

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D65/2011

CATCHWORDS

Sufficiency of evidence – whether claim proved on balance of probabilities; Contract - whether term implied to give business efficacy to agreement.

FIRST APPLICANT: Clive Sim
SECOND APPLICANT: Verna Ho
RESPONDENT: Aerox Builder Pty Ltd (ACN 133 716 382)
WHERE HELD: Melbourne
BEFORE: Senior Member E. Riegler
HEARING TYPE: Hearing
DATE OF HEARING: 18 August 2011
DATE OF ORDER: 5 September 2011
CITATION Sim and Anor v Aerox Builder Pty Ltd (ACN 133 716 382) (Domestic Building) [2011] VCAT 1688

ORDERS

1. The applicant's claim is dismissed.
2. Liberty to apply until 19 September 2011 for any consequential orders arising out of Order 1.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the First Applicant: Mr C Northrop, Counsel.
For the Second Applicant: Mr C Northrop, Counsel.
For the Respondent: Mr T Nguyen, director.

Reasons

Background

1. The applicants are the owners of a residential property located in Doncaster East. In December 2008, they decided to demolish an existing dwelling (and outbuildings) located on the property (**‘the Demolition Works’**) and construct two residential dwellings in its place.
2. On 29 December 2009, the applicants entered into a written contract with the respondent entitled *Contract of Agreement Demolition*, under which the respondent agreed to undertake the Demolition Works in consideration that it was paid \$10,500, inclusive of GST.
3. The Demolition Works were performed between February 2010 and March 2010. Shortly thereafter, the applicants entered into a contract with Infinity Homes Pty Ltd for the construction of the two residential dwellings. The works under that building contract commenced in July 2010. That entailed partially excavating the site to allow for fall on the land.
4. During the course of that excavation work, Infinity Homes Pty Ltd discovered small pieces of asbestos sheet buried in the soil to a depth of 300 mm.
5. The contaminated soil was then stock piled in one heap, initially at the rear of the property and then later moved to the front of the property. Under the terms of the building contract, Infinity Homes Pty Ltd was not responsible to remove that contaminated soil. Consequently, the building works were suspended until such time as the applicants were able to arrange for their own separate contractor to remove and dispose of that contaminated soil.
6. It was at this point that the parties fell into dispute. In particular, the applicants blamed the respondent for the presence of the asbestos in the excavated soil. They alleged that the asbestos was left over debris from the Demolition Works, which was buried by the respondent, rather than removed from site.
7. By contrast, the respondent denied any liability for the presence of asbestos in the excavated soil. It alleged that the asbestos had nothing to do with the Demolition Works undertaken by it and was pre-existing. Consequently, it refused to remove and dispose of the stockpile of contaminated soil without being compensated for that task.
8. Ultimately, the applicants engaged in their own contractor to remove and dispose of the contaminated soil at a cost of \$8,000. In addition, the applicants spent \$300 in obtaining clearance certificates and incurred further losses as a result of the building works being delayed.

Those further losses comprise \$15,600 for loss of rental and \$9,000 by way of additional holding costs. They now claim these amounts from the respondent.

9. Two central issues arise in this proceeding for consideration:
 - (a) Did the demolition work carried out by the respondent result in pieces of asbestos sheet being buried under the property?
 - (b) Even if the respondent did not bury pieces of asbestos sheet, is it, nevertheless, contractually obligated to remove pieces of asbestos sheet found buried under the property?

Did the respondent bury asbestos debris?

The applicant's position

10. Mr Northrop of counsel appeared on behalf of the applicants. He called Mr Sim who described the property prior to demolition as comprising a single-storey brick residence with tiled roof located centrally on the property. A garage was located at the rear of the property on the right-hand side of the block. Opposite the garage at the rear of the property was a small cubby house of approximately 1m x 2 m in area. It sat on a concrete slab. Towards the middle of the rear yard was a barbecue structure, again sitting on a concrete slab.
11. Mr Sim said that the cubby house was lined with asbestos sheet and that its roof was clad with corrugated asbestos sheet. He also said that parts of the garage interior had been lined with asbestos sheet and that the eaves of the original house were also clad with asbestos sheet.
12. Mr Sim confirmed that following completion of the Demolition Works, he and his wife, Ms Ho, entered into a building contract with Infinity Homes Pty Ltd for the construction of two dwellings on the property. He said that shortly after Infinity Homes Pty Ltd commenced work, he was contacted by the builder and told that pieces of asbestos has been uncovered by the builder's excavator. He subsequently visited the property and saw a stockpile of soil at the rear of the property. Mr Sim said he saw various types of asbestos within that stockpile of soil, which included flat sheets together with corrugated sheets. He said that the largest fragments were approximately 400 mm², although there were many other small pieces strewn within the stockpile.
13. Mr Sim recounted how he had requested the respondent to remove the stockpile of soil but was told that it was not the respondent's responsibility. He said that he eventually contracted with ATS Australasian Technical Services Pty Ltd, who successfully removed and disposed of the stockpile of soil at a cost of \$8,000.
14. Mr Northrop also called Mr Georgaklis, the managing director of Infinity Homes Pty Ltd. Mr Georgaklis confirmed that Infinity Homes

