

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D145/2006

CATCHWORDS

Contract for installation of swimming pool, additional costs arising from unforeseen circumstances, adjustment to contract price, damage to property

APPLICANT	Omega Pool & Spa Pty Ltd
RESPONDENT	Pat Connolly
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Small Claims Hearing
DATE OF HEARING	21 June 2006
DATE OF ORDER	17 July 2006
CITATION	Omega Pool and Spa Pty v Connolly (Domestic Building) [2006] VCAT 1429

ORDER

The Respondent shall pay to the Applicant the sum of \$3,812.96 forthwith.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr Ray, director
For the Respondent	Mr Connolly in person

REASONS

- 1 The parties entered into a building contract dated 4 October 2005 whereby the Applicant ('Omega') was to install a fibreglass pool inside an existing concrete pool which had failed for the Respondent ('the owner'). The contract price was \$32,767.00 which was to be a fixed price subject to variation for unforeseen circumstances as set out in the contract. The calculation of the contract price is set out in a quotation dated 14 September 2005 which also includes the allowances for Prime Cost Items and Provisional Allowances. The works were to be completed within ten days of commencement. Unfortunately disputes arose between the parties resulting in cancellation of the contract, and as I understand it, Omega has cancelled the Policy of Builder's Warranty Insurance. Although I have some concerns about this it is not a matter which is before me in this proceeding.
- 2 All payments under the contract have been made with the exception of the final payment of \$1,867.00 due '*...on practical completion of landscaping or other works*' (Progress Payment Schedule (e) page 6 of the Contract). Omega is claiming the balance of the contract price, including additional costs set out in the Statement dated 22 December 2005 in the sum of \$5,109.21 – a total of \$7,006.21 and payment for equipment which was left on site and has not been returned - \$490.00. Mr Connolly has lodged a Counterclaim whereby he seeks the sum of \$9,855.97 primarily being the cost of rectification and reinstatement works, with some claims being for the adjustment or removal of charges levied by Omega. Mr Ray, a director of Omega gave evidence on behalf of Omega, and Mr Connolly appeared in person. Mr Dale Edwards of Barrier Reef Pools, the supplier of the pool appeared to give evidence in response to a Summons to Appear issued at Mr Connolly's request.
- 3 The contract price excluded the following items, as set out in the Special Conditions on page 11 of the Contract:
 - Existing concrete pool to be drained and base broken (for drainage)
 - Pool fence legislation must be complied with
 - Asset protection owner responsibility.
- 4 Clause 3 of the Contract provides:

CONTRACT PRICE EXCLUSIONS

Omega shall not be responsible for any works not specified in this Contract and without limitation the following items are deemed specifically excluded from the Domestic Building Works unless this Contract provides for the contrary:

...

- (d) Repair reinstatement or relocation of reticulation systems, drains, sewer and gas lines, storm water drains, power cables, telephone

cables, water pipes and any other service lines in or around the area of the Swimming Pool or the access pathway which require repair, removal or relocation or which are damaged during performance of the Domestic Building Work;

- (e) Excavation or removal of any sub-surface materials or obstructions requiring equipment such as pneumatic or blasting equipment and/or explosives for ripping, cutting or blasting;

...

- (p) Taking up, replanting and repairing damaged lawns, gardens, driveway or other features on the site

...

- 5 Mr Ray said that whilst carrying on the works necessary to remove the base of the existing pool, Omega discovered a plastic membrane and another swimming pool ('the second pool'), the base of which also had to be removed. He said he had an on-site meeting with Mr Connolly on 24 November 2005, the day after the works commenced, to discuss the situation, when he told Mr Connolly that a 12 ton excavator would be required to break through this additional concrete – the thickness of which could not be determined until it was excavated. Subsequently it was found that the base of the second pool was approximately 300 – 350 mm thick. Mr Ray said he also explained to Mr Connolly that whilst Omega would do the works for the best possible price, it was impossible to assess the cost.
- 6 It appears there was no dispute between the parties about this work until an invoice for the additional work was rendered on 8 December 2005. Up until that time, payments had been made in accordance with the payment schedule set out in the contract. The additional work included the cost of the 12 ton excavator, the removal of the extra concrete, hand finishing with demolition saws and extra labour required for the installation of the pool. Mr Ray said that although three to four days had been allowed in the contract price for the works they actually took eight days.
- 7 The parties met on site on 14 December 2005 to discuss the additional charges. At that time two invoices had been rendered and in the Statement dated 14 December 2005 the outstanding balance under the contract was \$13,760.50. This Statement included invoice number 01003458 in the sum of \$3,961.00 for:

Removal of additional pool base; excavator and rock breaker, manual steel cutting, manual trim, cartage and tip fees, rock allowance not fully expended of \$412.00 has been taken off this amount. \$4,013.00 - \$412.00 = \$3,601.00 + GST = \$3,961.00.

