

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1564/2016

**CATCHWORDS**

Building Permit for Demolition s.29A & s.29B *Building Act 1993* – consumer- trader dispute s.183 *Australian Consumer Law and Fair Trading Act 2012* –misleading and deceptive conduct s.18 *Australian Consumer Law* – section 32 *Sale of Land Act 1962*

**APPLICANTS**

Miss Lauren Hobson and Miss Eliza Jane McAuliffe

**RESPONDENTS**

Mr Michael Robinson and Mrs Gina Anne Robinson

**WHERE HELD**

Melbourne

**BEFORE**

Member J. Pennell

**HEARING TYPE**

Hearing

**DATE OF HEARING**

10 February 2017

**DATE OF ORDER**

22 March 2017

**DATE OF REASONS**

19 April 2017

**CITATION**

Hobson v Robinson (Building and Property) [2017] VCAT 524

**ORDERS**

1. The respondents shall pay to the applicants \$6,427.98.
2. Having considered s.115B of the *Victorian Civil and Administrative Tribunal Act 1998* I make no order in relation to the respondents reimbursing the applicants the filing fee in this proceeding.

**MEMBER J. PENNELL**

**APPEARANCES:**

For the Applicants

Ms L. Hobson

Ms E.J. McAuliffe

For the Respondents

Mr M. Robinson

Mrs G.A. Robinson

## REASONS

- 1 In December 2015 the applicants purchased from the respondents a vacant block of land in Tyabb, Victoria ('the property'). Until 2015, the property had a house on it. The respondents purchased the property in 1996 as an investment property with a view to building a house on it for themselves (see para 26).
- 2 In or about 2015 the house was damaged by fire. Rather than rebuild, the house was demolished and the property sold as a vacant lot. As a result of the damage to the house the respondents received a settlement sum from their insurer from which the costs of demolishing the house were deducted. Contractors engaged by the respondents' insurer carried out the demolition works.
- 3 In or about September 2016 the applicants commenced building works on the property. Upon commencing the works it was discovered that the contractors performing the demolition works had not removed the footings of the original house from the property.
- 4 As a result the applicants claim that they have incurred additional costs to remove the footings of \$2,960.00.
- 5 The applicants also claim that at the time of taking possession of the property the abolition of the electricity supply had not been undertaken properly. As such, they claim the cost of the abolishment of electricity together with the costs of hiring a generator due to the fact that the electricity could not be connected to the property for a period of approximately 2 months. The generator was required for a period of 3 months (at a cost of approximately \$2,126.00 per month) so that the construction of their home could commence upon them taking possession of the property. No evidence was provided at the hearing as to the cost of abolishment but the total cost of the generator as claimed was \$6,427.98.
- 6 Finally, the applicants claim reimbursement of the filing fee of \$204.90.
- 7 The applicants claim that the respondents have either:
  - (a) breached s.32 of the *Sale of Land Act 1962* by failing to obtain and disclose all necessary Building Permits in relation to the demolition works; or in the alternative

- (b) engaged in misleading and deceptive conduct in breach s.18 of the *Australian Consumer Law*<sup>1</sup> in relation to the sale of the property by reason of their failure to disclose the demolition works ('the misstatement').

8 The hearing was conducted on 10 February 2017 at Melbourne. At the conclusion of the hearing I reserved my decision for the purposes of providing the parties written reasons. These are my reasons for decision.

### **Sale of Land Act**

9 Section 32 of the *Sale of Land Act 1962* requires that a vendor under a contract of sale of land must give to the purchaser a signed statement as to prescribed information concerning the land as detailed in the Act. In particular:

- (a) Section 32E requires that a vendor, if there is a building on the land, to disclose particulars of any building permits issued under the *Building Act 1993* in the preceding 7 years in relation to a building on the land; and
- (b) Section 32H requires the vendor to specify any services not connected to the land.

10 Section 32E provides that the vendor only has to provide details of any building permit in circumstances where there is 'a building on the land.' If the vendor does not comply with s.32 then the purchaser may rescind the contract of sale at any time prior to accepting title and being entitled to possession of the property. In addition, the section provides that a purchaser shall not rescind a contract of sale where the vendor has acted honestly and reasonably and ought to be fairly excused for the contravention.