Pty Ltd entered into a contract with the applicants. He said that prior to commencing the building works in July 2010, the site was vacant with grass growing on it. He recalled seeing *bits of rubble* left where the building structures had been removed. He explained that the site had required a 1.5 m site cut at the rear left corner of the block extending to 1.2 m at the rear right corner in order to accommodate the fall of the land.

15. He said that it was during this excavation work that the builder's subcontractor discovered pieces of asbestos buried underground. He instructed his subcontractor to stockpile the contaminated soil initially at the rear of the property, although it was later moved to the front of the property. He said that the pieces of asbestos were found within the top 300 mm of the excavated soil and predominantly towards the rear of the property. He also said that the asbestos was found in *soft soil*, which he suggested was soil that had been recently disturbed. Finally, he confirmed that the builder was not able to continue works until the contaminated soil was removed.

The respondent's position

16. Mr Nguyen, director of the respondent, appeared and gave evidence on its behalf. He confirmed the cubby house was clad with asbestos sheet and also roofed with corrugated asbestos sheet. However, Mr Nguyen denied that the interior of the garage had been lined with asbestos sheet. He said it was lined with plaster board. He also denied that the eaves were lined with asbestos sheet. He said that the eave lining was made from compressed cement sheet.
17. Mr Nguyen gave evidence that prior to commencing the demolition Works, he was aware that the wall and roof cladding of the cubby house was made from asbestos sheet. He said that all of the wall and roof cladding was manually dismantled, broken into small pieces and placed into black plastic bags. He said that all of the asbestos was subsequently taken to an approved depot and disposed of in accordance with regulatory requirements. In that regard, he produced a certificate entitled *Environment Protection Authority Waste Transport Certificate*, which he said verified the disposal of 4 m³ of asbestos waste, weighing 1,380 kg. He said that this certificate related to the asbestos waste removed from the applicant's property.
18. Mr Nguyen gave further evidence that during demolition and in particular, the uplifting of the concrete slab in front of the garage and the veranda concrete slab, he or his father discovered the presence of small pieces of asbestos in the soil and stuck to the underside of those concrete slabs. He said that his father, who also worked for the respondent, took photographs with his mobile phone of the pieces of asbestos sheet discovered on site. He produced copies of those

photographs and said that they accurately depicted what he saw on site. Those photographs show small pieces of flat material wedged into the underside of what appears to be pieces of a concrete slab. It is impossible; however, to determine what those pieces of the material are, based on the photos produced by Mr Nguyen.

19. Mr Nguyen recounted that after the discovery of asbestos, he contacted Ms Ho to advise her of the problem. He said that he told Ms Ho that the respondent could remove asbestos buried underground but there would be an extra charge of \$500 per load excluding tip fees. He said that she told him not to remove the buried asbestos until further notice.
20. Ms Ho was called to rebut that evidence. She disputed having any conversation with Mr Nguyen concerning the cost of removing asbestos.
21. Mr Nguyen strongly rejected any suggestion that the respondent had anything to do with the pieces of asbestos material found in the soil stockpiled at the front of the property. He said that the demolition work did not require excavation of the property, except where concrete slabs were uplifted or the foundations of the house were removed. Other than that, he said that the site was left substantially undisturbed.
22. During cross-examination, Mr Nguyen was asked whether he removed all asbestos from site. He answered that the respondent only removed the asbestos that was found on and above the surface of the land. Whatever was buried in the soil, including the soil disturbed by the removal of the concrete slabs and footings remained buried. Finally, he said that the asbestos found by Infinity Homes Pty Ltd existed prior to the respondent undertaking the demolition works. It was not part of the building structures removed by the respondent.
23. Mr Nguyen was also asked why he did not raise the issue concerning the discovery of asbestos in any written correspondence. His explanation was that he did not believe that the respondent was obligated to remove the asbestos, in the absence of being paid an additional amount. Further, he said that he had verbally raised the issue with Ms Ho, in any event.

