

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D573/2007

CATCHWORDS

Domestic building, Swimming pool, contract insufficiently expressed in writing, variation, incomplete or defective items, Measure of damages, whether the builder had the opportunity to complete, finished work inconsistent with approved plans.

APPLICANT	Ernst Vettori t/as Dorset Pools
FIRST RESPONDENT	Peter Bailey
SECOND RESPONDENT	Michelle Bailey
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	17 December 2007
DATE OF ORDER	8 January 2008
CITATION	Ernst Vettori trading as Dorset Pools v Bailey (Domestic Building) [2008] VCAT 2

ORDER

- 1 The Respondents must pay the Applicant \$4,360.00 forthwith.
- 2 The Principal Registrar is directed to refer the file and these reasons to the Building Commission to investigate whether any registered building practitioners referred to in the reasons have breached their obligations under the *Building Act* 1993 or any other relevant legislation.
- 3 The exhibits are not to be returned to the parties until order 2 has been complied with and the Building Commission has had the opportunity to inspect them.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr A. Fraatz of Counsel

For Respondents

Mr P. Bailey and Ms M. Bailey in person

REASONS

- 1 Mr Vettori trades as Dorset Pools and he claims \$8,400.00 from Mr and Mrs Bailey, who own a property at 9 Sang Court, Ringwood North.
- 2 The parties agree that there was a contract entered in late November 2004 for Mr Vettori to build a pool for the sum of \$29,000.00 and that \$21,650.00 has been paid. Mr Vettori claims that there was a variation which added a further \$1,050.00 to that sum. The Baileys claim that there are certain defective or incomplete works. The Baileys have had a quotation from another pool builder for over \$13,000.00 to rectify and complete. There are other items on the quotation that do not appear to relate to their claim. They agreed that they are only seeking to set off amounts owing by them to Mr Vettori; they are not making a counter-claim against him.
- 3 The only documents which the parties agree describe the contract are a one-page hand-drawn site plan which was tendered by Mr Vettori as exhibit A2, and a one-page document headed "Dorset Pools", numbered 0064 and dated 30 November 2004. It carried the words "Quotation valid for 30 days" at its foot and was signed by "Representative", apparently of Dorset Pools, but not by the Baileys. It is Mr Vettori's exhibit A3 and the Bailey's exhibit R1 ("the Quote"). Mr Vettori's exhibit also includes a break-down of how the sum was calculated on the facing page, but this was not provided to the Baileys.
- 4 Mr Vettori claimed that he had provided a copy of the SPASA standard-form building contract to the Baileys, but admitted it was merely a blank copy of the standard-form, with nothing that would identify it as relating to this project.
- 5 Another document tendered by Mr Vettori was his eight page exhibit A5. It was prepared at his request and cost by WirraWonga Pty Ltd Engineers ("the WirraWonga documents"). The first page is headed "proposed reinforced concrete swimming pool." It also identifies Mr and Mrs Bailey as the owners and the "owner-builder". The second page shows a kidney-shaped swimming pool. The third page is described as "Swimming pool site plan for: Peter & Michelle Bailey, 9 Sang Court, Ringwood North 3134." The fourth page is headed "WirraWonga Pool Design System" and appears to make engineering recommendations based on the pool dimensions shown on the second page. The fifth page provides details and sections of various aspects of the pool. The sixth page, which is particularly contentious in the dispute between the parties, is entitled:

SWIMMING POOL DETAILS

BASIC POOL WATER CIRCULATION AND FILTRATION

The seventh page is headed "Wirrawonga P/L: Specification for placement of Gunite for domestic swimming pools" and the eighth is headed "AS

1926-1993 Construction Requirements for Fences and Gates Summary Provisions.”

