VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1570/2015

CATCHWORDS

Breach of contract – conveyancer – failure to warn of absence of final inspection of structure – absence of final inspection not a ground upon which the Applicants could have avoided the contract - pre-purchase inspection – scope of retainer – inspector to identify insect infestation or major structural defect – none identified in report – not established that defects actually present were major structural defects - no breach proven – even if breach established no damages proven

FIRST APPLICANT	Brian James Edwards
SECOND APPLICANT	Kaye-Maree Edwards
FIRST RESPONDENT	Karli Louise Woods t/as Manorwood Conveyancing
SECOND RESPONDENT	Peter Andrew Hearn t/as Melbourne Pre-purchase Property Inspections
FIRST JOINED PARTY	Tonya Cook
SECOND JOINED PARTY:	Cameron Nicholls
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	14 December 2016
DATE OF ORDER	24 February 2017
CITATION	Edwards v Woods (Building and Property) [2017] VCAT 290

ORDER

The application is dismissed against both Respondents.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the First Applicant	In person by telephone
For the Second Applicant	In person by telephone
For the First Respondent	In person
For the Second Respondent	In person
For the First Joined Party	No appearance
For the Second Joined Party	No appearance

REASONS

Background

1. The Applicants are the former owners of a dwelling house and land in Point Cook ("the House"). They entered into a contract to purchase the House from the two Joined Parties ("the Vendors") on 30 August 2012.

2. At the time of the purchase there was a roofed pergola at the rear of the House that had been constructed by a builder engaged by the Vendors. After settlement of the purchase it transpired that the pergola had been constructed with a number of defects. Some three years after purchase, the Applicants had it demolished and replaced it with a new structure at a total cost to the Applicants of $26,024.56, comprising $21,340 that they paid to a builder, and further sums that they paid themselves towards the work.

3. The first respondent ("Miss Woods") is a conveyancer carrying on business under the name "Manorwood Conveyancing". In the course of her business she conducted the conveyancing work on behalf of the Applicants when they purchased the House.

4. The second respondent ("Mr Hearn") carries on business under the name "Melbourne Pre-purchase Property Inspections", conducting pre-purchase inspections of houses for prospective purchasers. A member of his staff inspected the House after the Applicants had signed the contract to purchase it but before settlement of the purchase. An inspection report was subsequently prepared and sent to the Applicants.

5. The Applicants claim that the cost of demolishing the defective pergola and the erection of the replacement structure was the result of the negligence of the respondents in carrying out the work that they undertook on the Applicants' behalf. They seek to recover from the respondents the said sum of $26,024.56 that they spent in reconstructing the pergola, together with certain other sums.

This proceeding

6. This proceeding was commenced by the Applicants against the two respondents on 26th November 2015. There were a number of interlocutory hearings.

7. On 13 October 2016 the tribunal joined the Vendors as joined parties to the proceeding on the application of Mr Hearn. From the text of the order it is apparent that the purpose of the joinder was to enable Mr Hearn to seek to limit his liability pursuant to Part IVAA of the *Wrongs Act* 1958. The order provided that, in the event that the Applicants made no claim against the Vendors, the Vendors were excused from further participation in the proceeding should they so wish.

8. No claim was made by the Applicants against the Vendors thereafter and the Applicants never made them respondents to their claim. When the matter was heard they did not appear.

Hearing

9. The proceeding came before me for hearing on 14 December 2016 with one day allocated. The Applicants, who now reside in London, appeared by telephone and the two respondents appeared in person. It was apparent that there were a number of difficult legal questions to consider and so after hearing evidence from each of the parties I informed them that I would provide a written decision.

The claim against Miss Woods

10. In their application, the Applicants claim that:

    (a) they paid Miss Woods "…to check everything was in order";

    (b) post settlement they discovered that the Vendors "…had not fulfilled their owner-builder obligations" with respect to the pergola;

    (c) they wrote to the Vendors to resolve the issue "…to no effect";

    (d) Miss Woods had received "the Building Permit advice" from the Council in November 2012 but only informed the Applicants in November 2014 following their demand for information.

    (e) they seek an order against her "…for full compensation for the cost of fixing the issue".