Finding

24. The applicants carry the evidentiary burden of proving that the asbestos discovered underground by Infinity Homes Pty Ltd resulted from the respondent's activities. They must prove on the balance of probabilities that the respondent buried asbestos debris from the Demolition Works, rather than carting it away.¹

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

25. There is no direct evidence of the respondent burying the asbestos sheets taken from the building structures demolished by it. The evidence is circumstantial. In particular, the applicants rely heavily on the evidence of Mr Georgaklis who said that his excavator found pieces of asbestos in loose soil down to approximately 300 mm. The applicants submit the presence of asbestos debris in disturbed soil indicates that it must have been buried by the respondent.
26. Consequently, I am presented with conflicting versions of evidence. On one hand, the applicants submit that it is open for me to infer, by the presence of asbestos in loose soil, that the asbestos was left by the respondent. On the other hand, Mr Nguyen has given evidence that the asbestos was present in the ground before the Demolition Works commenced.
27. In *Nominal Defendant v Owens*² the Full Federal Court stated that where satisfaction of the civil standard of proof depends on an inference, there must be something more than mere conjecture, guesswork or surmise. In my view, this proposition creates a high hurdle for the applicants to overcome when weighed against the direct evidence of Mr Nguyen.
28. In my view, the applicant's evidence does not go far enough to establish on the balance of probabilities that the respondent caused asbestos to be underground. All that it proves is that there was asbestos debris underground. In fact, that evidence is entirely consistent with the evidence of Mr Nguyen. In particular, Mr Nguyen confirmed that he also found asbestos debris underground. However, according to his evidence, it was left underground because there was no contractual obligation to remove it.
29. Apart from the circumstantial evidence raised by the applicants, Mr Nguyen's evidence on this point is otherwise uncontested. No-one was called to say that they witnessed the respondent burying the asbestos pieces before departing the site. Similarly, no-one gave direct evidence that the asbestos found underground was the debris from the Demolition Works.
30. Further, despite the fact that cross-examination revealed some minor inconsistencies in Mr Nguyen's evidence, he nevertheless struck me as a truthful witness. I find this to be case even though there is conflicting evidence as to the conversation that he said he had with Ms Ho in February 2010 regarding the discovery of asbestos and the offer to remove that asbestos for an additional cost. From all accounts, it appears that the conversation, if it occurred, was limited in scope and given the period of time that has elapsed, it would not be unusual for either party to have difficulty recalling exactly what was said and

² (1978) 22 ALR 128 at 132

when. I do not regard that conflict of evidence as being of material significance.

31. Consequently, I accept the evidence of Mr Nguyen and I find that the respondent removed all asbestos debris that existed on or above the property as part of the Demolition Works. I further find that whatever asbestos debris was discovered underground remained underground. That raises the second issue for consideration, namely whether the respondent was contractually obligated to remove asbestos debris discovered underground.

Is the respondent contractually obligated to remove pieces of asbestos sheet found buried under the property?

32. Clause 8.3 of the contract between the parties states:

REMOVAL OF CONCRETE:

Condition applies: STRICTLY clean concrete only. Proprietor held responsible for any form of asbestos and/or other form of contaminated material or substance hidden underneath concrete layer.

YES NO (please circle)

33. The word "YES" was circled in the contract.
34. I find that this means that the contract did not require the respondent to remove asbestos or other form of contaminated materials hidden underneath the concrete slabs. The question arises whether that clause also extends to you asbestos debris found underground but not under a concrete slab. In my view, it does. Although the contract requires the respondent to demolish the *existing dwelling, garage* and undertake a *site clean*, I do not consider the scope of the work under the contract to require the respondent to extract buried contaminated material from the site. In particular, there are no express terms in the contract to that effect, nor do I consider that such a term could be implied.
35. In that regard, I refer to the often quoted passage in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*:

For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.³

36. In the present case, it cannot be said that a term requiring the respondent to extract all asbestos debris from the land is required in order to give business efficacy to the agreement. Similarly, it cannot be

³ (1977) 180 CLR 266 at 283, endorsed in *Godelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347 and 404.

said that such a term is reasonable and equitable, especially if the contract price does not reflect that additional work.⁴

37. Consequently, I find that the respondent was not contractually obligated to remove pre-existing, subterranean asbestos debris from the site.
38. That being the case, I dismiss the applicant's claim.

SENIOR MEMBER E. RIEGLER

⁴ The cost to remove the contaminated soil was \$8,000, compared with the cost of the Demolition Works of \$10,500.