There is a notation on the invoice indicating this amount was reduced by \$412.00 to \$3,549.00. On the Statement dated 14 December 2005 the charge of \$3,961.00 is reduced to \$3,549.00 with the notation:

Adjusted as per meeting 14/12/05

- 8 The Statement also included Tax Invoice No 01003467 for \$302.50 (also dated 14 December 2005) in the following terms:

Tip fees and labour to remove last of concrete from pool \$121.00

Run water line 15m @ \$11 per mt + GST \$181.50

It is common ground between the parties that they met on 21 December at Omega's offices at which time Mr Connolly paid \$7,600.00 and asked for a breakdown of the additional charges.

- 9 Mr Ray said that at that meeting Mr Connolly had indicated that \$7,600.00 was the final amount he would pay, and that Omega was not to attend site again. Mr Connolly is concerned that the amount claimed by Omega for the additional works increased significantly once he queried it. He was sent a breakdown of the additional charges under cover of the following letter dated 22 December 2005 (omitting the formal parts)

Account Query

Thank you for insisting on a review of your account and charges. At this busy time of the year we may not have picked up errors in the account.

I have determined the cost price of the line items for the part of the works that you have queried, removed the GST, added Omegas Margin as per the contract and reinstated the GST.

I have then calculated the allowance made in the contract for each item as per the Quote and deducted the amount from the sub total of the paragraph above.

You will be able to calculate the cost price of each line Item from the attached spreadsheet by removing the GST then removing the 25% Builders Margin then reinstating the GST.

Many of the costs charged to our company are commercially confidential but you are at liberty to ring suppliers to ensure that the prices charged are fair (...)

I have arranged for the cancellation of Invoice no's 01003458 & 01003467 and issued a new invoice for the correct amount of \$5109.21.

I have attached the invoice and statement for your information and immediate payment please.

The concrete beam will be installed as soon as practicable after payment. On completion of the beam the final payment will then be due and payable.

- 10 On 27 December 2005, Mr Connolly sent Omega an email indicating he was withdrawing from the contract. Mr Ray responded by email on 28 December 2005 requesting Mr Connolly to contact him to discuss the charges for the additional works. There seems to have been no response to

this email and on 10 January 2006 Mr Ray sent a further email to Mr Connolly which included the following offer:

...Providing that we can undertake works without an unreasonable delay causing further movement and deterioration of the installation I am prepared to make the following concession to resolve the matter:

- Omega will rectify the pool level at no charge excluding the supply of water
- Omega will install a 360mm beam
- Omega will detail the pool (scratches)
- Omega will accept a payment as per the original outstanding invoice
- Omega will undertake not to levy interest charges (refer item 14 contract) to the outstanding accounts
- Omega will complete the works within 14 days of receipt of outstanding payments.

11 Once again Mr Connolly did not respond, although he arranged for the pool to be inspected by Mr Edwards of Barrier Reef, and Mr Wray an inspector he was referred to by SPASA. Although Mr Connolly lodged a complaint with SPASA this was later withdrawn, and perhaps, unfortunately a mediation was not conducted by SPASA. Thereafter followed a number of letters from Omega to Mr Connolly which are less than conciliatory including advice that the filling of the pool without a Water Permit had been referred to South East Water (letter of 28 February). Although Mr Connolly had purported to terminate the contract on 27 December, a Notice of Default was served on Mr Connolly on 3 March which alleged the following breaches of the contract

- a. Failure to pay the Builder in accordance with the contract
- b. Deny the Builder access to the building site
- c. Failed to perform the owner's obligations

12 Mr Connolly apparently did not respond and Omega purported to cancel the contract by Notice served on 15 March at which time Omega advised that the Builders Warranty Insurance had been cancelled.