- 6 It is clear that pages one, two , three and possibly page four were prepared specifically for the Bailey’s pool, whereas pages five to eight appear to be standard pages that could be used for any pool. Pages six and seven have as a footer “(c)2002 WirraWonga P/L”.
- 7 Mr Vettori asserted that this document did not form part of the contract, but was just provided to enable a building permit to be obtained. He also provided a letter from Mr David Plant for and on behalf of WirraWonga dated 13 July 2007 which stated, excluding the formal parts:

RE: Plumbing Schematic Included With Pool Plans

This letter is to confirm the intention of the generic pool plumbing schematic included with all swimming pool structural engineering plans prepared by WirraWonga.

- The plan is not numbered or referenced on the design compliance certificate prepared by WirraWonga for the pool being designed.
- The schematic is a generic schematic, intended to inform the pool owner of the range and configuration of equipment which may be installed for a swimming pool or spa.
- The schematic does not prescribe or list the actual equipment which is necessary or proposed for the specific pool to be constructed. The actual equipment to be installed for each project is determined by the pool builder in consultation with the owner, and must be tailored to suit the pool features and treatment/heating requirements for that project.
- It is not reasonable to interpret this generic document as a formal engineering specification or component listing for the proposed swimming pool.

I assume Mr Plant’s letter refers to the sixth page of the WirraWonga documents, but I cannot be certain if this is the case. Mr Plant was not called to give evidence, and in any event, his letter of 13 July 2007 was clearly written in contemplation of litigation between the parties. Although proceedings were not commenced at the Tribunal until August 2007, there was an earlier claim before the Magistrates Court which, I understand, was stayed or withdrawn. The Baileys provided a copy of their defence to that action, dated 12 June 2007.

- 8 Further, I assume that all pages provided by WirraWonga for either the Baileys or Mr Vettori to supply to the building surveyor are necessary to enable them to obtain a building permit. It therefore follows that at least some of the items shown on page six must be necessary to obtain the building permit and Certificate of Final Inspection.
- 9 Mr Plant’s “Certificate of Compliance - Design” referred to “Drawing Nos”, “Specifications” and “Computations”. Against “Drawing Nos.” is

“04-2712” and inverted commas opposite specifications and computations appear to indicate that the same number applies to them as well. The number only appears on the first four pages of the WirraWonga documents, none of which could be described as a specification. Further, the third page refers to the eighth as “attached specification” but I am not satisfied that the specification for the child-proof fences and gates is the whole specification.

- 10 I note with concern that the drawings approved by the building surveyor, Ms Maryanna Grzan (Exhibit A7) bear no resemblance to the pool as built, and in Mr Vettori’s words, the finished pool is 15 to 20% larger than the pool as designed. The pool as designed is kidney-shaped with a small oval spa. The pool as built is rectangular with a large semi-circular spa. The parties agree that the excavation was carried out by the Baileys.
- 11 With even greater concern, I note that the Certificate of Final Inspection provided by Ross Laws of Manningham City Council approved the pool and referred to the building permit. There is no suggestion that there was any amendment to the permit or the engineering design to take into account the significantly larger and heavier pool.
- 12 The pool in photographs tendered by Mr Vettori is not in the same position as shown on the design. The site plan shows the pool approximately parallel to the rear fence, whereas the pool as built is at an angle. The documents indicate that an important measurement is that the pool should be 1800mm from the boundary. It is possible that the closest corner to the rear fence does not comply, but this would need to be checked on site. Also, the photographs show that there is no security fence. The third page of the WirraWonga documents note “pool area security to be maintained during and following construction.” The pool is shown full of water.
- 13 I note that the pool is located in the Maroondah City Council’s municipal district. I note in particular Mr Vettori’s statement in evidence “It was supposed to go to Maroondah but [Mr Bailey’s] friend was at Manningham”.
- 14 Mr Vettori has ignored most of his obligations regarding the contents of a domestic building contract under s31 of the *Domestic Building Contracts Act 1995* (“DBC Act”) and in particular has failed to provide a contract which, under 31(1)(d):

includes the plans and specifications for the work and those plans and specifications contain enough information to enable the obtaining of a building permit;

As Mrs Bailey said in evidence, most of the problems between the parties are because there is an inadequate written contract between them. However I am also concerned that Mr and Mrs Bailey appear to have ignored their obligation to fence at the date that the photographs were taken.

