

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D543/2013

CATCHWORDS

Domestic building – builder alleged to have deposited soil on adjoining land – action by adjoining landowner – absence of proof

APPLICANT	Mr John Lim
RESPONDENT	Metricon Homes Pty Ltd (ACN: 005 108 752)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	25 September 2014
DATE OF WRITTEN REASONS	24 October 2014
CITATION	Lim v Metricon Homes Pty Ltd (Building and Property) [2014] VCAT 1349

WRITTEN REASONS SUPPLIED AT THE APPLICANT’S REQUEST

Following the hearing of this proceeding on 25 September 2014 I dismissed the application for reasons that I gave orally at the time. The Applicant has recently requested written reasons and these are now provided.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the Respondent	Miss Anderson, Customer Relations Manager; Mr Turnley, Construction Manager

REASONS

The claim

- 1 The Applicant Mr Lim is the owner of a vacant allotment (“the Allotment”) of land in Mernda, which is in the City of Whittlesea. The Respondent is a builder.
- 2 In November 2013 when the Applicant inspected the Allotment he found that a large pile of soil had been dumped on it. He suspected that the soil had come from an adjoining allotment (“the Respondent’s Land”) upon which the Respondent was building a new house. The Respondent denied having placed the soil on the Allotment.
- 3 By this proceeding the Applicant sought an order that the Respondent pay him \$950 which he said was the cost that he will incur to remove the pile of soil.

The hearing

- 4 The matter came before me for hearing on 25 September 2014. The Applicant appeared in person and the Respondent was represented by its Customer Relations Manager, Miss Anderson, and its Construction Manager, Mr Turnley.
- 5 The Applicant did not see anyone dumping the soil on the Allotment and called no witness to identify who was responsible. The evidence to support the claim consisted of a number of photographs taken at various times. The Respondent also produced photographs. These photographs, on both sides, were the only evidence that I had as to the source of the soil.
- 6 A number of the photographs showed that there had been some excavation on the Respondents Land preparatory to the pouring of a concrete slab.
- 7 Others showed that the pile of soil complained of was on the side of the Allotment closest to the Respondent’s Land.
- 8 A recent photograph shows that some rubbish has since been dumped on the pile of soil which will also have to be removed.
- 9 Some photographs show that there was another pile of soil on the other side of the Allotment near the boundary, which appeared matched the colour of the soil recently excavated from the land on the other side of that boundary. Another house was also being built on that land. It was different in colour from the soil complained of. Later photographs show this soil to have been removed.
- 10 Mr Turnley denied that the soil dumped on the Allotment came from the Respondent’s Land. He said that the excavation on the Respondent’s Land was a site scrape made for the slab. He produced receipts from the Respondent’s contractor showing that it was removed from the site. He suggested that anyone could have dumped the soil on the Allotment.

- 11 I noted from the photographs of the site scrape on the Respondent's Land that the soil appeared to have been a similar colour to the soil which had previously been on the opposite side of the Allotment but has since been removed. It was also similar to the colour of the soil in the land on the other side. However it was much darker in colour than the soil in the pile that was the subject of this claim.

Findings

- 12 I found that, not only could I not be satisfied on the balance of probabilities that the soil complained of came from the Respondents Land, I thought that it was unlikely to have come from there because it appeared to be a different colour. I said that I could not find where it came from.
- 13 The onus was on the Applicant to prove his case and he did not do so. I therefore dismissed the Application.

SENIOR MEMBER R. WALKER