DISCUSSION

13 Whilst Omega has addressed the problems with the pool in its correspondence they do not appear to have responded to any of Mr Connolly's complaints. I can well understand Mr Connolly's concerns that the amount charged for the additional works increased significantly after he requested details of the charges. Had a more accurate accounting of the backfill been provided by Omega there is every possibility the parties would have been able to resolve matters between themselves.

- 14 Although Omega offered to carry out certain works this offer was conditional upon Mr Connolly first paying the outstanding amount – the balance of the contract price and the charges for the additional works – even though the works were clearly incomplete,. Mr Connolly had otherwise made payment of all moneys owing under the contract.
- 15 It is perhaps most convenient to consider each of Mr Connolly's claims before considering Omega's claim. In relation to each of the those claims, I make the following comments and findings:

Level pool - \$675

- 16 Omega concedes the pool was out of level and that this work was necessary. Mr Ray indicated the cost to Omega of carrying out the necessary works would have been \$320.00 including the hire of a pump. Mr Connolly relies on an invoice from LJ Pool Installations and says that he was referred to Mr Les Evans by Mr Edwards of Barrier Reef Pty Ltd. This was confirmed by Mr Edwards. Although I have some concerns about the invoice as no contact details other than a mobile phone number are provided, and although GST is included the invoice is not in the form of a Tax Invoice, and does not include the contractor's ABN I accept that the work has been carried out and will allow \$600.00 (the cost of the works exclusive of GST) which I am satisfied is a reasonable cost for these works.

Install concrete beam around pool - \$1,913.44

- 17 Notwithstanding Mr Ray's evidence that he does not consider a concrete beam to be aesthetically pleasing if it is installed independently of the general concreting works, I find it was part of the contract works. I note Omega had offered to carry out these works, and believed access had been denied after the works commenced (by reference to the email of 27 December). Mr Connolly claims the sum of \$1,913.00, in support of which he provided a copy of a quotation from Jim's Concreting – the only contact details on which are a post office box number and a mobile phone number – the name of the person who completed and signed the quotation is not apparent. Although Mr Connolly said the work had been carried out, he was unable to produce an invoice or proof of payment. I note that Mr Connolly was meticulous in the paperwork he had with him in relation to his contract with Omega, including relevant bank statements confirming payments made under the contract.
- 18 Mr Ray gave evidence that Omega allowed \$900.00 for the installation of the concrete beam although he maintained that it was not included in the contract works. I find that Omega was not given a reasonable opportunity to complete these works and therefore allow its estimate of \$900.00.

Repair driveway end - \$1,048.86

- 19 I accept that some damage was caused by the 12 ton excavator. I accept Mr Ray's evidence that there are additional track marks inside those left by the

12 ton excavator which he said were not caused by any machinery used by the Applicant. Mr Connolly did not provide any evidence to support his assertion that this damage was solely caused by Omega's machinery. Mr Edwards gave evidence that his usual practice is to protect driveways by laying old carpet. Although Omega relies on the exclusion clauses in the contract, Clause 5 on page 15 provides:

...The Building Owners shall, at his own expense, provide for Omega suitable access to the property at all reasonable times for equipment, personnel and materials, and the building Owner shall be liable for any damage to footpaths or any private property caused by *reasonable acts* of Omega necessarily done while gaining access consistent with Omega's obligation to render services with *due care and skill*. (emphasis added).

Omega's failure to take necessary protective measures to minimise damage to the driveway cannot be considered reasonable. Further a builder has a statutory obligation to carry out the works in a '*proper and workmanlike manner*' (s8 of the *Domestic Building Contracts Act 1995*). I find that the works were not carried out with due care and skill as required by the contract, nor in a proper and workmanlike manner. Taking into account the age of the driveway and the inexplicable additional damage I will allow \$250.00.

Replace broken light post - \$280.00

20 The evidence of the parties as to how this came to be damaged was contradictory. Mr Connolly alleges it was damaged when Mr Ray used it to hoist himself up on to the pool deck rather than using the steps. Mr Ray said it was a non-operational metal pole in a rusty and unserviceable condition which gave way when he grabbed hold of it to save himself. In the circumstances, and noting the age of the property and the pool surrounds I prefer Mr Ray's evidence and make no allowance in relation to this item.