THE CLAIMED VARIATION

- 15 Mr Vettori claimed a variation to supply and install the pool lights. He said that there was an arrangement that Mr Bailey, who is an electrician, would do the wiring and supply and install the pool lights. He said Mr Bailey did the wiring only. Mr Vettori supplied them, and even supplied the transformers to the Bailey's son when Mr Bailey asked him to. Mr and Mrs Bailey disagree with Mr Vettori's recollection and say that Mr Bailey was only obliged to do the wiring, which he did.
- 16 It is unlikely that there would have been a disagreement about a variation had Mr Vettori fulfilled his obligation to provide a written contract which described all items to be provided by him, or fulfilled his obligation under the Quote:

I have read and accepted these conditions and extras as part of my contract and agree that there will be no variation except on a signed certificate¹

He has also failed to comply with the provisions of sections 37 and 38 of the DBC Act which require most variations to be in writing. Mr Vettori has failed to prove there was a variation and I make no allowance for it.

THE ALLEGEDLY DEFECTIVE OR INCOMPLETE WORKS

- 17 The Baileys claim the cost to them of rectifying items which they allege are defective or incomplete. Part of the confusion over what was included in the contract is because the sixth page of the WirraWonga documents² shows, in diagrammatic form, how each item connects to each other item on that circuit. For example, twin solar suction connects to solar pump, which connects to solar controller, non-return valve, solar collector and back into the pool. Mr Vettori claims that not everything on the diagram is necessary, but with few exceptions, the document is not expressed that way. Again I emphasise that it was within Mr Vettori's power to state clearly in writing what was to be provided to the Baileys under the contract and he failed to do so.

Have the Baileys unreasonably refused access to Mr Vettori to complete any work?

- 18 The relevance of this question is whether, for the items to which the Baileys are entitled, the measure of damages should be the cost to them of having another swimming pool contractor complete the job, or the cost to Mr Vettori of doing so. If he had been refused access unreasonably Mr Vettori should only have to pay the cost he would have incurred (in labour and materials) to complete the job.
- 19 According to their own evidence, neither party has been particularly reasonable in their dealings with the other. I accept Mr Vettori's evidence

¹ Emphasis added

² See paragraph 5 above.

that he made a number of calls to the Baileys that were unanswered; however, I do not accept his evidence that he was unaware of any complaints by the Baileys until the debt collector notified him. I accept the evidence of Mrs Bailey that she spoke to Mr Vettori in early 2006 and said there were "A few things we need to sort out - [Mr Bailey] needs to speak to you". I note the admissions of Mr Bailey that he did not speak to Mr Vettori about these items and that he told the debt collector he did not want Mr Vettori to do any more work.

- 20 I do not accept that Mr Vettori has sought access to undertake all the items which I find he should reasonably have completed. I allow the Baileys the cost to Mr Vettori of the item he was willing to install and the reasonable cost to them of having another pool contractor provide and install the items he was not willing to install.

No Spa Blower, no air controls for the Spa

- 21 Mr Vettori agreed that no spa blower has been provided and that this is necessary to operate the spa. I accept his evidence that he was willing to install it, but that he could not complete installation until certain landscaping work had been completed by the Baileys. He agreed that if the Baileys are entitled to the cost to them of having this provided by others, is reasonable and I accept his evidence that the cost to him to install the spa blower and air controls is approximately \$350.00. Mr Vettori must allow this sum to the Baileys.

