

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. **BP185/2015**

CATCHWORDS

Work and labour – refusal to perform unless variation agreed to - repudiation

FIRST APPLICANT	Mr Peter William Phillips
SECOND APPLICANT	Mrs Pamela Lesley Phillips
THIRD APPLICANT	Brendan Phillips Electrical Services (ACN: 007 129 679)
RESPONDENT	Phillip Island Sheds Pty Ltd (ACN: 166 881 385)
WHERE HELD	Melbourne
BEFORE	R Walker, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	8 April 2015
DATE OF ORDER	8 April 2015
CITATION	Phillips v Phillip Island Sheds Pty Ltd (Building and Property) [2015] VCAT 569

**WRITTEN REASONS SUPPLIED AT THE REQUEST OF THE APPLICANTS
MADE 15 APRIL 2015**

This matter was heard and determined on 8 April 2015 when an order was made that the third Applicant be removed as a party and that the Respondent pay to the First and Second Applicants \$2,178.25.

Oral reasons for the decision were given at the time but written reasons have now been requested. What follows is an edited version of what I said at the hearing.

R Walker
Senior Member

APPEARANCES:

For Applicants

Mr and Mrs Phillips

For Respondent

Mr White, Director and Mr White Senior

REASONS

Background

- 1 This is an application by the applicants (“the Owners”) for damages for breach of a contract they entered into for the Respondent to construct a shed in the back yard of their home on Phillip Island. It is a quarter acre property, the land is zoned residential, the house is occupied as a residence and so the provisions of the *Domestic Building Contracts Act 1995* (“the Act”) apply.
- 2 The Respondent is a building contractor and its director, Mr White, is a registered builder. It is an agent for a company in Queensland (“the Supplier”) that manufactures components for sheds of particular designs. The Respondent takes orders and contracts with people to supply and erect sheds according to the Supplier’s designs.
- 3 The Owners had sold their house on the opposite side of the street and had to vacate by 4 December 2014. They had a large shed in the property they sold which accommodated their boat and caravan and they needed a new shed at their new address so that they could locate them.

The contract

- 4 The agreement was entered into on 30 September 2014. The contract price was \$15,160.40. The terms of the written contract between the parties were somewhat sparse and not designed to meet the requirements of the Act. This is a domestic building contract within the meaning of the Act and the Owners complained of many breaches of the provisions of the Act. Although a number of breaches were demonstrated the case really does not turn on those.
- 5 The issue is really one of common law. The contract was to erect a shed in accordance with a quotation dated 29 September 2014 for an agreed price and to an agreed design. The quotation set out some allowances for, amongst other things, concrete, excavation and soil removal. There was a provision that if the excavation and soil removal cost any more than \$1,100, the extra would be charged at cost plus a margin of 20%. It was what is called a prime cost item. A prime cost item cuts both ways and if the money is not spent the Owners are entitled to a credit.
- 6 A key issue in this case is whether the work was to be done by a particular date, that is, 4 December 2014. Mr White denied that and said that he told Mr Phillips that he could not guarantee completion by any particular date. Mr Phillips says that he stressed that he needed to be out of the other shed by 4 December and there is at least one email that supports that. In view of the urgency for the Owners to give vacant possession to their purchasers I think it is unlikely that a particular date was not discussed. I prefer the evidence of Mr Phillips.

Payment

- 7 The contract contains no provision about how the price is to be paid. The Respondent requested and was paid a deposit of 10%, being \$1,438.00. The Act requires the deposit to be no more than five per cent. There was no provision for any deposit or progress payments to be paid.
- 8 The Respondent also requested and was paid an instalment of \$7,658.00 before delivery of the materials for the shed was made by the Supplier. Strictly, under the terms of the contract, the Respondent was not entitled to demand either payment but they were nonetheless demanded and paid.
- 9 The two amounts paid total \$9,096 .00.