Make electrical wiring safe - \$225.00

21 There is some dispute as to the discussions which took place between one of Omega's workmen and Mrs Connolly in relation to the light switch on the post. I accept that it may have been a live wire. Mr Edwards confirmed that his usual practice would be to arrange for an electrician to attend to check the wiring. However, it is also apparent that Mr Connolly did not take any steps to have the wiring rectified, or disconnected for some months. Even if Omega had arranged for disconnection of the electricity this would have been at Mr Connolly's cost – electricians and plumber not being included in the contract price (refer 'Note' on quotation). I make no allowance in relation to this item.

Rectification of pool safety fence - \$3,990.00

Rebuilding brick piers/wall

- 22 This claim includes the cost of rebuilding the brick wall/piers. The only evidence in relation to the cost of rebuilding the brick wall is the quotation from Jim's Concreting dated 22 February 2002 (which also included the quotation for the concrete edge beam) and I repeat my previous observations and reservations about the failure to provide an invoice or proof of payment.
- 23 There were a number of existing brick pillars which according to Mr Connolly had previously been used to support a mesh pool fence, one of which had to be removed to allow access for the 12 ton excavator. I am of the view that Mr Connolly's expectation that the pillar would be dismantled so that the bricks could be used again was unrealistic. The brick wall and all of the brick piers have since been demolished, allegedly because they were damaged during the works. Mr Connolly alleges that several brick piers/wall were damaged whilst the excavator was on-site. However, I am not satisfied on the evidence before me that these were damaged through any failure by Omega to carry out the works with all reasonable care. Even if I were satisfied that the damage to the brick piers was Omega's responsibility it would not be reasonable to order Omega to pay for their replacement in circumstances where it is apparent from the photographs that they were old and in generally poor condition.

Replacement of the pool fence

- 24 Although I was provided with photographs showing the brick wall/piers there are no photographs showing the pre-existing pool fence. Mr Connolly was unable to provide any evidence as to the purchase and payment of a pool fencing, and could not even recall who it was purchased from.
- 25 I am satisfied that the installation of the pool fence was not part of the contract works, and was therefore not Omega's responsibility. However, I observe in passing that it was irresponsible of Omega to fill the pool in the absence of any pool fencing even if they believed the fence was being organised by Mr Connolly. Whether or not Mr Connolly has since complied with his obligations regarding the installation of a pool fence is not relevant in considering this claim.

Adjustment to invoice for backfill - \$1,568.00

- 26 The contract included an allowance for 100 cubic metres of backfill at \$28.00 per cubic metre. Mr Connolly said that he expressed concern at what seemed to be an excessive allowance and was told by Mr Ray that if a lesser quantity was required he would be refunded the difference at the rate of \$28.00 per cubic metre. Mr Ray said that nine truckloads of fill had been used and that Omega had offered Mr Connolly a credit of \$458.00. Mr Connolly gave evidence that he had made enquiries of Boral (after receiving copies of the delivery dockets from Mr Ray) and believes four

truckloads or 44 cubic metres were delivered. The Boral delivery docket, which identify Mr Connoly's property as the delivery site, indicate that there were four deliveries to site:

Delivery date	Docket Number	Quantity
23 November 2005	362403	15.30 tonne
2 December 2005	364013	13.52 tonne
1 December 2005	363857	13.52 tonne
1 December	363767	<u>15.26 tonne</u>
	Total	57.6 tonne

- 27 Utilising Mr Ray's calculation of 1.25 cubic metres per tonne this equates to approximately 72 cubic metres. Mr Connolly is therefore entitled to a credit of \$784.00 (28 cubic metres @\$28 per cubic metre).

Removal of charges for cartage of rubbish - \$683.75

- 28 Mr Ray conceded that there was no provision in the contract as to the rates to be applied for removal of rubbish but said this was because it had been expected that most of the excavated material could be used on site. He said this charge related to the removal of the additional concrete excavated from the base of the second pool.
- 29 Tip fees are expressly excluded under clause (f) of the Contract Specifications set out on page 10 of the contract. Further there are no details in relation to spoil disposal. Similarly there is no allowance for cartage or tip fees in the Quotation.
- 30 I accept that there would have been additional debris to be removed as a result of the excavation of the base of the second pool and that it was appropriate to hire a tandem tipper for this purpose. Mr Connolly confirmed that while the works were being carried out he had all curtains closed because of the noise and was therefore unable to say what had been removed by the excavator. Omega claims an amount of \$618.75 for the hire of the tipper, which having reviewed the invoices provided to me at the hearing I accept is the cost of the hire of the tipper plus the builder's margin of 25% and will allow it.
- 31 I will also allow the tipping fees of \$65.00 which I accept would have been incurred in relation to the concrete removed and tipped using the tandem tipper. Mr Ray gave evidence that he removed the remaining debris using his own tandem trailer, and that the charge for the tandem trailer of \$200.02 in fact related to a charge for his time. I accept that additional debris was removed by Mr Ray but am of the view the charge is excessive and consider a \$100.00 credit appropriate. I am also satisfied that \$55.00 tipping fees were incurred and will allow them.