11. Mr Edwards said that Miss Woods was recommended to him by the estate agency through which the Applicants purchased the property, Sanctuary Lakes Real Estate. Miss Cook's office shares a common entrance with the estate agency. Mr Edwards said that he sent documents to Miss Wood's office on 31 August and subsequently went into her office and found that they had been received and he was told that Ms Cook would deal with them when she returned.

12. At the time of the purchase, the Applicants resided overseas and Mr Edwards only had two days available to him in order to purchase the property and make arrangements for the inspection and the conveyancing

13. On 5 September 2012 Ms Wood wrote to the Applicants thanking them for their instructions and setting out the terms of her engagement and what she proposed to do. At that time it is clear that she had the contract of sale including the Vendors' statement.

14. Included with the Vendors' statement was a building permit for the construction of a pergola at the House by the Vendors as owner builders at a cost of $4,500.00. The contract was also conditional upon the Applicants having the House inspected by a builder and the inspection not showing any major structural building defect or insect infestation.

15. There was nothing in the documents received by Miss Woods to alert her to the fact that there had been no final inspection of the pergola by the relevant building surveyor following its construction. However, in the course of her enquiries during the conduct of the conveyancing work she obtained a certificate from the Wyndham City Council on 15 November 2012 to that effect. She did not inform the Applicants of that and settlement proceeded of 30 November

2012. I asked her why she had not obtained this certificate much earlier and she told me that it was her practice to obtain certificates close to the settlement date in case the information in the certificate changed before settlement.

16. In their Points of Claim the Applicants said:

> "The contract stipulates that if there were any matters of concern, then Manorwood would let us know immediately. The certificate provided to Manorwood by Wyndham City … dated 15 November 2012, clearly shows that there was no final inspection on the record for the verandah. Manorwood failed to provide us with: the outcome of the search they were contracted to carry out and the professional advice we paid for. We only obtained a copy of the certificate on 5 November 2014… as a result of persistent requests to Manorwood….. It is reasonable to expect a conveyancer to identify anomalies pertaining to the documentation provided by the Vendors, ensure any issues are addressed and that we, the Applicants, be advised."

17. Miss Wood said that when she found that there had been no final inspection she asked the Vendors conveyancer to provide a final certificate but they said that the Vendors would not do that and that they were not required to do so. She said that she did not believe she drew the matter to the attention of the Applicants.

18. Having signed a binding contract of sale, the Applicants were already bound to settle the purchase and the only defect that would have entitled them to refuse to settle would have been a defect in the title. The absence of a final inspection of a structure on the land is not something that goes to the title of the land sold. Rather, it relates to what is sometimes called "the quality of the subject matter". It is not a ground upon which the contract might have been avoided. Consequently, even if Miss Woods had told the Applicants that there had been no final inspection for the pergola, there was nothing that they could have done about it. They would still have had to proceed to settlement. Miss Woods could only request the Vendors to provide a certificate, which she did, but they refused to do so.

19. The complaint against her must therefore fail.

The claim against Mr Hearn

20. Special condition 11 of the contract of sale provide as follows:

> "This contract is subject to the purchaser obtaining an independent building and pest report within seven business days of the purchaser signing this contract note. If the report shows a major structural defect or pest infestation the purchaser may end this contract but only if the purchaser serves written notice on the vendor/agent together with a copy of the report within seven days of the purchaser signing this contract. All monies must be immediately refunded to the purchaser if the contract is ended."

21. On 31 August, Mr Edwards contacted Mr Hearn's office and requested a report. Mr Hearn said that his records indicate that the request came on a Friday and that his employee agreed to carry out the inspection and provide a report for $680.

22. The property was inspected on 11:15 AM on 3 September by a Mr Benneker. His report, which is 15 pages and contains photographs of all rooms and outside

areas, describes the House in detail and says that it was structurally sound at the time of inspection although some minor movement was noted to internal walls and ceilings and some minor matters are noted.

23. The summary contained in the report says that it is a report as to the condition of the building elements in accordance with Appendix C of AS4349 .1–2007. There is also a statement that the report does not include the identification of unauthorised building work or work not compliant with building regulations.