11 In this case the applicants accepted title to the property prior to becoming aware of the existence of the footings and the fact that abolishment of the electricity supply had not been undertaken properly. It follows that the applicants lost their right to rescind.

12 Section 48A of the *Sale of Land Act 1962* provides that a purchaser of land may claim damages for any loss or damage suffered as a result of the vendor's failure to comply with the Sale of Land Act.<sup>2</sup> It was alleged by the applicants that the respondents failed to comply with the Sale of Land Act by:

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<sup>1</sup> Schedule 2 of the Competition and Consumer Act 2010.

<sup>2</sup> Part 8.2, s.217 of the Australian Consumer Law and Fair Trading Act 2012

- (a) failing to provide a building permit for the demolition of the house in the section 32 vendor's statement; and
- (b) failing to properly disclose in the vendor's statement that the electricity was not connected to the property.

### **Section 32E- Was a building permit required for demolition?**

- 13 Section 32E only requires a building permit to be disclosed if there is a building on the property. As there was no building on the property and as such no building permits were required to be disclosed.
- 14 It was argued by the applicants that a building permit was required and that permit should have been disclosed. For the reasons that follow, I am satisfied that no building permit was required to demolish the subject building.
- 15 Section 29A and 29B of the *Building Act 1993* specify the requirements for demolition of a building. The consent of the relevant responsible authority (being the council) is required where:
- (a) the proposed demolition, together with any other demolition completed or permitted within 3 years immediately preceding the date of the application would together amount to the demolition of more than half the volume of the building as it existed at the date of the first building permit to be issued within that period for the demolition of any part of the building; or
  - (b) the demolition is of any part of the façade of a building that faces the street.
- 16 Item 2, Schedule 8 of the *Building Regulations 2006* provides that no building permit is required in relation to a class 10 building. A class 10 building is generally described as a non-habitable building<sup>3</sup> and includes sheds and carports. In this case the house was destroyed by fire and therefore may be considered to be non-habitable and therefore not requiring a building permit for its demolition and removal.
- 17 The respondents were unable to say if a Building Permit had been obtained for the demolition works. Their insurer's contractor performed the demolition works and they assumed the insurer would obtain any necessary permit.

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<sup>3</sup> NCC Series Volume One Building Code of Australia.

- 18 The respondents' vendor's statement attached to the contract of sale states that no building permits had been issued in relation to the property. In addition, by an email dated 21 December 2016 the respondents' insurer advised them that due to Occupational Health and Safety reasons and on the advice of Fire Services, house was demolished.
- 19 By an email dated 16 January 2017 the Mornington Peninsula Shire Council advised the respondents that it could not say if any Building Permit had been obtained for the works due to the necessary data not being saved as a result of a 'glitch' in their IT system, but did advise that its 'other systems' had notes which indicated that a Building Order to demolish had been issued. In circumstances where a Building Order has been issued by a Council the demolition works only need to be performed in accordance with that Order and do not require a Building Permit to be issued.
- 20 Therefore, I find that there has been no breach of s.32E of the *Sale of Land Act 1962* because:
- a. there was no building on the land as required by the wording of the section; and in the alternative
  - b. a Building Order had been issued by the Mornington Peninsula Shire Council, with the result that no Building Permit was required for demolition.

### **Section 32H – Electricity Connection**

- 21 Section 32H of the Sale of Land Act requires the vendor to specify any services not connected to the land. The vendor's statement provided by the respondents record that only the telephone was not connected to the property at the time of sale.
- 22 The applicants say that at the time they commenced the building works on the property they could not connect to the electricity supply as a result of it being damaged during the demolition of the house. It was therefore necessary to perform the abolishment works at the property and arrange for the reconnection of the electricity supply. Abolishment of the electricity supply to a property involves the permanent removal of all metering and servicing assets from a premises. Therefore, I find that as a result of the applicants not being able to connect to the electricity supply at the time of commencing their building works, the respondents have breached s.32E of the Sale of Land Act, by failing to disclose that electricity was not connected.

