

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP890/2017

CATCHWORDS

Contract for the supply and installation of pedestrian and vehicle gates; applicant specified that the gates to be constructed of Treated Pine timber; gates as supplied were constructed of Oregon timber as specified in respondent's quotation accepted by applicant; applicant claimed cost of replacement of gates with gates constructed of Treated Pine timber; contract between parties found to be for gates constructed of Oregon; gates found to be fit for purpose; claim dismissed.

APPLICANT	Formation Landscapes Pty Ltd (ABN 21 148 216 031)
RESPONDENT	Stonnington Fences & Gates Pty Ltd (ACN 117 627 513) t/as Old Malvern Pickets
WHERE HELD	Melbourne
BEFORE	B Thomas, Member
HEARING TYPE	Hearing
DATE OF HEARING	31 January 2018
DATE OF ORDER	3 April 2018
DATE OF WRITTEN REASONS	5 April 2018
CITATION	Formation Landscapes Pty Ltd v Stonnington Fences & Gates Pty Ltd (Building and Property) [2018] VCAT 506

ORDERS

1. The claim is dismissed.
2. No order as to costs.

B W Thomas
MEMBER

APPEARANCES:

For the applicant: Mr Christopher Weiss, Director

For the respondent: Mr Peter Scott, Director

REASONS

BACKGROUND

- 1 The respondent (“the fencer”) was engaged by the applicant (“the landscaper”) to supply and install a timber picket fence at a residential property in Bay Street, Brighton owned by Mr and Mrs Mallinson (the owners). The entire fence was to include a pedestrian gate and an automatic vehicle gate using Treated Pine pickets. The fencer subcontracted the manufacture of the gates to Adrian Barry Pty Ltd (“the manufacturer”) who used Oregon and not Treated Pine pickets.
- 2 The landscaper alleges that:
 - a) for external use and durability, Oregon is an inferior timber to Treated Pine; and
 - b) the gates as supplied and installed by the fencer are not fit for their intended purpose.
- 3 The landscaper claims the sum of \$5,800.00 as the cost of replacing the gates using Treated Pine timber.
- 4 The proceeding was heard on 31 January 2018. Mr Weiss appeared and gave evidence on behalf of the fencer. He relied on a report by Archicentre Australia dated 21 April 2017. Mr Scott appeared and gave evidence on behalf of the fencer and relied upon a document entitled “Expert Witness Statement” of Adrian Barry, the director of Adrian Barry Pty Ltd.

THE ISSUES

- 4 The issues for determination by the Tribunal are –
 - (a) What were the terms of the contract between the client and the fencer?
 - (b) Were the gates as constructed and painted, fit for the purpose for which they were to be used?

THE EVIDENCE

Mr Weiss

- 5 Mr Weiss spoke to a document headed “Timeline of events for front fence works” to which a number of documents were annexed.
- 6 Under cover of an email to the fencer dated 30 June 2015, Mr Weiss requested a quotation for picket and feature fencing, gates and gate automation systems. Attached was sheet TP01 prepared by Jack Merlo Design Landscape and Construction dated 1 July 2014, showing that each gate was to be constructed of Treated Pine pickets. The fencer’s initial quotation was dated 14 July 2015, but there was no reference to the species of timber to be used for the gates.
- 7 Following a meeting on-site between Mr Weiss and Mr Scott, on 29 April 2016 the respondent provided an updated and amended quotation. The quotation stated that the timber for each gate would be “65 mm F8 Oregon

timber based upon the supplied picture”. The amended quotation was accepted by Mr Weiss on 9 August 2016 and the gates were installed on or about 17 August.

- 8 On 4 September 2016, Mr Weiss emailed Mr Scott that the paint work on the gates and the pickets was bubbling in patches saying –

The painter tells me that you were on site to discuss the painting that’s bubbling and you mentioned that the timber should not of (sic) been painted for 5 – 6 weeks. ... The bubbling you refer to has nothing to do with the 5 – weeks scenario. It refers to tannin leaching.

Mr Scott replied –

The pickets are Cypress Pine as quoted & and installed

The gates were in Oregon pine as quoted

- 9 On 26 September 2016, Mr Scott provided a response from Mr Barry headed ‘**Product supplier information statement to accompany limited warranty offer**’. Relevantly the document states –

F11 free of heart Douglas Fir Pine [Oregon] is usually chosen for the gate frame as it is available in large sections, is cost compatible and is very stable.