24. The author of the report added:

> "External additions have been built to the dwelling since it was constructed and should be checked with your local Council to ascertain if a permit was required."

25. There are numerous photographs in the report of the interior and exterior of the House. The notation in regard to the pergola is as follows:

> "Pergola. Timber construction. Corrugated iron roofing. All appears to be in good condition with little to no maintenance required".

26. That notation accompanies a photograph of the pergola and there is nothing that I can see in that photograph that appears to me to be a failure or deficiency in its construction or something which might be said to have put the inspector on notice that something was wrong with the way it had been built. However I am not an expert and the photograph in the report is quite small.

27. Mr Hearn sought to rely upon terms and conditions of contract that he uses in his business in order to limit his liability. He said that it was the practice of his staff to send terms and conditions to each customer with a note to say:

> "By not contacting us you agree to the terms".

28. In general, a party cannot impose contractual liability upon another merely by proclaiming that silence shall be deemed consent (Halsbury: *Laws of England* 4th Ed. Vol.9 Para 251).

29. He also provided what he said was a screenshot of his computer system to establish that the Applicants were sent the terms and conditions at 3:52 PM on 3 September by email and that the notation on the screenshot said that the terms and conditions were accepted. Since the terms and conditions were not sent out until after the inspection had taken place, I find on the balance of probabilities that Mr Hearn had already accepted the Applicants' request for a report by then and so the contract already been entered into. Consequently, sending out terms and conditions later that day was of no effect (*Olley v. Marlborough Court* [1941] 1 KB 532).

The deficiencies in the pergola

30. The extent of the deficiencies in the pergola are set out in the report of an engineer, Mr Smith, which is dated 5 April 2016. Mr Smith never saw the pergola and had to rely upon photographs given to him by the Applicants. Consequently, in reading the report, I must bear in mind that what I am reading

are conclusions drawn from these photographs, albeit by an expert. The other difficulty I have is that Mr Smith was not available to answer a number of questions that I would have put to him concerning his report.

31. The defects that he listed are as follows:

    (a) Construction is not in accordance with the original design and the permit documents;

    (b) The inspections were not made by the relevant building surveyor;

    (c) The construction enclosed an external house gutter on the north wall which has become a non-compliant box gutter;

    (d) The flashing to the brick walls did not did not comply with the regulations;

    (e) The roof cladding extended over the gutter by 100 mm instead of 65 mm as required by the Guide to Standards and Tolerances 2007;

    (f) The wall cladding of the skylight does not have a 25 mm clearance to the roof flashing to prevent water entry by capillary action;

    (g) The wall cladding joints have not been provided with weather strips;

    (h) There is no flashing to the windows in the skylight;

    (i) The upper level roofing is suspected to be at a pitch of less than 5°, although he acknowledged that he had not measured it;

    (j) The box gutters have no fall;

    (k) The Code requires the box gutters to be installed in a straight line with no change in direction;

    (l) The box gutters do not have continuous support under the base:

    (m) The foundations are likely to be too shallow:

    (n) The building has been constructed without an engineer's certificate of design compliance.

32. He concluded:

> "The structure is defined as an illegal structure without enough redeeming features to remain unaltered to conform to the various codes that full demolition was the only way forward to provide a veranda that complied to the BCA and VBA requirements" (sic.)

33. That statement is somewhat emotive in tone and seems at odds with the relatively minor nature of the matters that he raised. He did not identify any specific fault as necessitating the demolition of the structure.

34. Mr Smith did not say in his report that any of these defects should have been apparent to Mr Benneker when he made his inspection. From the descriptions that Mr Smith has given:

    (a) clearly, Mr Benneker could not have known about (a), (b), (m) and (n).

(b) one would expect that the enclosed external house gutter on the north wall, (c), ought to been apparent to Mr Benneker from an upstairs window.

(c) the lack of a pressure flashing (d) is only depicted in one photograph (2) along one length of a brick wall. Otherwise, the flashings to the brick walls are not shown in the photographs. What I can see in this photograph looks to me like a flashing but I am not an expert.