Adjustment to invoice for excavators - \$1,656.92

- 32 This claim is in two parts: first in relation to an alleged overcharging for the 4 ton excavator and secondly in relation to the charge for the 12 ton breaker. In relation to the 4 ton excavator although the cost incurred by Omega, consistent with the allowance in the contract (as set out in the detailed quotation dated 14 September 2005), of \$700.00 was included in the Statement dated 14 December 2005, and has been paid by Mr Connolly, Omega now seeks to charge \$1,188.00. There is no justification for this additional charge and it is denied. Mr Connolly is therefore entitled to a credit of \$488.00 being the amount of the overcharge.
- 33 Mr Connolly alleges that although he was advised by Mr Ray that a 12 ton excavator would be required to break through the base of the second pool. He said that he was advised by Mr Ray that the cost of the 12 ton excavator would be no more than the credit for the additional backfill. Mr Ray denied this conversation, and said that he told Mr Connolly it was impossible to estimate the cost because the extent of the concrete had yet to be determined. I preferred the evidence of Mr Ray as to the discussions between the parties in relation to this item, and make no further adjustments to the amount claimed by Omega for the additional excavation works.

Labour for removal of rubbish, gravel \$1,000.00

- 34 Mr Connolly claims the sum of \$1,000.00 for the removal of debris and rubbish left of the site. He was not able to produce any evidence to support this claim and it is denied.

Costs of 2nd building surveyor inspection - \$275.00

- 35 This claim is related to the further building surveyor inspection required because the pool was filled without a pool permit, and in the absence of a pool fence. I refer to my earlier comments in relation to the claim for the pool fence and note that Mr Connolly conceded under cross examination that he had made application for a pool permit by facsimile and that at the time the pool was filled he believed the permit was in place.

OMEGA'S CLAIM

- 36 Where Mr Connolly as part of his counterclaim seeks an adjustment of the additional costs rendered by Omega, I have considered those items above but will include them as deductions against Omega's claim (refer Allowances below). However, in addition to the claim for the balance of the contract price, Omega also claims the sum of \$490.00 for items apparently left on site. Omega has not previously requested that these items be returned. Omega was unable to provide a detailed list of the items left on site, nor did it produce any evidence as to the calculation of the claim. In all the circumstances, it is therefore denied.
- 37 In considering the itemised breakdown of the additional charges I note an amount of \$921.25 has been charged for the hire of the Franna Crane,

although the allowance in the quotation was for \$850.00. Having regard to Mr Ray's evidence that where an allowance was included in the contract for a particular item that is the maximum amount that would be charged I will allow a credit of \$71.25.

ALLOWANCES

- 38 It is most convenient to deduct whatever adjustments to the charges rendered by Omega which I have allowed in favour of Mr Connolly from Omega's claim:

Balance of contract price		<u>\$7,006.21</u>
Items left on site		<u>\$ 490.00</u>
		\$7,496.21
Less		
Items left on site – claim denied	\$ 490.00	
Overcharge for hire of Franna Crane	\$ 71.25	
Adjustment to invoice for backfill	\$ 784.00	
Overcharging for excavator	\$ 488.00	
Adjustment for removal of rubbish	\$ 100.00	
Level pool	\$ 600.00	
Installation of concrete beam	\$ 900.00	
Allowance for damage to driveway	<u>\$ 250.00</u>	
	\$3,683.25	
		<u>\$3,683.25</u>
		\$3,812.96

- 39 Mr Connolly raised a number of concerns and complaints which do not form the basis of any claim and which have therefore not been considered in these Reasons.
- 40 I will therefore order that the Respondent pay the Applicant the sum of \$3,812.96

DEPUTY PRESIDENT C. AIRD