- 23 The applicants did not provide any evidence of the cost of the abolishment works. Accordingly, the claim for abolishment works is dismissed.
- 24 In addition, the applicants claim the cost of renting a generator for a period of three months. This was incurred as a result of the applicants having to undertake the abolishment works and reconnect the electricity supply to the property. The generator was required by the applicants' builder to provide power to the site, for the period of time it took to complete the abolishment works and reconnection of the electricity supply, so that construction of the applicants' house could continue. As such by reason of the respondents' breach of s.32E the applicants have suffered loss and damage being the generator cost of \$6,427.98.

### **The Australian Consumer Law**

- 25 The applicants alternatively, allege that the respondents, contrary to s18 of the Australian Consumer Law ('ACL') engaged in misleading and deceptive conduct by failing disclose to that the footings were left in the Section 18 of the ACL provides:

'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.'

- 26 The words 'in trade or commerce' in s.52 of the *Trade Practices Act 1974* (now, in effect, s.18 of the ACL) were considered in *Re Ku-Ring-Gai Co-Operative Building Society No. 12 Ltd* (1978) 22 ALR 621. The Full Federal Court viewed cases interpreting the Commonwealth's power pursuant to s.51(i) of the Constitution to make laws 'with respect to ...trade and commerce.' Deane J<sup>4</sup> commented that:

'the terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phrases of development of trade, commerce and commercial communication, the terms are clearly of the widest import..... They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making.'

- 27 In *O'Brien v Smolonogov* (1983) ALR 107 the Federal Court considered a sale of a portion of the respondent's land in order to fund construction on the remainder of the property. It was held that 'a private sale of property by an individual is not conduct in trade or

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<sup>4</sup> *Re Ku-Ring-Gai Co-Operative Building Society No. 12 Ltd* (1978) 22 ALR 621 per Dean J @ p.167

commerce ...except if it is done in the course of a business activity or otherwise in a business context.’<sup>5</sup> The land was not part of the respondent’s trading stock and was not used for any business activity, nor was it sold in the course of carrying on a business. As such, the sale of land was not in trade or commerce as it ‘lacked a trading or commercial character’<sup>6</sup> never having been used for a business purpose.

- 27 In *Argy v Blunts & Lane Cove Real Estate Pty Ltd* 94 ALR 719 the sale of a private property by auction was considered not to be ‘in trade and commerce.’ Hill J said:<sup>7</sup>

‘The question to be determined is whether the owner of a house by selling it does so in trade or commerce. It could scarcely be said that a person who sells his home, whether by private treaty or by auction and whether he conducts the negotiations personally or through a real estate agent, is undertaking what he does in the course of a trade or business or in a business context...’

- 28 In *Havyn Pty Ltd v Webster* [2005] NSWCA 182 the New South Wales Court of Appeal distinguished the decision in *O’Brien* [is it more accurate to say “reached a different conclusion than in *O’Brien*” ?] in circumstances where the property sold was a block flats. Significantly, in this case the Court held that the property was being used for a business activity. That is, the vendor carried on the business of letting out of flats, in a systematic and businesslike way through managing agents, for the purposes of deriving income.<sup>8</sup>

- 29 In the case before me while the house and land had been used by the respondents primarily as an investment property, after the house was damaged by fire and demolished the sale of the land cannot be said to have been affected in trade and commerce, as required for s.18 of the ACL to apply. The house has been demolished and the property sold as a vacant block. In addition the applicants purchased the block for the purpose of building a home for their own domestic purpose.

- 30 In all the circumstances the sale of the property was not in trade or commerce and therefore the applicants’ claim pursuant to the ACL must be dismissed.

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<sup>5</sup> *O’Brien v Smolonogov* (1983) ALR 107 @ p.111

<sup>6</sup> OP Cit @ p.114

<sup>7</sup> *Argy v Blunts & Lane Cove Real Estate Pty Ltd* 94 ALR 719 per Hill J @ [54]

<sup>8</sup> *Havyn Pty Ltd v Webster* [2005] NSWCA 182 @ [99]



## **Orders**

- 31 For the reasons provided herein I order that the respondents pay to the applicants \$6,427.98.
- 32 Having considered s.115B of the *Victorian Civil and Administrative Tribunal Act 1998* I make no order in relation to the respondents reimbursing the applicants the filing fee in this proceeding.

**MEMBER J. PENNELL**