(d) the conclusion that the overhang of the roof cladding over the gutter (e) is 100 mm instead of 65 mm is taken from the same photograph (2). The view of the gutter in the photograph is at least 2 m away from the camera. He did not measure the overhang and he does not say how he concluded what the length of the overhang was. Perhaps he has inferred the size of the box gutter from the positioning of the Tek screws in the roofing material that are visible in the photograph but he does not say. Certainly the difference of 35 mm is not a large measurement.

(e) the lack of a clearance between the wall cladding and the roof flashing is shown clearly enough in the photographs and I think that Mr Benneker ought to have seen that. Mr Smith describes that item in his report as being of medium concern.

(f) the lack of weather strips to the wall cladding of skylight is also apparent and I would have thought that Mr Benneker should have seen that they were not there, although Mr Smith does not say in his report that they are a legal requirement. He refers to this as item as being only of low concern.

(g) lack of flashing to the windows in the skylight is identified from the photograph where the architrave of the window had come off. It is not suggested by Mr Smith that the absence of a window flashing would have been apparent with the architrave in place. I am not satisfied that it has been shown that Mr Benneker ought to have seen that there were no window flashings.

(h) as to the roof pitch, Mr Smith said:

> "Custom Orb roofing is only suitable for pictures greater than 5° … The upper level roof, although not measured by me, appears to be very flat."

He does not positively assert that the pitch is inadequate. It seems to be only a suspicion on his part which is understandable, given that he is operating only from photographs. There is certainly a pitch on the roof shown in the photographs and I am quite unable to say whether it is more or less than 5°.

(i) Mr Smith said that the lack of fall in the box gutter is shown in photographs (2) and (14). Looking first at photograph (2), and considering that it was impossible for Mr Smith to take measurements, it may be that he has inferred the position of the base of the box gutter from the position of the flashing over the upturn of the gutter, which is parallel to the mortar course. That coincidence of the flashing with the mortar

course ought to have been evident to Mr Benneker if he had looked out that window. Photograph (14) shows a waler plate against the wall with cut-off sections of roof rafters still attached. This photograph was taken during the demolition. Mr Smith infers that the box gutter was level from the marks of the silicon for the pressure flashing shown on the bricks above the waler plate. He does not comment upon small sections of different coloured timber on top of the joists which appear to me to be of progressively different thicknesses although it is difficult to see in the photograph. I would have liked to have asked Mr Smith whether he thought it likely that the purpose of these pieces of timber was to give some fall to the base of the gutter. In the absence of any expert evidence that that was their purpose, I cannot find that it was. Because of the location of this gutter, I am unable to find that Mr Benneker ought to have noticed that it had no fall, if indeed that were the case.

(j) it would have been obvious to Mr Benneker that the box gutter did not run straight but had a 90° angle in each corner.

(k) I am unable to say how Mr Smith concluded that the gutters had no support because he does not say. However if there was no support for the gutter I cannot find that Mr Benneker should have seen that because with the gutter in place, any lack of support would not have been visible.

35. Mr Smith's report also includes photographs of the replacement structure which is larger, much more elaborate and much better finished than the original pergola. Since the original pergola is said to have cost $4,500.00 and the replacement structure cost $26,024.56, that is to be expected.

Should the inspector have identified these matters?

36. Mr Hearn contracted to inspect the House and provide a report and it was an implied term of the contract that he or whoever he got to do the work would do it will all reasonable professional care and skill.

37. The purpose of the inspection was to provide an independent building and pest report within seven business days as contemplated by the special condition in the contract of sale. The concern was to see whether there was a major structural defect or pest infestation. If there was, the Applicants would have been entitled to avoid the contract.

38. The expression "major structural defect" has been said to refer to a shortcoming, imperfection or lack of something that pertained to the structure that is important, serious or significant. *Clarke v Mariotis* [2009] VSC 279.

39. In the report itself, under the heading "MAJOR DEFECT", the author states:

> "A defect of sufficient magnitude where rectification has to be carried out in order to avoid unsafe conditions, loss of utility or further deterioration of property.
>
> Were there conditions conducive to structural damage or major defects at time of inspection from a visual inspection: No".

40. Under the heading "STRUCTURAL DEFECT", the author states:

"Fault or deviation from the intended structural performance of the building element.