... if properly installed and maintained, free of heart Douglas Fir Pine is one of the best and certainly the most versatile commercially available joinery timbers. So it is my preferred choice for gates.

Because of this I have no hesitation in providing a 10 year warranty on the gates that I manufacture, provided the following conditions are met.

1. Finish coats of paint are applied as per Australian standards, and as per manufacturers (sic) specifications within 4 weeks of delivery to site.

- 10 Bubbling paint continued to appear and between September 2016 and February 2017, the landscaper was obliged to sand and repaint the gates on three occasions.

- 11 On 14 March 2017, the gates were inspected by Mr Greg Nevin, the Business Development Manager for Haymes Paints. In a letter to Mr Scott of that date Mr Nevin said that the “paint peeling” was due to a high moisture content in the timber, and the solution was to strip back the paint in the affected areas to allow timber seasoning to occur to an acceptable level, and then to repaint the affected areas. Mr Scott further advised that Mr Barry offered to carry out the works suggested by Mr Nevin. However, this offer was rejected because the owners of the property, Mr and Mrs Mallinson, had received third-party advice that the bubbling of the paint was caused by sap leaking from the Oregon timber and would continue to do so. Furthermore, Oregon was an inappropriate species of timber for this type of application.

- 13 Mr Scott requested written confirmation that Oregon is not fit for use in the gates. Mr Weiss engaged Archicentre to provide a report as to the durability and performance of Oregon over Treated Pine. In a report dated 21 April 2017, Mr Simon Tiller, an architect, said –

More important is the question whether Oregon is sufficiently rot resistant in a weather exposed location, particularly where unpainted end grain is exposed. Oregon is rated Durability Class 4 according to Australian Standard 5604, Timber – Natural durability ratings. This implies a probable life expectancy (possibly) of up to 7 years. According to AS 5604, Kiln-dried treated Pine would be expected to last considerably longer, i.e. decades rather than years.

On this basis the use of Oregon for gates is not adequate as built in this instance. Gates need to be replaced with an adequately durable timber species.

- 14 In a letter to the fencer dated 5 May 2017 by way of reply to the Archicentre report, Mr Barry said -

Free of heart F11 Douglas Fir pine in large section was chosen by me as an appropriate timber for the gates I supplied to you because I believed it would perform suitably if properly painted and maintained.

... And because my quotation was accepted. I can only assume the details contained therein were met with approval.

I am fully aware of the short comings of 'Oregon' containing heartwood in external applications. Natural durability ratings for timber as per AS 5604 may be defined as inherent resistance of the heartwood of a timber species to decay and insect attack. As I have used free of heart timber. I am of the opinion that it falls outside the parameters for testing to achieve the classification that Douglas Fir Pine usually achieves.

If your customer's gates are working satisfactorily and are not showing signs of decay, then I believe they are fit for purpose until such time as is demonstrated, otherwise ...

- 15 On 5 May 2017, Mr Scott provided a copy of Mr Barry's letter to Mr Weiss and advised the fencer would not be replacing the gates.

Mr Scott

- 16 Mr Scott said the Landscape & Construction sheet TP01 was not a detailed specification for the gates, but was simply a document in support of a Landscape Town Planning Application. It did not contain any details regarding the specification or grading of the timber to be used.
- 17 At the meeting on-site before the 29 April 2016 quotation was submitted to Mr Weiss, changes to the TP01 sheet regarding the timber to be used and the method of construction was discussed between Mr Scott and Mr Weiss. Mr Scott said he would have stated to Mr Weiss that Oregon and not Treated Pine would be used for the gates.

18 Mr Scott referred to the Contract Conditions referred to as Item 1 in the Footnotes to the 29 April 2016 quotation, and in particular Conditions 8 and 11, which state –

8. MATERIALS

All timber and/gates or other materials used in construction are of standard quality.

...

11. DISPUTES

Any complaints must be lodged in writing with the Company within 7 days.

He said by accepting the quotation, the landscaper was bound by the Contract Conditions, particularly Condition 8.

