for which they have not paid. Mr Piechatschek was very vocal in his evidence about this. However, considering the evidence in its entirety, I am not satisfied I should do so. The house after a while, after being transported by the Applicant, had no value except as "matchwood" so someone told Mrs Rattle as I recall. I decline to attribute a value both in the absence of evidence as to acquisition cost (except for a vague reference by Mr Clune) and in the absence of evidence that the house after a while had a value or now has a value I can determine. No part otherwise of the confusing Defence to Counterclaim is established either.

25 The version given to me in evidence by Mr and Mrs Rattle of the facts in this case says nothing favourable about the conduct of the Applicant. Mr and Mrs Rattle, I believe it is true to say, have had a terrible experience fully justifying the description "nightmare". The Applicant's conduct has

been appalling. It has treated them very badly. And it has not cared it has done so, it is quite evident to me.

26 I am asked also, in consequence, to order an amount for stress and inconvenience. I consider, in the circumstances, it is proper to ask for this, and for me to allow an amount as a contractual loss. A proper and just figure is, I think, $10,000.00 - $5,000.00 each for Mr and Mrs Rattle as compensation for what they have had to endure.

27 I allow interest which was sought on the Counterclaim in a sum to be detailed to me again in writing considering the amount I have ordered on the Counterclaim – which may be slightly different from the amounts mentioned in submissions.

28 I was asked also to deal with the question of costs. I consider it proper to do so. Cost do not follow the event in the Tribunal by reason of s109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998.

29 I am satisfied, however, having regard to s109(3) that I should depart from s109(1) considering it is fair to do so under s109(2).

30 The Applicant has completely lost on its claim and the Respondents have completely won on the counterclaim. This matter should have settled at mediation – as it had the opportunity to do on 22 January 2007. Yet the Applicant almost relentlessly pursued its claim when it was doomed to fail. The Respondents even indicated (as I recall) they may never have Counterclaimed for their losses if they had not been sued in the first place. Even that aspect of the Applicant's claim relating to transportation was excluded from the jurisdiction. See s6 of the *Domestic Building Contracts Act* 1995. At the same time the Applicant has wilfully failed to see the Respondents receive any satisfaction at all and has instead subjected them to a tedious and protracted hearing. In my view, by the conduct of the proceedings, the Applicant has sought to subject the Respondents to as much difficulty and inconvenience as possible.

31 It is proper to order costs in favour of the Respondents.

32 I was asked to order indemnity costs. To do so, I must be satisfied the case is sufficiently "exceptional". Given the Applicant's wilfulness in going ahead with the litigation, and the way in which it has been conducted, and given what Mr and Mrs Rattle have had to endure over the years by reason of the Applicant's conduct (tearfully described in evidence by Mrs Rattle) I am satisfied that an order for indemnity costs is warranted.

33 Accordingly I order the Applicant to pay the costs of the Respondents on an indemnity basis. If I had the opportunity to do so, I would have ordered that Mr Clune pay these costs himself. But he, unfortunately, was not sued personally.

34 Those costs, I ask, to be detailed to me again in writing. I exclude the costs I ordered on 19 November 2007. I am not satisfied the figure mentioned in submissions to me makes that exclusion.

35 I so order.

**SENIOR MEMBER D. CREMEAN**