Where in the inspector's opinion the structural performance of the building elements is impaired at the time of inspection and the expected consequence may be unknown until further information is obtained.

Was a structural defect around that time of inspection from a visual inspection: No."

41. Mr Benneker has therefore said in his report that there was no major structural defect in the House.

42. Mr Smith did not state in his report:

    (a) that the defects that he identified should have been detected by Mr Benneker; or

    (b) that any of these defects was a major structural defect.

43. The evidence does not establish that the deficiencies identified by Mr Smith in the pergola amounted to a major structural defect or pest infestation. Consequently, even if they had all been identified in the report, the Applicants would nonetheless have been bound to complete the purchase notwithstanding the deficiencies in the pergola. They have therefore suffered no loss from the fact that they were not warned of the existence of these deficiencies before settlement.

Is there any recoverable loss in any case?

44. Even if liability had been established against one or other of the respondents, it does not follow that the damages that are sought arose as a result.

45. The claim brought against each respondent is for breach of contract. In an action for breach of contract an applicant is entitled to full compensation for the loss suffered from the breach. In *Hungerfords v. Walker* [1989] HCA 8 Mason CJ and Wilson J said (at para 5):

    "…a plaintiff is entitled to restitutio in integrum. According to that principle, the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss. In principle he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract or negligence."

46. The cost of demolishing the pergola and building the replacement structure does not arise directly from either of the alleged breaches.

47. Where a purchaser, due to the negligence of another person, buys a defective property not knowing that it is defective, his measure of damage is not the cost of repairing the defects.

48. In *Carborundum Realty Pty Ltd v RAIA Archicentre Pty Ltd* (1993) Aust Torts Reports 81-228, a prospective purchaser of a house engaged the Defendant to inspect the house and report as to its condition. The inspection was conducted carelessly and failed to detect a number of defects. In reliance on the report the

Plaintiff purchased the house and was then faced with the cost of repairing the defects. The learned judge said (at p.62,354):

> "The measure of damage is clear enough. The Plaintiff is not entitled to remedy the defects and charge the cost to the Defendant; (*Perry v Sydney Phillips & Son* [1982] 1 WLR1, 257 at pages 1,301-1,302). These damages are to be assessed at the time of the Defendant's inspection and report ... and they are to equal the difference between on the one hand the price actually paid and on the other the price which a willing but not anxious purchaser would have paid to a willing but not anxious vendor, given that a careful architect had carefully recorded and reported upon the result of a careful inspection."

49. In the present case, the Applicants were not induced to purchase the House by a negligent report as to its condition or the failure of Ms Woods to report the absence of a final inspection. They had already signed a contract to purchase the House before entering into the agreement with either of the respondents. They were bound to complete that contract, subject only to the right to avoid it if they were able to do so. There is no evidence what they would have done so if they had been entitled to and I cannot assume that they would have avoided it.

50. Further, it is not known what a willing but not anxious purchaser of the House knowing of the problems with the pergola, would have paid. In *Carborundum Realty*, the court found, after considering valuation evidence, that the value of the property was equivalent to its value at the time of purchase, less the cost of repairs, but that will not follow in every case. The claim must be for the difference in value which must be established at the hearing by evidence. There was no valuation evidence in this case.

51. Further, the amount sought by the Applicants goes well beyond what might have been the cost of repairing the pergola. A simple structure of cheap construction has been demolished and replaced with something much more elaborate almost 3 years later at over five times the cost. I cannot say that the value of the House at the time that it was purchased by the Applicants was what they paid for it ($710,000.00) less the cost of performing this exercise ($26,024.56). In effect, the Applicants are asserting that the House at the time of purchase was worth only $683,975.44. In order to justify such a finding I would need some valuation evidence.

52. Further, the House was re-sold by the Applicants in January 2016 for $817,000.00. The Applicants say in their submission that the capital gain of a little over $100,000.00 was due to a general rise in property values and that may well be right but I have no valuation evidence and in the absence of such evidence I cannot make any findings as to the true value of the House at the time it was purchased.

Conclusion

53. For all of these reasons, the application is dismissed against both respondents.

SENIOR MEMBER R. WALKER