19 Before the gates were delivered to the site, two coats of oil based primer were applied by the fencer with another coat applied by the landscaper at the fencer's premises. Mrs Mallinson advised him that the top coats of paint were applied by the owners' painter during rain. Mr Scott said he believed that this was the cause of the paint bubbling, which was confirmed by Mr Nevin, the Business Development Manager of Hames Paints, who had inspected the gates.

20 Mr Scott provided a copy of Adrian Barry's Product supplier information statement to Mr Weiss on 26 September 2016. He submitted that the gate manufacturer's warranty had been breached because the finished coats of paint had not been applied to the gates within 4 weeks of delivery to the site. However, Mr Weiss said he did not receive the document until approximately 6 weeks after the gates were installed and after receipt of the fencer's invoice.

21 In reply to the Archicentre report, Mr Scott relied on the Expert Witness Statement of Adrian Barry. Mr Barry describes himself as being a qualified carpenter and joiner and registered builder with "35 years' experience in the performance of a variety of timbers commonly used in a variety of applications". His instructions from Mr Scott were to "provide justification for use of Oregon for gate manufacture and to refute claims that it is inferior to Treated Pine". He also notes that he has previously supplied timber gates made from Oregon and Spotted Gum to the respondent.

22 Mr Barry says that the defects highlighted in the Archicentre report are –

- The result of paint defects or lack of suitable top coat preparation organised via the property owner &/or the landscaper.
- Landscaper did not follow my instructions in the warranty information to ensure all edges are properly sealed.

23 Mr Barry also makes the following comments –

- If no precise details are provided on drawings, then it is assumed any information is normal or a suggestion.
- The Archicentre report ... clearly ignores that when fully protected a service life of 50 + years can be expected. ... To state Oregon cannot be used externally is misleading & erroneous.
- Neither the landscaper nor the property owner had made any attempt to seal the base of the gates & therefore continue to avoid the overall warranty.

FINDINGS

- 24 The principal issue is what are the terms of the contract between the parties? Mr Scott maintained that at the meeting on site before he provided the 26 April 2016 quotation, he made it clear to Mr Weiss that Oregon timber would be used for the gates, and not Treated Pine.
- 25 Although Mr Scott was unable to provide any written record of this meeting, the quotation clearly states that the gates would be constructed of “65 mm F8 Oregon timber based upon the supplied picture”. Mr Weiss was therefore on notice that Treated Pine would not to be used. He accepted the fencer’s quotation without questioning the reference to Oregon and the gates were manufactured and installed. I find that the terms of the contract were that the gates would constructed from 65 mm F8 Oregon.
- 26 The other issue for determination is whether the gates are fit for purpose. The *Australian Consumer Law and Fair Trading Act 2012* (Vic) (ACLFTA) provides that the Tribunal may hear and determine a ‘consumer and trader dispute’ which is defined to include a dispute which arises between a purchaser of goods or services and a supplier of goods and services (ss 182(1) and 184(1) of the ACLFTA). I am satisfied that this is a consumer – trader dispute within the meaning of the ACLFTA.
- 27 Therefore, the Tribunal is empowered to make orders for the payment of damages under s 184 (2) of the ACLFTA. The ACLFTA also confers jurisdiction on the Tribunal in respect of claims under the Australian Consumer Law (ACL) (s224).
- 28 The ACL provides certain statutory guarantees to consumers about the goods and services they are purchasing. In particular, there are guarantees that goods will be of an acceptable quality and that the product will be fit for the purpose for which it was intended (ss 54 and 55). I am satisfied that the statutory guarantees with respect to the gates supplied and installed by the fencer apply.
- 29 Mr Weiss did not contest the opinion of Mr Nevin that a high moisture content in the timber was the cause of the paint bubbling and that rectification simply involved sanding back and repainting the affected areas, or that Mrs Mallinson had advised Mr Scott when he inspected the gates that it was raining when her painters applied the two top coats of paint. I accept this evidence and find that the application of the two top

coats of paint in the rain when the gates had a high moisture content, was the probable cause of the bubbling.

- 30 Finally I note that Mr Barry offered to repaint the affected areas on the gates once the moisture content had decreased, but this offer was rejected by Mr and Mrs Mallinson because Treated Pine had not been used in the construction of the gates.
- 31 I therefore find that the gates are fit for the purpose for which they were required by the landscaper.
- 32 I will order that the claim be dismissed.

B W Thomas
MEMBER