No Jet Pump

- 22 Mr Vettori said that the jet pump is not necessary because if there are six or less "venturis" (input nozzles into the spa) they can be operated using the ordinary filter pump by switching filtration off in the pool and on in the spa. His evidence was not convincing. The diagram on page 6 of the WirraWonga documents does not note the spa jet pump as optional and there are only six venturis shown. He also agreed that there had never been a discussion about whether there would be a jet pump - the only information before the Baileys that could indicate what they were entitled to was this diagram.
- 23 The diagram alone is not conclusive evidence. As Mr Vettori said, the diagram also shows a 'wet deck gutter', not noted as optional, and there is no suggestion that the Baileys were entitled to this. However, I find it most unlikely that a person entering a contract for a swimming pool with a spa would agree that it was reasonable to operate the spa by first turning off filtration to the pool.
- 24 Mr Vettori agreed that if the Baileys were entitled to the jet pump at retail prices, the \$600.00 in the amount quoted by M and S Pool Care in exhibit R2 ("M and S quote") is reasonable. Mr Vettori must allow this sum to the Baileys plus GST, a total of \$660.00.

No Salt Chlorination and no Chemical Injection Port

25 Mr Bailey said that at present they mix chlorine in a bucket. Mr Vettori said that salt chlorination and chemical injection are alternatives, and I accept his evidence regarding this. He also said that the method of disinfecting the pool water was not discussed. I find that it is reasonable for a person entering a pool contract to expect that there will be a means of chlorination other than mixing it in a bucket, and I allow the cheaper means mentioned on the M and S quote, which is salt chlorination for \$1,300.00. Mr Vettori must allow this sum to the Baileys plus GST, a total of \$1,430.00.

No heat

26 This item was withdrawn by the Baileys at the hearing when it was pointed out by me that this item was marked as “optional” on the drawings.

Valves do not work - they collide with each other

27 A photograph provided by the Baileys shows that gate valves provided by Mr Vettori cannot operate because they are too close together. Mr Vettori said that they can be switched around so that they do work, but if this is so it is hard to understand why they were not installed initially so that they would work. No specific sum was allowed for this work but it was included in an item of \$1,000.00 in the M and S quote. An allowance for the valves is made below.

Pipe size suction line - 40 mm instead of 50 mm

28 The parties agree that the suction lines are 40 mm. The suction lines shown on page 6 of the WirraWonga documents are all 50 mm. Mr Vettori said this is not necessary as the filter pump is placed lower than the spa, so it is gravity fed rather than requiring the pump to suck hard. I am not satisfied with Mr Vettori’s evidence in the absence of an agreement in writing to this effect. Nevertheless, no evidence was given by the Baileys as to the extent of their loss (if any) regarding this item, and no amount is allowed.

Spa hasn’t been commissioned

29 The parties agree the spa has not been commissioned. I accept Mr Bailey’s evidence that it cannot be commissioned while the gate valves do not work. No specific sum was allowed for this work but it was included in an item of \$1,000.00 in the M and S quote.

30 This sum makes allowance for all the labour associated with items on the quote. More than half the value of items supplied on the M and S quote has not been allowed; however I accept that work to the valves have not been allowed elsewhere. The amount allowed for labour, the valves and commissioning is allowed at half the sum of \$1,000.00 plus GST, being \$550.00.

FINANCIAL RECONCILIATION

Contract sum		\$29,000.00
Less:		
Paid	\$21,650.00	
Spa blower and air controls for spa	\$350.00	
Jet pump	\$660.00	
Salt chlorination	\$1,430.00	
Labour, valves and spa commissioning	<u>\$550.00</u>	
Total deductions:		\$24,640.00
Amount owing to Mr Vettori		\$4,360.00

ORDERS

- 31 The Baileys must pay Mr Vettori \$4,360.00 forthwith.
- 32 The Principal Registrar is directed to refer the file to the Building Commission to investigate whether any registered building practitioners referred to in the reasons have breached their obligations under the *Building Act* 1993 or any other relevant legislation.

SENIOR MEMBER M. LOTHIAN