Delay

- 10 It was not until the instalment of \$7,658.00 was received that the materials were finally ordered by the Respondent from the Supplier in Queensland. Mr White said several times during his evidence that the delays were really beyond his control. Where there is a fixed time for completion agreed upon, whether or not a delay in delivery of raw materials is beyond a builder's personal control is irrelevant unless there is some provision in the contract allowing him extra time if that should occur. He is responsible for the because he is the contracting party and a delay caused by his supplier is still his delay.
- 11 In any case, I am not satisfied that the delay was beyond his control because it appears that the delay in delivery arose because of a delay in submitting the order for the materials. Mr White would not order them until this progress payment was paid and, as already stated, he was not entitled to demand such a payment..
- 12 The agreement was struck back in 30 September or 1 October. The building permit was obtained by 23 October. There was no reason that I can see why the materials could not have been ordered by that time or why the construction could not have been done by 4 December as required, or at least by Christmas.
- 13 So I find that there was a breach of contract in the failure to complete the construction within time.
- 14 A further delay arose because of a mistake in ordering which resulted in the delivery of the wrong materials. The building permit also had the wrong size for the shed and it had to be amended. The materials delivered also had the wrong pitch for the roof.

Demand for a variation

- 15 When Mr White went to see his solicitor about another matter his solicitor, no doubt as wishing to protect Mr White as best he could, suggested that he obtain Mr Phillip's signature to a variation accepting late completion and a change to the pitch of the roof of the shed. When Mr Phillips refused to sign

the variation, the appropriate course for the Respondent was to move back onto the site and complete the shed but it did not do so.

- 16 Although he did not say so clearly, it was clear from Mr White's conduct and from his evidence at the hearing that he was not prepared to continue with the construction until some agreement was reached concerning the delay and the incorrect pitch of the roof..

Termination

- 17 Quite obviously, when a party is in breach he cannot say to the innocent party: "I will be in further breach unless you agree to let me off the present breach". He has to perform his contract according to its terms. By refusing to proceed with the construction the Respondent repudiated the contract.
- 18 The owners were then entitled to accept the repudiation, bring the contract to an end and finish construction of the shed themselves and that is what they did. They now seek to set off against the balance of the contract price the cost of them doing so and to recover the excess cost from the Respondent.

The claim

- 19 I am satisfied with most of the amounts claimed but I am not satisfied about the claim for the electric motor for the garage door. That was not part of the contract. Mr Phillips sought to rely on a peripheral reference to a motorised door that he made in an email but that was well after the contract was entered into and cannot change its terms.
- 20 I am satisfied there should be a credit for the different roof pitch. It was not the roof that was agreed and it was not unreasonable in the circumstances for the Owners to insist upon a roof at the correct pitch. The amount claimed of \$550 does not seem to me to be an unreasonable amount because if the Respondent had performed the contract it would have cost it at least that much to do alter the roof to the correct pitch.
- 21 There was the cost of altering the building permit of \$550 which will be allowed.
- 22 Because of the delay, the Owners had to rent their former shed from the new owners at \$200 per week. Altogether they had to pay \$3,200. There was sworn evidence of that plus a letter from the person to whom it was paid. On one view it seems a lot to pay for a garage, but it is a large garage, it was the Christmas/New Year period and this is a beach resort. In any event the money has been paid and the loss was foreseeable when the contract was made.
- 23 There was an allowance of \$1,100 for excavation on site, none of which was spent and so that will be allowed.
- 24 The cost of completion claimed was \$2,420 but in fact it only cost \$2,418.75 and that is all that can be allowed.

25 The roller door fitting of \$265.00 will be allowed.

Conclusion

26 When one adds all that up and takes away the balance of the contract price, which is \$6,064.40 the balance the remaining is \$2,019.35.

27 There will be an order for that sum plus the issuing fee of \$158.90, making together the sum of \$2,178.25.

28 I should add that Mr White complained about Mr Phillips removing the materials for the shed from the Respondent's yard without his permission. It was marked with the Owners' name and they had paid for it. The calculation of the amount awarded has, in effect allowed in favour of the Respondent the value of that material.

R Walker
Senior Member